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**TOLERANCE IS LAW:  
REMIXING HOMAGE, PARODYING PLAGIARISM**

*Mathias Klang & Jan Nolin\**

**Abstract**

Three centuries have passed since copyright law was developed to stimulate creativity and promote learning. The fundamental principles still apply, despite radical developments in the technology of production and distribution of cultural material. In particular the last decades' developments and adoption of ICTs have drastically lowered barriers, which previously prevented entry into the production and distribution side of the cultural marketplace, and led to a widening of the base at which cultural production occurs and is disseminated. Additionally, digitalisation has made it economically and technically feasible for users to appropriate and manipulate earlier works as method of production.

The renegotiation of barriers and the increasing number of creators who publish their works has led to an increase in copyright violations and a pressure on copyright legislation. Many of these potential violations are tolerated, in some cases have become common practice, and created social norms. Others have not been so fortunate and the law has been rigidly enforced. This arbitrary application decreases the predictability of law and creates a situation where creation relies on the tolerance of the other copyright holders. This article analyses different cases of reuse that test the boundaries of copyright. Some of these are tolerated, others not. When regulation fails to capture the rich variation of creative reuse, it becomes difficult to predict which works will be tolerated. The analysis suggests that as copyright becomes prohibitive, social norms, power and the values of the copyright holder dominate and not law.

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\*Mathias Klang is Senior Lecture at the University of Borås.

Jan Nolin is Professor at the University of Borås.

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## 1. Introduction

In 2004 Constantin Films released the film *Downfall* (*Der Untergang*, Oliver Hirschbiegel, Germany), a strong film portraying the final ten days of Nazi Germany and Adolf Hitler's life in his Berlin bunker. Bruno Ganz gives a powerful portrayal of Hitler, in particular in a scene where Hitler realises that all is lost, and blames all those around him. This scene has caught the imagination of many.

This bunker scene has served as the raw material for numerous parodies that have been posted on YouTube. Editing has transformed the subtitles of the original German, thereby altering the meaning of the scene. Hitler's fury is turned against a whole range of issues ranging from the death of Michael Jackson, the lack of functionality in iPads, the fact that people were making *Downfall* parodies and eventually to Hitler enraged because the copyright holder was attempting to remove the parodies. It is one of many ironies in this case that the various parodies probably received a far larger viewership than the full-length film itself.

In an interview Hirschbiegel seemed positive about the parodies: "The point of the film was to kick these terrible people off the throne that made them demons, making them real and their actions into reality. We think it's only fair if now it's taken as part of our history, and used for whatever purposes people like."<sup>1</sup> Despite this approach, the copyright holder Constantin Films demanded in April 2010 that YouTube remove their copyrighted material and YouTube complied. However, later the same year YouTube stopped blocking *Downfall* parodies. Today there are whole communities online devoted to making and communicating *Downfall* parodies.

Following this action, discussion of the application of copyright law in relation to cultural remixes was, naturally not for the first time, sparked into life. However, the *Downfall* parodies also brought the vulnerability of the parody authors, and their dependency on third party platforms, into focus.

Most obviously, this case challenges modern legal interpretations of the parody. This example also highlights some of the fundamental difficulties involved in the regulation of cultural artefacts today. Arguably, the iconic image of Hitler's rage is in the public domain and it would be ridiculous for someone to claim ownership. This rage has been portrayed and parodied several times, perhaps most famously in *The Great Dictator* (Charlie Chaplin, 1940, USA). Each dramatisation of Hitler is both a reconstruction and interpretation, and adds to the status and relevance of the rage.

Furthermore, the bunker scene itself is a depiction of an historical authentic scene that has been reconstructed with the help of historians. To what extent can a producer make claim to owning some form of creative rights in this instance? They naturally own their version of the portrayal and it would be strange to discuss the filming of the scene itself as a form of plagiarism of the works of earlier documentary filmmakers, historians and parodists. However, this becomes possible once the works are re-created and, in some sense, parts of the Hitler myth become property.

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<sup>1</sup> E Rosenblum, "The Director of Downfall Speaks Out on All Those Angry YouTube Hitlers", *New York Magazine* (15 Jan 2010) available at [http://nymag.com/daily/entertainment/2010/01/the\\_director\\_of\\_downfall\\_on\\_al.html](http://nymag.com/daily/entertainment/2010/01/the_director_of_downfall_on_al.html) (accessed 29 Nov 2011).

Lawrence Lessig<sup>2</sup> argues that code is law, suggesting that in virtual environments law is subverted by computer code and therefore controlling code, and code makers, is a necessary act for the regulator. This article argues that cultural production, reuse and remixing is controlled by a diverse group of actors whose ability to apply law, licenses and code creates an increasingly complex and unpredictable environment for the cultural producer. This inability to predict legal outcomes leads us to the conclusion that cultural producers are dependent on the goodwill of multiple actors. Therefore, *tolerance is law*.

The purpose of this text is to unpack the concept of copyright regulation of cultural artefacts in relation to social norms. In doing so, this article will demonstrate that without an understanding of relevant social norms and licenses it is difficult to fully understand the uncertainties and ambiguities of legal Internet-based cultural production today. This work will argue that digital tools for cultural production/manipulation, in combination with an insufficient legal framework, have created a grey area where the copyright holder needs to decide what *not to tolerate*. This grey area will be discussed through examples and four different analytical categories: *plagiarism*, *homage*, *piracy*, and *parody and remix*. In doing this, the dichotomies tolerated/untolerated and legal/illegal will be used. Additional hard cases will be used to further illustrate the difficulties entailed in attempting to predict legal outcomes.

## 2. The Roots of Copyright

The concepts of property and copyright law are complex. While Copyright does not create property per se, there is a belief that there is property in creative works. For instance, creators generally talk about *their* works. Modern copyright legislation creates a set of rights, which give the creator exclusive rights to decide whether his or her work may be copied or transferred to an audience. In order to understand the character of this complex idea and the obvious dysfunctionality in digital settings, it is useful to look briefly at the analogue roots of copyright law.

The origins are to be found in the beginning of the Enlightenment. Central to the Enlightenment is its focus on the individual and the role of experience. The Enlightenment broke with an authoritarian past and placed human experience, and not authority, as the foundation for an understanding of truth. Modern copyright law is usually seen to begin with the *Statute of Anne* in 1710.<sup>3</sup> Typically, legislative initiatives are layered upon each other. This means on the one hand that the foundational perspective of the Statute of Anne has been formative for the development of copyright law in the centuries to come. On the other hand, increasingly sophisticated legislative work has tweaked a number of basic presuppositions into adapting to cultural and commercial shifts.

The *Statute of Anne* was concerned with the regulation of the relationship between authors and publishers. With the introduction of this act the focus of protection shifted from the printers, who had control over the technology of copying and distribution, to the author whose control was over the creation of the works. In essence, this meant

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<sup>2</sup> L Lessig, *Code and Other Laws of Cyberspace* (NY: Basic Books, 1999).

<sup>3</sup> *An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein Mentioned* (1709).

that the owners of the technology/distribution were disfavoured and the author favoured.

The *Statute of Anne* regulates an idealised example of what today is a much more complex and heterogeneous range of cases. In the eighteenth century, authorship, book and reproduction were all very clearly identifiable. It is interesting to position this original problem of copyright law with the case of *Downfall*. The differences are in several instances quite jarring. It becomes obvious that the relationship seems to have reversed to the state before the statute. The production company, not the involved creative artists have claimed the right to stop the parodies.

The Statute of Anne viewed authorship as a process of creating something out of nothing. Furthermore, the focus of the act was to encourage learning by regulating the book trade. Any legal advantages gained by the author were incidental, a means to reach an end.

*Downfall* illustrates a case quite contrary to these initial intentions. Rather than creating something out of nothing, this film is heavily dependent on actual historical events as well as on eyewitness testimony and historical scholarship. Furthermore, motion pictures are typically handcrafted by a collective group of specialists. As such, it constitutes a form of creation that was not conceivable when the statute of Anne was written. Granted, there were theatrical performances and operas, but these could be seen as dramatisations that were not reproducible. What could be protected were texts such as published plays.

The original intention of the act, to stimulate further creative effort, by creating legal rights residing with the author, could be seen as an act of clarification and thus creating predictability. However, these intentions seem to have been undermined in the digital age. The parodies of *Downfall* constituted multiple reinterpretations of the same work. The creative/collective project involved in a continuous reframing of the same individual scene is, arguably, an original artistic project. Nevertheless, copyright regulation was used in this case to stifle creativity, rather than stimulate it. What remains is an unpredictable, and potential costly, uncertainty for those who would modify and/or disseminate material. Those who dare act are at the mercy of the tolerance of others – a situation that creates novel barriers to creation and dissemination of culture.

The simple polarity of legal/illegal is difficult to apply to international settings as the law has national variations and sources. The polycentricism<sup>4</sup> of law, and the social norms said to underpin them, becomes a serious issue once the material in question is shared globally. The disparity in interpretation and implementation in different jurisdictions causes the predictability of law to suffer and increases the reliance on tolerance among the different actors.

### 3. Copyright and Technology

The purpose of copyright law was to regulate the book market. The philosophical underpinnings were taken from arguments on the commoditisation of finite, rival<sup>5</sup>

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<sup>4</sup> J Black, “Forms and Paradoxes of Principles Based Regulation”, *LSE Legal Studies Working Paper* No. 13/2008.

<sup>5</sup> Rival goods are goods whose consumption by one individual prevents simultaneous consumption by others.

objects. In such a system, the creator was highly dependent upon the role of professionals, such as printers and booksellers, to be able to communicate to a wider audience.

In this light, a specific socio-technical system, concept of technology and level of technological sophistication is embedded in the *Statute of Anne*. It attempts to balance norms between the author and the book market without focusing on particular systems of copying and distribution. These systems lay in the hands of the printer/booksellers and were to be resolved contractually.

By failing to see the role of technology, the act fixates social norms in a static technological system. Arguably, this notion of technology has been formative for later legislation. The starting point for legislative discussions today is still the static technological understanding embedded in the technological systems of the early eighteenth century.

Eventually, the *Statute of Anne* was successfully exported to other countries.<sup>6</sup> The norm of copyright slowly became internationalised. However, as long as the system remained in the hands of the nation states it was flawed, since the protection offered by the states was first and foremost intended for their own nationals. Towards the end of the eighteenth century, international book piracy was viewed as a serious problem and the United States was commonly identified as the worst perpetrator in this field.<sup>7</sup>

The first major attempt to create a just international legal norm of copyright came with the Berne Convention of 1886 which established, among other things, the principle of *national treatment*, which holds that each member state accord citizens of other member states the same rights of copyright that it gave to its own citizens. In other words, the author's claim should be valid in all countries.

While it has been thoroughly institutionalised, this carries with it a number of strange implications. Creative ideas are seen as, in a sense, culturally neutral. Once put in text, the cultural product carries a potential of ownership in all countries, regardless of the different cultural contexts involved. In addition, this stimulates a system of translation rather than creation. It becomes impossible for an author to be deeply inspired by a foreign work and use creative energy in order to adapt it to another cultural frame of reference. Rather, artists must create something different or translate the original work to a new language.

Once again, the *Downfall* parodies serve as a sobering example of modern problems. This is a German film about a German dictator. In a sense, therefore, it is a national project. However, this German dictator started a world war, killing millions. The atrocities of Nazi Germany were a problem not only for Germans, but for all Europeans as well as for the rest of the world. From this viewpoint, it may seem strange that a German production company can be tolerated to produce a film about Hitler that refuses members of other nations and cultures the opportunity to comment and rework this German perspective.

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<sup>6</sup> A Johns, *Piracy: The Intellectual Property Wars From Gutenberg to Gates* (Chicago: University of Chicago Press, 2009).

<sup>7</sup> *Ibid.*

## 4. Five Analytical Categories

### 4.1 Plagiarism

The strictness of copyright legislation, as it developed, also created problems for well-established creators. How, for instance, should an author create narratives that reflected on earlier cultural achievements without infringing on earlier works? Under certain conditions, cultural references and borrowing are seen as being permissible, even praiseworthy, within the framework of the copyright system. There is, however, a line drawn at plagiarism.

It is important to note that all copyright violation is not plagiarism and all plagiarism is not copyright violation. It can be argued that plagiarism is more akin to fraud than copyright as it is the passing off of another's work as one's own.<sup>8</sup> There are several examples how artistic works have been building upon previous works in a way that today, would have been considered to be plagiarism or copyright violation.

Social norms provide a context within which the law can operate<sup>9</sup> and both systems of law and norms are enclosed in the actions which technology makes possible. Therefore the development of technology and social norms pushes the evolution of law. This created a convention where it frequently became difficult to draw a line between three types of references to original works: parody, plagiarism and homage. From the vantage point of the creator, this makes legal risks unpredictable, and therefore may have a chilling effect on the development of culture, as he or she must rely on the goodwill and tolerance of others.

As copyright deals with the expression of an idea, and not the idea itself, it opens up the discussion of how to define plagiarism. The issue of plagiarism is, in its clearest form, when an author takes the work of another and presents this work as his own. In this situation the new work is clearly a violation of the first author's copyright as that which has been taken is the expression of the idea. However, plagiarism becomes more complex when the thing that is appropriated is not expression but the idea itself. Furthermore, it becomes difficult to draw a line between such, clearly illegal practices, and the more accepted genres of homage and parody.

In most cases, being accused of plagiarism is viewed as an embarrassing, if not, serious offence. Most cases of revealed plagiarism have had serious consequences for the authors and/or publishers. In 2010, the German Minister of Defence was stripped of his doctorate and forced to resign after revelations that his PhD thesis contained sections of plagiarised text.

It is interesting to note that not all authors react in this manner. When the author Helene Hegemann was accused of plagiarising sections of her debut novel *Axolotl Roadkill*<sup>10</sup> she countered with: "There's no such thing as originality anyway, just

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<sup>8</sup> See for example R Posner, *The Little Book of Plagiarism* (New York: Pantheon 2007). R Moore, *Standing in the shadow of giants: Plagiarists, authors, collaborators* (Stamford: Ablex Publishing, 1999).

<sup>9</sup> R Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Harvard: Harvard University Press, 1994).

<sup>10</sup> H Hegemann, *Axolotl Roadkill* (Berlin: Ullstein, 2010).

authenticity.”<sup>11</sup> This approach is reminiscent of the concept of intertextuality.<sup>12</sup> In this interpretation of intertextuality it is (almost) impossible to construct a new text but rather each text builds on the past and is “... the absorption and transformation of another”.<sup>13</sup>

With this argument, intertextuality creates another grey area alongside homage and parody. Even more damaging, it can be claimed that it relocates the illegality of textual reproduction to another legal system. This is the argument of Posner<sup>14</sup> who suggests that the taking of another’s ideas in this way is not a form of copyright violation – as the expression is not repeated – but is rather a form of fraud as the later author claims to be presenting original ideas of his own. Therefore, while the taking of another’s ideas may not be a violation of copyright, indeed the works that are taken may no longer be protected under copyright, the act still runs counter to the social norm of not appropriating that which is not rightly one’s own.

This line of thought can either be seen to introduce more confusion into the copyright regulative system or serve as a resource for clarifying the legal framework. Perhaps copyright legislation needs to be connected to more legal frameworks? This would, however, introduce other problems. With fraud as a starting point it is maybe necessary to reinterpret the difficult issue of *self-plagiarism*. With this framework, it becomes impossible to use copyright as an argument against self-plagiarism<sup>15</sup> as the author naturally would give himself permission to reuse a text.

#### 4.2 *Homage*

Homage is a form of reproduction that seems to exist as a norm somewhere between plagiarism and copyright. It constitutes a grey area between what is otherwise a strict and unforgiving dualism.

Homage may be viewed as a mark of respect when a creator takes ideas or themes from earlier works and interprets them in an original way. An example is the Chicago Union Station staircase scene in *The Untouchables* (Brian De Palma, 1987, USA), which is based on the *Odessa steps* scene in *The Battleship Potemkin* (Sergei M. Eisenstein, 1925, USSR). In both cases violent scenes are interspersed with a baby in a pram uncontrollably rolling down the stairs. Alternatively the films *Kill Bill Vol. 1* and *Kill Bill Vol. 2* (Quentin Tarantino, 2003 and 2004, USA) are the director’s homage to the whole genre of martial arts films.

If a work of art signals that it is homage, it also seems to beg exemption from the strictness of copyright. However, it also serves to introduce more uncertainties into what is already an extremely complex legal area. For instance, many of the films by

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<sup>11</sup> N Kulish, “Author, 17, Says It’s ‘Mixing,’ Not Plagiarism”, *New York Times* available at <http://www.nytimes.com/2010/02/12/world/europe/12germany.html> (accessed 29 Nov 2011).

<sup>12</sup> J Kristeva, “Word, Dialog and Novel” in T Moi (ed), *The Kristeva Reader* (NY: Columbia University Press, 1986), at 34-61.

<sup>13</sup> *Ibid*, 37.

<sup>14</sup> R Posner, see note 8, above.

<sup>15</sup> S Bird, “Self-plagiarism and Dual and Redundant Publications: What is the Problem? Commentary on ‘Seven Ways to Plagiarize: Handling Real Allegations of Research Misconduct’” (2002) 4 *Science and Engineering Ethics*, at 543-544.

Tarantino are loaded with multiple homages. As these films have uniformly been commercial successes, one wonders if the idea of homage doesn't serve to legitimate the systematic theft of the creative work of others.

For example, in *Kill Bill Vol. 1*, Tarantino portrays the highly identifiable character of a one-armed swordsman, which is based upon the earlier Asian film *One-Armed Swordsman* (*Dubei dao*, Cheh Chang, 1967, Hong Kong).

One way of interpreting this upfront, polite and reverent reuse of other creative works is to argue cultural refinement. Tarantino can be said to have an eye for underrated creative elements in lower budget films that are generally unknown to the wider western audience. As he reuses and reframes such material in high-profile Hollywood blockbusters, he can be seen to be doing the originators a great favour, according credibility to otherwise quickly forgotten productions.

Other perspectives emerge, for example, there is an element of "might makes right" as it seems to be quite okay for big productions to steal from lower budget productions. Pang argues that there is a norm of cultural dominance building on the assumption that "Hollywood productions are superior to the local ones both in terms of creativity and in the legal sense—only Hong Kong plagiarizes Hollywood, and never vice versa".<sup>16</sup>

Another example of East West cultural transfer can be seen in the film *The Lion King* (Roger Allers and Rob Minkoff, 1994, USA), which bears a strong resemblance to *Kimba the White Lion* (*Janguru taitei*, Eiichi Yamamoto, 1965–1967), the Japanese television cartoon from the 1960s. Similarities include the name of the lead character (Kimba/Simba), the plot line and scenes with nearly identical composition and perspective. Disney's official position is that similarities are all coincidental and that the story is inspired by public domain works such as the biblical story of Moses and *Hamlet* by William Shakespeare.<sup>17</sup>

Sometimes the movement between East and West becomes so mixed up in intertextuality that the issue of original creator becomes exceedingly difficult.

When Akira Kurosawa produced his epic *Seven Samurai* (*Shichinin no samurai*, 1954, Japan) he was inspired by Hollywood Western movies. The film spurred the Hollywood remake *The Magnificent Seven* (John Sturges, 1960, USA), a film which had a substantial impact on the Hollywood Western, particularly those of Sam Peckinpah. Another Kurosawa movie (*Yojimbo*, 1961, Japan) was remade by Sergio Leone into *A Fistful of Dollars* (*Per un Pugno di Dollari*, 1964, Italy) and sparked the Italian Western film wave in the 1960s. This was also to impact strongly on the Hollywood Western. There is a spiral dialogue of each retelling adding further dimensions to earlier works by building on and contributing to the production of a genre.

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<sup>16</sup> L Pang, "Copying Kill Bill" (2005) 23 *Social Text*, at Nr. 2, 133-153.

<sup>17</sup> P Schweizer and R Schweizer, *Disney: The Mouse Betrayed: Greed, Corruption, and Children at Risk* (Washington, DC: Regnery, 1998).

### 4.3 Piracy

For most of the history of copyright the question of piracy concerned the organised, unauthorised taking of others' material. The modern usage of "piracy" is connected to pirating material goods such as "fake" brand watches, handbags, shoes and clothes. Digital manipulation of cultural artefacts has thus been seen as similar to other forms of piracy while, arguably, it constitutes a somewhat different phenomenon. However, reworking the ideas of others is an old practice performed both by other professionals and by cultural consumers.

As it is the protection of the actual expression of an idea, copyright is closely connected to the fixation of the idea. The ability to create edited works depends on access to the necessary equipment. For the largest part of copyright history the products have been analogue and the equipment was not generally accessible to a larger user group. With the digitalisation of society, the tools of production and communication became widely available.

Since the widespread proliferation of Internet access there has been a political, economic and legal discussion on the ways in which the technology creates and supports copyright infringement on a large scale in the form of illegal file sharing.

A large part of the public digital piracy debate, and the legal arguments put forward to the courts has been connected to tolerance. Commonly the arguments take two forms: functional equivalency, where the argument is put forward that digital technology is simply a different format and should not be discriminated against, or as a variation of safe-harbour where the argument is that no infringing material was in the hands of the accused. In just over a decade there have been several large, internationally famous, cases notably: *Napster*,<sup>18</sup> *Grokster*<sup>19</sup> and *The Pirate Bay*.<sup>20</sup>

The *Napster Case* was the first important case based upon peer-to-peer (P2P) technology. Napster was a music sharing service, where users shared their material via a central server.<sup>21</sup> The service was active between June 1999 and July 2001 during which, its ease of use attracted several million users to share music online. The service was closed after a court order.

The *Grokster Case* concerned a P2P file-sharing client launched in 2001. The technology was an attempt to bypass the central server which was vital to the Napster system. Grokster argued that they did not violate copyright as none of the copyrighted material passed through their servers and that the software has significant uses unconnected with illegal file sharing activity. The United States Supreme Court's decision in 2005 shut down Grokster.<sup>22</sup>

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<sup>18</sup> *A&M Records, Inc. v Napster, Inc.*, 114 F. Supp. 2d 896 (2000).

<sup>19</sup> *Metro-Goldwyn-Mayer Studios Inc. v Grokster, Ltd.*, 545 US 913 (2005).

<sup>20</sup> *The Pirate Bay Case*, Court of Appeal November 2010 (Svea Hovrätt, mål nr B 4041-09).

<sup>21</sup> M Rimmer, "Napster: Infinite Digital Jukebox or Pirate Bazaar" (Feb 2001) 98 *Media International Australia Incorporating Culture and Policy*, 27-38.

<sup>22</sup> L Heymann, "Inducement as Contributory Copyright Infringement: *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd*" (2006) 37 *International Review of Intellectual Property and Competition Law*, 31-46.

The *Pirate Bay Case* dealt with a website that maintained links to bit torrent files. The latter are a vital component for the torrent system of P2P sharing. The site went online in 2003 and legal action began when the Swedish police seized their servers in 2006. The case made its way to the Swedish Court of Appeals but was denied hearing in the Supreme Court. The Pirate Bay argued, similarly to Grokster, that none of the files constituting copyright violation passed through their servers, the courts did not agree with this argument.

Prior to the digitalisation and dissemination of Information and Communication Technologies (ICT), copyright and violation was a discourse among professionals. For each technological step making modes of production more accessible there has been a need to argue for a widening of scope of protection to include the results of the new technology. Therefore, it can be argued, the actual constraints to piracy were neither legal nor based upon social norms but were largely technical.

Given this, it is unsurprising that when the technological barriers were lowered individuals would begin to create and share on a larger scale. In light of this increased infringement, copyright organisations have been lobbying the courts and legislators to convert the law into an artificial barrier to replace the lost technical barrier. To this end, the term piracy has been adopted creating an element of fuzziness in the understanding and interpretation of copyright law. By building upon arguments and norms in physical goods the term has been adapted to the digital domain. The move towards more defined and limiting legislation (from the users' point of view) has had a detrimental effect on many previously tolerated activities. In other words, as technology allows more, less is tolerated.

The uncertainty of creation, fuzziness of law and dependence on tolerance can be seen in the analogue world were courts have rejected defences and turned potentially creative works into piracy. For example, in the case of *Rogers v Koons*<sup>23</sup> the artist Jeff Koons unsuccessfully argued that his use of elements of Rogers' photograph in his sculpture, *String of Puppies* (1998), was to be interpreted as parody. The court did not accept Koons' argument that his sculpture was a parody of modern society. Further, the court went on to interpret parody to mean that the appropriated work must itself be, at least in part, parodied. The courts position differs in this aspect from a commonly accepted understanding that parody is an "...imitation characterised by ironic inversion, not always at the expense of the parodied text".<sup>24</sup>

In a recent example of the line between tolerated and non-tolerated fan fiction an attempt was made to publish a sequel to JD Salinger's, *The Catcher in the Rye*<sup>25</sup> (1951). The existence of fan versions or variations on the work have been, more or less, openly available online and yet in 2009, Salinger broke his customary silence and sued the author John David California (a pseudonym for Fredrik Colting). California's book was presented as a sequel and revolved around the protagonist of *The Catcher in the Rye*, Holden Caulfield, as an old man on the run from a nursing

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<sup>23</sup> *Rogers v Koons*, 960 F 2d 301 (2nd Cir.1992).

<sup>24</sup> L Hutcheon, *A Theory of Parody: The Teaching of Twentieth-Century Art Forms* (London: Methuen, 1985), at 6.

<sup>25</sup> JD Salinger, *The Catcher in the Rye* (London: Little, Brown and Company, 1951).

home. In his complaint to the court<sup>26</sup> Salinger argued that the book, *60 Years Later: Coming Through the Rye*,<sup>27</sup> published in the United Kingdom, was in fact a violation of his copyright.

In marketing the book it was presented as a sequel, while to the court Colting argued that the work was a parody of its original. In essence the court agreed with Salinger and found that California had "...taken well more from 'Catcher', in both substance and style, than is necessary for the alleged transformative purpose of criticizing Salinger and his attitudes and behaviour". The court issued a ruling preventing the manufacturing, publishing, distributing, shipping, advertising, promoting, selling, or otherwise disseminating any copy of the sequel.<sup>28</sup>

While the concepts of parody and fan fiction will be developed further below, it is important to recognise the difficulty in ascertaining whether an interpretative work of creation building upon a familiar iconic work will be tolerated or not.

#### **4.4 Parody**

The system of copyright is not positioned in a vacuum but must exist concurrently with other systems and norms. Most importantly, the democratic ideal of free speech often takes precedence in squabbles on copyright. It becomes problematic if individuals or groups are not allowed to discuss certain works since that would create censorship. There are two genres that are frequently discussed: research and parody. While researchers are regularly treated liberally, the parody is often controversial.

In essence, parody creates another grey area, or loophole, in the complex legal framework relating to creative works.

Despite the exclusive stature of copyright it is regularly deemed to be secondary to the "right" to parody. Spence presents four common arguments on why parody should be permitted: (1) parody is a distinct genre and needs protection, (2) parody demonstrates an instance of market failure in copyright as authors are unlikely to give permission to have their works parodied, (3) parodies as transformative works – the works are new and original even if they are dependent upon the earlier work, and (4) the parodists right to free speech needs to be supported.<sup>29</sup>

Under UK law there is no method or test for defining parody and it is not included in the list of copyright exemptions. Therefore the formal test is whether the new work

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<sup>26</sup> *JD Salinger, individually and as Trustee of the JD Salinger Literary Trust (Plaintiff) against John Doe, writing under the name John David California; Windupbird Publishing Ltd; Nicotext AB; and ABP, Inc. d/b/a SCB Distributors Inc (Defendants)*, United States District Court Southern District New York, Case 1:09-cv-05095-DAB, Filed 07/01/2009.

<sup>27</sup> John David California, *60 Years Later: Coming Through the Rye* (London: Windupbird Publishing, 2009).

<sup>28</sup> *Ibid*, 39.

<sup>29</sup> M Spence, 'Intellectual Property and the Problem of Parody'(1998) 114 *Law Quarterly Review* 594-620.

reproduces a substantial part of the original expression.<sup>30</sup> However, many other European jurisdictions have statutory exemptions in favour of parody.<sup>31</sup>

The conflict existing between parody and copyright needs to be regularly defined by the courts. One such example is *Campbell v Acuff-Rose Music*<sup>32</sup> where the Supreme Court explored whether 2 Live Crew's, *Pretty Woman* (1989), a remake of Roy Orbison's, *Pretty Woman* (1964), diluted the market for the original version and came to the conclusion that the markets were substantially different. Therefore the parody was not diluted by the fact that the makers benefited economically from their version.<sup>33</sup>

A recent conflict concerning the overlap between copyright and parody occurred in a work that portrayed the American Civil War classic *Gone With the Wind* (1936) by Margaret Mitchell.<sup>34</sup> Where Mitchell's novel tells the story of the troubles of the wealthy, white daughter of a slave owner Scarlett O'Hara, Alice Randall's *The Wind Done Gone* (2001)<sup>35</sup> is set in the same location and period but told from the point of view of Scarlett's half-sister, the slave Cynara. Although *The Wind Done Gone* avoids using the names of Mitchell's characters or locations, it is not difficult to understand from the title and context what Randall's novel is portraying and parodying.

Margaret Mitchell's estate reacted to the publication of Randall's book by suing her and her publisher for copyright infringement on the grounds that *The Wind Done Gone* was too similar to *Gone with the Wind*, thus infringing its copyright. The case was eventually settled out of court in 2002 when Randall's publisher Houghton Mifflin made an unspecified donation to Morehouse College in Atlanta. It is interesting to note that while Randall and Houghton Mifflin attempted to define the work as a parody, physical copies of *The Wind Done Gone* bore stickers with the text "The Unauthorized Parody".

Cases such as these raise two interesting questions: First, who holds the right to define what is and what is not parody? Second, when in doubt, who has the right to interpret a parody? In cases such as these, the boundaries between censorship of free speech and defence of individual copyrights become blurred.

In the *Pretty Woman* case the court supported the parody and an argument can be made for the development of a legal position in relation to fair use and parody. However, in *The Wind Done Gone* example the settlement out of court only strengthens the uncertainty entailed in the creation of works of parody. It is noteworthy that the right to argue infringement or accept parody is not only up to the

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<sup>30</sup> See *Joy Music Ltd v Sunday Pictorial Newspaper* [1960] 2 QB 60; [1960] 1 All ER 703; *Williamson Music Ltd v Pearson Partnership Ltd* [1987] FSR 97; *Schweppes Ltd v Wellingtons Ltd* [1984] FSR 210.

<sup>31</sup> P Kamina, *Film Copyright in the European Union* (Cambridge: CUP, 2004), at 276-278.

<sup>32</sup> 510 U.S. 569 (1994).

<sup>33</sup> A Bridy, "Sheep in Goats' Clothing: Satire and Fair Use after *Campbell v. Acuff Rose Music, Inc.*" (Winter 2004) 51/ 2 *Journal of the Copyright Society of the U.S.A.* 257-278.

<sup>34</sup> M Mitchell, *Gone With the Wind* (London: Macmillan Publishers, 1936).

<sup>35</sup> A Randall, *The Wind Done Gone* (Boston: Houghton Mifflin Harcourt, 2001).

original creator but remains the discretion of the heirs. Such a power can naturally be used or abused at a whim,<sup>36</sup> a situation that makes predictability impossible.

#### 4.5 *Remix*

For the purpose of this article a remix is the rearranging or mixing of cultural material from one or several data sources. Within this article the remix here will focus on the blending of audio and video from different sources. Lawrence Lessig<sup>37</sup> argues that culture today has the potential to be an active zone encompassing large numbers of small-scale creators working on enriching the cultural sphere. However, this potential read- and-write culture is threatened as law-makers are in the process of creating a read/only culture where the freedoms afforded through the copyright bargain are being eroded. Lessig calls for the building and strengthening of a remix culture, a society that not only allows, but also encourages derivative works. Within such a culture the default would be that it is permissible to add to, and share, available works. The motivation or desirability for such a culture would be the widespread increase in creativity and cultural output.<sup>38</sup>

Under the present legal regime, the remix, both in its legal and illegal forms, is often under direct threat of legal action and the ensuing uncertainty of creators as to the legality of their actions. A popular form of remixing is the creation of music videos by recording video clips from movies, cartoons, games etc. and adding new soundtracks – usually music – to the clips. An example of this practice can be seen in the work of Johan Söderberg (2003) whose remix of Lionel Richie’s song *Endless Love* is set to news images of George W Bush and Tony Blair, and creates the impression of a love story between the world leaders.

In 2004 the artist DJ Danger Mouse released his album *The Grey Album*. This album was created by taking an instrumental version of The Beatles *The White Album* upon which he had added an a cappella version of *The Black Album* by the rapper Jay-Z. Initially it was tolerated and praised, but when *The Grey Album* increased in popularity the record company EMI began to send cease and desist letters to DJ Danger Mouse and websites that carried the album.<sup>39</sup> This is despite the reaction of Paul McCartney who is quoted as saying “I didn’t mind when something like that happened with *The Grey Album*. But the record company minded. They put up a fuss. But it was like, ‘Take it easy guys, it’s a tribute.’”<sup>40</sup>

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<sup>36</sup> M Rimmer, “Bloomsday: Copyright Estates and Cultural Festivals” (Sept 2003) 2/3 *Scripted* 383-428.

<sup>37</sup> L Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (London: Bloomsbury, 2008).

<sup>38</sup> *Ibid.*

<sup>39</sup> M Rimmer, “The Grey Album: Copyright Law and Digital Sampling” (Feb 2005) 114 *Media International Australia Incorporating Culture and Policy* 40-53.

<sup>40</sup> “Paul McCartney is Down With Hip-Hop” (24 Feb 2011) available at *Wods.radio.com* (accessed 19 Jun 2012).

A subgenre within remix is a form of fan production<sup>41</sup> that entails the blending of pop music set to Japanese anime cartoons. The resulting works are known as Anime Music Videos (AMV).<sup>42</sup> These AMV violate both the cartoonists and the musicians' rights and, as the goal is to create a work within a specific new genre, can only with difficulty be interpreted as parody.

The AMV can however be seen as a form of fan fiction where the creator builds upon the familiar to re-interpret and provide something new. The reasons for this activity can be everything from entertainment to serious cultural criticism to subaltern critique.<sup>43</sup> Fan fiction has, by definition, always been part of a sub-culture and it is part of a historical tradition.<sup>44</sup> Fan fiction will be discussed in more detail in the following section.

From a legal situation AMV's are a relatively uncontroversial case of copyright violation. However, researchers such as Lessig, McKay,<sup>45</sup> and Chander and Sunder have put forward arguments where they argue that there needs to be an increased tolerance for fan production as a legitimate and permissible form of cultural production.

## 5. Hard Cases

As was argued above, the original goal of copyright was to regulate the book market. This goal was expanded to enable the author to take advantage of the exclusive rights, which were the bi-product of the regulations. Copyright was internationalised through the Berne Convention and adapted to suit novel technologies. In addition, the terms of protection for copyrighted works were extended and thus the bargain created within the copyright system was weighted to the advantage of the creator rather than their counterparts – the consumer.

Copyright law has, since its inception, positioned the cultural consumer as passive. The consumer is vital to the system as they are the reason d'être and yet they are not the focus of legislation. In an analogue environment this may not be particularly important, as the consumer has not had a viable means of production or dissemination. In addition, the analogue product is more tangible and distinctly material compared to the digital.

If, for the moment, the strictness of judicial thought is put aside, it is notable that the view of consumer as passive is quite dated. At the very least, researchers within social sciences, humanities and a range of professionals working with communication and

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<sup>41</sup> A Marwick, "I Can Make You a (Net) Celebrity Overnight: Fan Production and Participatory Culture in Online Reality Shows" (May 2007) *Media in Transition* 5.0, Cambridge, MA.

<sup>42</sup> P McKay, "Culture of the Future: Adapting Copyright Law to Accommodate Fan-Made Derivative Works in the Twenty-First Century" (2011) 24 *Regent University Law Review* 117.

<sup>43</sup> A Chander and M Sunder, "Everyone's a Superhero: A Cultural Theory of 'Mary Sue' Fan Fiction as Fair Use" (2007) 95 *California Law Review* 597.

<sup>44</sup> E Judge, "Kidnapped and Counterfeit Characters: Eighteenth-Century Fan Fiction, Copyright Law, and the Custody of Fictional Characters" in R McGinnis (ed), *Originality and Intellectual Property in the French and English Enlightenment* (London: Routledge, 2009) 22–68.

<sup>45</sup> P McKay, "Culture of the Future: Adapting Copyright Law to Accommodate Fan-Made Derivative Works in the Twenty-First Century" (2011) 24 *Regent University Law Review* 117.

creative arts regard the consumer as a co-creator. This idea was theorised by Marcel Duchamp who posed questions on the nature of art: “The creative act is not performed by the artist alone; the spectator brings the work in contact with the external world by deciphering and interpreting its inner qualifications and thus adds his contribution to the creative act”.<sup>46</sup>

Duchamp’s view of the consumer as co-creator increases in complexity when observed beyond mere consumption. To better understand who owns a cultural product it could be fruitful to look at three types of hard cases in the cross section between tolerated/untolerated and legal/illegal: psychological plagiarism, actor portrayal and fan fiction.

The first type, psychological plagiarism, refers to the “theft” of the idea prior to publication, or post publication in a manner that does not constitute copyright violation. An interesting example of this can be seen in the conflict between two French authors. In 1995, Camille Laurens published the novel *Philippe*,<sup>47</sup> where the narrator, a mother, deals with the loss of her young child. This was an issue close to Laurens’ as she had herself lost a child. In 2007, the Marie Darrieussecq published the novel, *Tom est Mort*,<sup>48</sup> this too featured the loss of a child told in the first person from the perspective of the mother. The similarities in the subject and form (first person singular voice) led to Camille Laurens accusing Darrieussecq of psychological plagiarism. It was not that Laurens laid claim to all storylines where a mother loses her child but she felt that Darrieussecq had plagiarised the emotional right to write on this topic, as she had never lost a child. The accusations of psychological plagiarism have no foundation in law or probably not even in plagiarism per se but in the concept of not having the right to write of a trauma one has not experienced. The social norm of a form of ownership is much wider than the legal protection. The law has chosen a set of norms to protect while leaving others outside the realm of protection. This is, in itself, not strange, but as social norms develop the law should be prepared to re-evaluate that which is protected and that which is not.

Another hard case situation lies in the situation where a performance of a work is so intimately connected to the mannerisms of a specific actor that it is popularly referred to as the manner of that actor. This situation is not covered by copyright, and may in popular discourse be referred to as trademark but is legally protected by neither system. Take, for example, the performance of Bruno Ganz in his portrayal of Hitler. The popular attempts to parody his acting mannerism in this scene is now often referred to as “doing” Ganz. This can be seen when Vivian Wagner “does Ganz” in *Iron Sky* (Timo Vuorensola, 2012).

Other examples of such connections are that of Marlon Brando with the godfather (Francis Ford Coppola, *The Godfather*, 1972) or Anthony Hopkins with Hannibal Lecter (Jonathan Demme, *The Silence of the Lambs*, 1991). The long running TV show *The Simpsons* (Matt Groening) has practically made a central feature of copying

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<sup>46</sup> M Duchamp, “The Creative Act” from session on the Creative Act, Convention of the American Federation of Arts, Houston, Texas, April 1957. Reprinted in R Lebel, *Marcel Duchamp* (NY: Paragraphic Books, 1959), at 77-78.

<sup>47</sup> C Laurens, *Philippe* (Paris: POL, 1995).

<sup>48</sup> M Darrieussecq, *Tom est Mort* (Paris: POL, 2007).

the styles of famous performances in addition to scenes and plots from a score of classical movies.

Actors' legal rights to their portrayal are minimal or non-existent but their socio-cultural connection is very strong. Indeed the reason why mannerisms are copied is often to provide connections, a form of intertextuality, which creates humour and dynamism in the new cultural expression. This is an interesting, and unfortunately underexplored, area of research where social norms are granting cultural and emotional recognition beyond legal rights. This type of connection is not limited to acting skills but can be seen in the styles of artists, photographers and authors. Consider the iconic gun barrel sequence, created by Maurice Binder, played in the opening of each James Bond film: even to those who are unfamiliar with his name will recognise attempts to mimic his style. Similarly we can see how the seascapes of the photographer Hiroshi Sugimoto re-interpret Mark Rothko's multiform paintings.

The third area of complexity concerns fan fiction. This is a common activity where the consumer takes the works of a published creator and uses elements such as characters or scenarios to create new works. The original creator or publisher rarely authorises these. Such products are often referred to as "fan fiction". The World Wide Web contains a seemingly endless supply of passionate fan fiction produced by devoted fans. Often, these are constructed around exceptionally successful series. For instance, the archive at fanfiction.net has more than 1,300 Twilight Forums, each with a multitude of texts and role-plays. Jenkins<sup>49</sup> has discussed the ways that consumers, and particularly devoted fans, are redefining mainstream cultural production. Essentially, it becomes impossible to counter fan movement with copyright law. In most cases, a passionate fan base is what the copyright holder yearns for and it usually makes perfect business sense.

The process of fan fiction, borrowing from earlier works to continue a well-known story has its roots back in oral story-telling and may be seen in early works such as *The Epic Cycle* and its relation to *The Odyssey* and *The Iliad*.<sup>50</sup> Even in the analogue eighteenth-century fans were doing more than simply deciphering and interpreting its inner qualifications. In her study on fan-fiction in the Enlightenment, Elizabeth Judge notes that practices included annotations in book margins, penning alternative endings and revisionist interpretations. In addition, rival authors wrote parodies or unauthorised sequels and "...contemporary fans made fascinating interventions in these characters' lives by casting them in sequels, migrating them to different genres, honouring them with namesake racehorses, and spawning character merchandise, such as waxworks, silk fans, and china sets".<sup>51</sup> It may therefore be taken as a given that the desire to produce and spread fan-fiction has been part of our culture and comparable to our desire to read the established works upon which fan fiction is based. Therefore it should come as no surprise that the recent shift in basic communications infrastructure and the digitalisation of cultural experience have led naturally to an increased ability to produce and spread works of fan fiction.

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<sup>49</sup> H Jenkins, *Convergence Culture: Where Old and New Media Collide* (NY: New York University Press, 2006).

<sup>50</sup> J Burgess, *The Tradition of the Trojan War in Homer and the Epic Cycle* (Baltimore: Johns Hopkins University Press, 2001).

<sup>51</sup> E Judge, see note 44 above, at 26.

An edited version of the George Lucas' *Star Wars: Episode I - The Phantom Menace* (1999, USA) was disseminated in 2000. *Star Wars Episode I.I: The Phantom Edit*, was a product of a dissatisfied fan. It was intended to create a more powerful version of the film through substantial editing. Most famously it removed almost all appearances of the character Jar Jar Binks. George Lucas' initial response was to praise the initiative<sup>52</sup> but this quickly turned to criticism and copyright protectionism.<sup>53</sup> This change of heart seems to have been connected with the increasing popularity of the new version. In the case of *The Phantom Edit* the move from homage to infringement was indiscernible in the product itself; the shift in perception comes from the external factors, i.e. its popularity.

In the face of psychological plagiarism the law is mute as copyright can only protect expressions creating a first to market advantage among creators. Social norms may be able to distinguish between the "real" owner and the first publisher but the law does not recognise this distinction. Actor portrayals illustrate another example where the audiences are prepared to assign property-like features to individuals far beyond the scope of the law. Despite its long tradition the concept of fan fiction is not well established and universally protected under copyright. Those creators who attempt to practice this form of expression will regularly face a mixed response of admiration and legal threats and the practice exists only as long as the copyright holder tolerates it.

## 6. Regulation by Proxy: Architecture and License

Assisted by technology, there is a large amount of cultural creation emerging from the gap between social norms and legal rules. While the tools for creativity are mainly in the hands of the users, the infrastructure for transferring cultural products are in the hands of service providers and are often made available free of charge. As the users do not pay for the infrastructure they are regularly denied a level of service that customers would expect.

The de facto standard for spreading remixed material such as AMVs, *Downfall* parodies and *Endless Love* today is the video-sharing site YouTube. There is, however, an additional level of regulation that must be taken into consideration as it impacts on the ability to transfer cultural material. This level of regulation is the system of licenses, which any user wishing to upload a video is required to agree to.

As the licensing system is based upon a contractual relationship between the user and the platform provider, and the latter is providing the service for free, the agreement tends to be weighted in favour of the provider. In consequence, cultural products are required to fit into the norms set by the technology and the wishes of the service provider. Additionally, as the service provider receives little or no payment, they have scant incentive to defend the "rights" of the uploader to transmit any cultural product.

A weakness in this system is that if the platform provider receives a complaint from a copyright holder, whether valid or not, the platform provider will inevitably commence the automated removal of all materials covered by the complaint. This was

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<sup>52</sup> BBC News, "Mystery of Star Wars Phantom Edit" (7 Jun 2001) available at <http://news.bbc.co.uk/2/hi/entertainment/1375742.stm> (accessed 29 Nov 2011).

<sup>53</sup> D Kraus, "The Phantom Edit" *Salon.com* (5 Nov 2001) available at [http://www.salon.com/2001/11/05/phantom\\_edit/](http://www.salon.com/2001/11/05/phantom_edit/) (accessed 29 Nov 2011).

the process that took place when Constantin Films sent a complaint to YouTube, as described in the introduction of this text.

The complaint by Constantin Films activated YouTube's automated filtering system, Content I.D. even though their claims were questionable as the use of the *Downfall* clip would have been covered by the fair use rules in the American copyright system. The effect is, as McSherry defines it, "...a content owner can take down a broad swath of fair uses with the flick of a switch. It seems that's exactly what Constantin Films has chosen to do".<sup>54</sup>

This situation neatly illustrates the way in which the design and implementation of technology can be used to create a regulation outside the control of the legislator.<sup>55</sup>

While there are of course measures a user can take if his material is removed from a content provider, it is, however clear that the user is placed in an unfavourable position and will have difficulties in asserting his or her rights. Therefore, enabled by a system of licensing and enforced by technology this system labels certain forms of cultural production as undesirable. These systems are skewed in favour of the rights holder and legitimize the process of limiting legally established rights granted through copyright legislation. If tolerance can be seen as a grey area then this labelling is a renegotiation to black.

## 7. Law, Social Norms and Architecture

Social norms may be understood as agreements, which coordinate our interactions with others.<sup>56</sup> Such norms often mediate forms of social interaction that are viewed as socially correct behaviour in a given situation. These norms are negotiated and enforced within social groups rather than being dictated from above. This is why, for example, laws governing jaywalking, speeding and tailgating can be the same in different countries but our social adherence to the rules differ widely.<sup>57</sup> There is a tendency to adhere to social norms once they have become established partly from indoctrination in the rule as being the correct way to act and due to the expectation that others will also follow this accepted behaviour.<sup>58</sup>

One way of understanding the problem is the realisation that law and social norms rarely fully match each other. Instead, the law explains what ought to be done while norms demonstrate what is actually done. To this complex image must also be added the effects of our technology, as it is ultimately here that people are limited by what is physically possible. Any discussion on the rights or wrongs of, for example, copying of a cultural artefact is ultimately defined by our ability to make such a copy.

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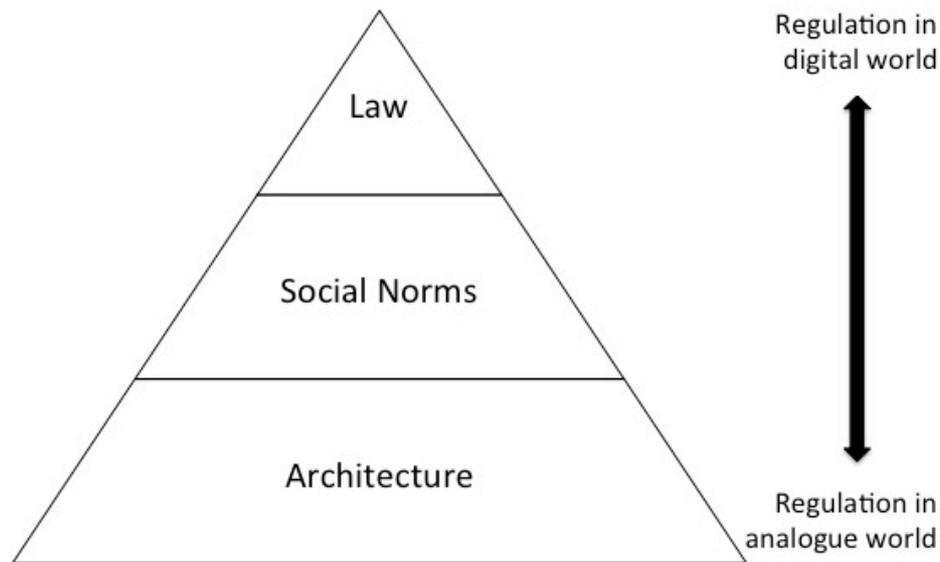
<sup>54</sup> C McSherry, "Everyone Who's Made a Hitler Parody Video, Leave the Room" *Commentary Electronic Foundation Blog* (20 Apr 2010) available at <https://www.eff.org/deeplinks/2010/04/everyone-who-s-made-hitler-parody-leave-room> (accessed 29 Nov 2011).

<sup>55</sup> For a deeper exploration of this see A Murray, *The Regulation of Cyberspace: Control in the Online Environment* (London: Routledge-Cavendish, 2006) and Lessig, note 2 above.

<sup>56</sup> D Lewis, *Convention: A Philosophical Study* (Cambridge MA: Harvard University Press, 1969).

<sup>57</sup> T Vanderbilt, *Traffic: Why We Drive the Way We Do* (NY: Knopf, 2008).

<sup>58</sup> H Young, "Social Norms" in S Durlauf and L Blume (eds), *The New Palgrave Dictionary of Economics*, 2<sup>nd</sup> ed (London: Palgrave Macmillan, 2008).



*Fig. 1: The regulatory pyramid*

Therefore, the concept of regulation by proxy can be interpreted as the ways in which a need for regulation increases as the technology enables people to do things which were previously impossible. This regulation is additionally enhanced through licenses and architecture and result in the attempt to strengthen social norms towards the needs of the regulator or technology controller.

Three main technological factors are of importance to modern applications of copyright law. First, the bulk of our cultural production has now become digitalised. Second, our homes have become connected at fixed costs. Third, our ability to store (and the cost of storing) data has improved to the point where storage is not an issue.

To this can be added the major shift in our cultural consumption practices, legal or otherwise, where the aid of digital devices is prevalent. All the technology surrounding our cultural consumption implicitly encourages us to store, share and consume culture. Or to put it very simply – what implicit message is transferred with a MP3 player that can store 40,000 songs?<sup>59</sup>

In order to illustrate these concepts this article introduces the regulatory pyramid in Figure 1, above, illustrates the wide range of practices afforded by modern technology and its architecture. Social norms urge us not to tolerate some of these practices, such as using the technology to hurt other people e.g. harassment, stalking etc. Social norms are much less clear on what is not allowed concerning digital manipulation of cultural artefacts. Most young people will take their cue from the rich media library of YouTube, which therefore can be understood as a vehicle for setting social norms on a global basis. Similar social norms on sharing are further propagated by a wide range of social media platforms, such as, Facebook and Delicious. However, as the figure illustrates, the law is considerably less tolerant in comparison with social norms.

The falling away of technical barriers to sharing has led to a demand that the law should step in and replace the role of barrier. Therefore, in a world where copying is

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<sup>59</sup> The iPod classic claims this capacity.

costly the need for law is low. When copying costs plummet there is a need to use law in place of the previously existing physical barriers to copying. In addition, it can be seen that the norm of creating and sharing is strong and at variance with the demands of the copyright industry calling for limitations to user rights.

Indeed, as individuals enter the arena of cultural sharing they take their cues from the tolerated/legal and the intolerated/legal products. On the face of it, it is difficult to see why these products are available while others; those in the intolerated/illegal section are penalised. The result is that the users have the desire to create, the technology to do so, and the infrastructure to share but are expected to respect legal rules which do not seem to make much sense or to match the current set of social norms.

The norms at work create a system where the individuals believe themselves to have the right to interact with the cultural products presented by the culture industry. Therefore, growth in all areas of cultural activity from consumption to adaptation can be observed. Individuals are building on earlier works and attempting to create new material. In a sense they are rejecting the established rights or the established rights holders. The social norms are one of cultural production with a high level of borrowing and intertextuality. Users are giving themselves permission and re-enforcing these rights through dominant social norms of sharing and creation.<sup>60</sup> At the same time these norms are also protecting certain forms of rights which copyright does not take into consideration (plagiarism, actor portrayal, fan fiction) there is no legal redress when social norms are broken, yet there remains a high level of adherence to social norms.<sup>61</sup> On the other hand there are the chilling effects of the fear, uncertainty and doubt created by a copyright regime that demands of the potential creator to rely upon the toleration of rights holders.

## 8. Conclusion

The purpose of this work was to look at the ways in which unpredictability in the interpretation of copyright, the varying sources of law and the discrepancy between social norms and law create a high level of uncertainty in the creation of cultural material. This uncertainty exists because the potential creator is dependent upon the tolerance of the copyright holder not make legal demands. The situation is exasperated by the problem that this tolerance is demanded *after* the new work is made available to the public. This work argues that this uncertainty creates a principle where law is tolerance.

In particular it was the aim of this work to widen the discussion by not limiting its scope to a legal, technical or social topic. The production of innovative cultural material relies on a healthy access to earlier material, the creativity to expand on that material, the legal leeway to share that material and the technical platforms with which to reach other users. For most of the history of copyright the most limiting factor for a large scale participatory cultural sphere has been a lack of technical means with which to create and share the results of the work. Today these technological limitations have been reduced and are easily surpassed by most users wishing to participate in a cultural exchange.

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<sup>60</sup> H Jenkins, see note 49 above, p. 256.

<sup>61</sup> R Ellickson, see note 9 above.

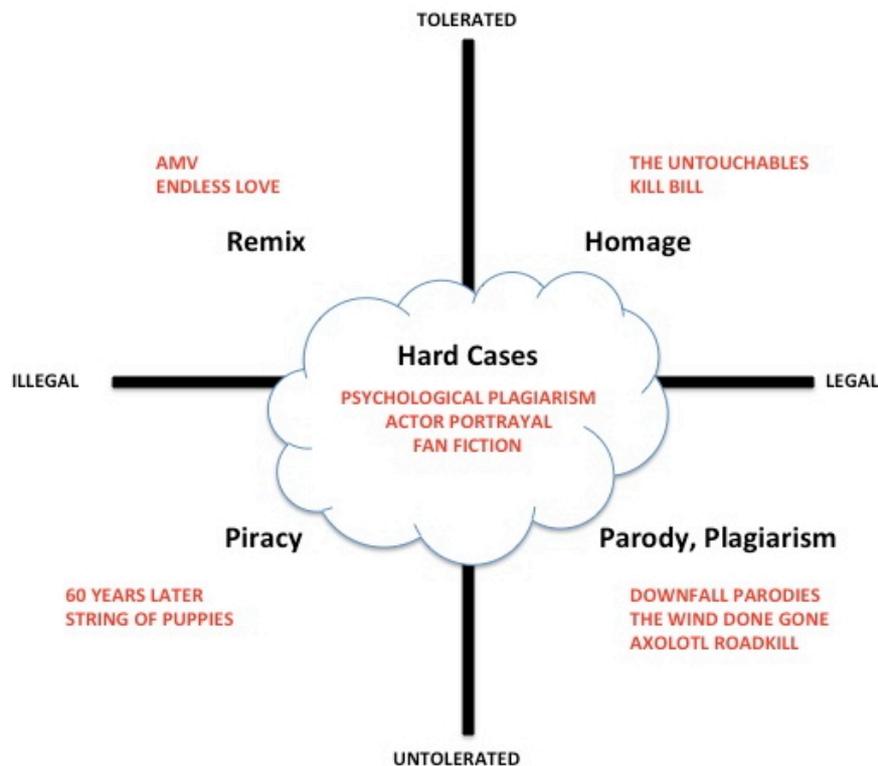
Society should therefore be entering into an unprecedented production of cultural material. On the one hand this is exactly what is happening. The amounts of copyrightable material being produced and spread today are far greater than in any other period in history. However, on the other hand, the legal risks and the regulation through licenses discussed here show that the material being produced and spread is discriminated against and is under risk of being removed. Additionally, this may also have legal consequences for the creators of these works.

The original purpose of copyright, and its often legitimising reason put forward today, is that by protecting the rights of the creator there will be an increased incentive to produce more material. Society offers a monopoly in return for an increased level of cultural material. However this bargain has been steadily eroded. At the point where it is technically possible for wide scale participation it is in danger of being broken.

As the examples presented in this text illustrate, it is increasingly difficult to know what the outcomes of an instance of appropriation will result in. In order to illustrate the examples collectively this work attempts to map the different examples into the fields of legal, illegal and tolerated and untolerated reproduction.

By positioning them in this manner, this article hopes to demonstrate the difficulties involved in understanding how the current copyright system deals with these types of actions. Naturally, each of these cases is different in the circumstances of their development and presentation but all represent the use of an earlier work in an attempt to present a new work. They are, so to speak, both dependent on the earlier works and at the same time stand independently in relation to them as new cultural products.

Here, this article has attempted to position the works culturally. *Endless Love* and the AMV therefore represent an art form, which is both tolerated and illegal and has commonly come to be seen as examples of a remix, while the tolerated legal form of this process would be seen as homage. Meanwhile, the untolerated, legal form would be a parody, while the untolerated and illegal form is usually seen simply as piracy.



*Fig. 2: Tolerance is law*

The purpose of this visualisation is to present the reader with a clearer understanding of cultural products within a cultural socio-legal system mediated by conventions of tolerance. The legal-illegal dichotomy is easily understood but by simply remaining on this axis it is easy to believe that the law exists alone, as a system without a social context.

Additionally, by visualising the process of creation based on earlier works in this way there appears a need for clarification of the position of the groups' works that are either untolerated and legal or tolerated and illegal. Both these groups rely on a weak set of protective rules. This constitutes an unpredictable legal situation.

It is prudent to place homage in the section of Legal/Tolerated. Despite the issues that may surround their creation and use, they are firmly accepted as a legitimate form of activity. However, this is not necessarily obvious by only scrutinising the cultural product itself, but is understood from the socio-legal reactions to their distribution. One could argue that it is the inaction of the copyright holder that makes them legitimate.

Parodies and plagiarism are in the cross section of Legal/Untolerated. Taken as a theoretical standpoint most legal systems support the right to parody. However, the parody is not necessarily safe simply because of this abstract right. Both *The Wind Done Gone* and the *Downfall* parodies have been threatened by copyright holders and show how precarious a position this is to maintain. This attempt at positioning is made even more complex as in light of the fate of *Axolotl Roadkill* and *The Lion King* as they have not been challenged in court. From this it is assumed that they are legal works where the author of *Axolotl Roadkill* admits to plagiarism and the creators of *The Lion King* deny any "wrongful" borrowing. In the hard case of fan fiction, *The Phantom Edit* adds further complexity. The edit was not threatened with copyright action, but it was enough for George Lucas to express concerns for the editor to publically write "...I sincerely apologize to George Lucas, Lucasfilm Ltd. and the loyal 'Star Wars' fans around the world for my well-intentioned editing demonstration that escalated out of my control".<sup>62</sup> Furthermore, the whole concept of the right to retell a tale is under question in the French psychological plagiarism conflict.

In the area of Illegal/Tolerated can be found the cultural products that are on the definite fringe of cultural production. This is the home of the remix, such as AMV's and the *Endless Love* duet. These cultural products have a low survival level should any copyright holder decide to take action.

Finally, the system's losers in the Illegal/Untolerated field, here are the works that have been challenged and lost. They are, for all intents and purposes, banned works.

As this article has demonstrated the law is not the sole arbiter. There is no way to say with certainty which act may be penalised simply by looking at the law and the cultural product. Architecture in the digital age is no longer the problematic step it may once have been. Therefore, in order to better understand the relationship between legality and tolerance the relationships between law, social norms and technology

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<sup>62</sup> C McSherry, see note 54 above.

must be better understood. Studying and implementing law as a self-contained system diminishes its importance and weakens its relevance.

One of the main purposes of law is to provide a measure of predictability and stability. This fundamental purpose is enshrined in the principle that there should be no punishment without law. However, as this work has shown, this is no longer true. It is not that copyright is difficult to interpret; it is that copyright is no longer in the driving seat. Many creators are left in uncertainty relying on the tolerance of others. This is problematic as tolerance is a social norm and, as such, varies in time and space. In worst case scenarios larger players can be favoured at the expense of creation – this may not only damage creativity but also lead to a cultural imperialism enacted by the dominant players in the copyright world.