Transatlantic Copyright Comparisons:

Hyperlinking and Making Available as Modes of Communication

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In this working paper, the authors comparatively analyse recent Canadian and European Union copyright cases regarding the nature and scope of communication rights. Global electronic commerce and online communication have destabilized the global copyright system. In response, international instruments are nearing completion or about to be negotiated that could have potentially significant impacts on copyright law and practice. Examples include a Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, and a Transatlantic Free Trade Area (TAFTA) including the European Union and United States.

The authors argue that the potential costs and benefits of such agreements will be impacted not only by the instruments’ text but also by jurisprudential developments and commercial practices in each jurisdiction. Their objective is to reveal, through comparative analysis of recent case law, both conceptual convergences and divergences that might facilitate or frustrate legal harmonization and policy coordination.

A quintet of recent decisions of the Supreme Court of Canada fundamentally altered understandings of the conceptual structure of copyright as an indeterminate bundle of rights. In Canada, copyright boils down to rights of reproduction, performance, and publication. That taxonomy encompasses other rights as simply illustrative of these essential activities. Major legislative revisions just made to Canada’s copyright statute must be interpreted in that context, including a new provision defining “making available” as part of the communication right.

While Canadian cases addressing this issue continue to unfold, the European Court of Justice is also poised to release a decision on whether hyperlinking constitutes communication to the public within the meaning of Article 3(1) of the Information Society Directive. While the factual issues in Canadian and European cases are different, the economic considerations and conceptual implications are remarkably similar. Economic efficiency and market functionality lie at the heart of jurisprudential developments on both sides of the Atlantic.

A deeper understanding of the ways that Canadian and European Union copyright cases will, in the authors’ opinion, help to identify positive opportunities for constructive cooperation, rather than the usual ratcheting-up of
minimum standards, and therefore facilitate development of an economically and cultural vibrant online environment.