

Transatlantic Copyright Comparisons: Making Available via Hyperlinks in the European Union and Canada

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This article provides a timely comparative analysis of recent Canadian and European Union (EU) copyright cases regarding the nature and scope of communication rights, as applied to the issue of copyright liability for hyperlinking. It links these evolving practices with the pertinent international law, in particular with the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), together known as the WIPO Internet Treaties.

Introduction

Digital technologies, online communications and electronic commerce have destabilised the global copyright system. The 1996 WIPO Internet Treaties were an early response to this sea change, which subsequently triggered a wave of further-reaching domestic implementation actions, whose higher levels of protection were often tied in with bilateral and regional preferential trade agreements (PTAs), in particular where industrialised countries were partners to the deal.

Building on textual and conceptual analyses of the WIPO Internet Treaties, we undertake a comparative analysis of judicial interpretation of domestic legislation that implements them. We focus on one specific issue and examine in some detail the European and Canadian law and practice of “making available” as a mode of communication to the public, in particular via hyperlinking.

Such a comparison is interesting and valuable, as the WIPO Internet Treaties themselves do not dictate any particular result. Rather, geopolitical compromises during the negotiations led to agreements that are agnostic about certain details, deferring hard questions to Member States’ lawmakers tasked with implementing the treaty provisions. Nearly a dozen and a half years after the agreements were signed, this article asks whether the WIPO Internet Treaties are being implemented, interpreted and applied in domestic law consistently across jurisdictions? And, regardless of whether jurisprudence is converging or diverging, what are the policy implications?

Although early cases on either side of the Atlantic sometimes produced complex or even conflicting results, clearer patterns are emerging. For one example, rulings in Canada and Europe align around copyright liability for streaming—asynchronous, on-demand transmissions have recently been held to constitute “communication” of works in both jurisdictions. Also, in both jurisdictions, similar issues remain unresolved, and opportunities for comparative lessons exist. Copyright liability for hyperlinking provides a timely illustration.

Our comparative findings suggest that preserving flexibility for courts to interpret domestic laws according to socio-economic conditions, technological developments and local priorities is desirable. While the wish for certainty in international intellectual property agreements is understandable, leaving the resolution of complex or controversial questions to domestic lawmakers is sometimes a preferable alternative to locking in premature or ill-conceived international intellectual property norms. Local courts are better able to adapt to dynamic environments, such as the digital space, than international diplomats.

Of course, international law forms an important part of the context in which courts interpret and apply national legislation. Before turning to the specific case studies exploring these issues in the context of the WIPO Internet Treaties’ making available provisions, a look at the origins and contents of those provisions is essential—first, to understand their basic structure and flexibility, and secondly and perhaps more importantly, to contextualise the evolution of the copyright regime and its incessant, albeit not necessarily successful, struggle to cope with the digital challenge.

The origins of “making available” in the WIPO Internet Treaties

The World Intellectual Property Organization (WIPO) Copyright Treaty (WCT)¹ and the WIPO Performances and Phonograms Treaty (WPPT)² (collectively, the WIPO Internet Treaties) sought to modernise global copyright law and make it fit for the internet age, by facilitating “adequate solutions to questions raised by new economic,

¹ WIPO Copyright Treaty, December 20, 1996, WIPO Publication No.226 (1997) 36 I.L.M. 65 (entered into force March 6, 2002) (WCT).

² WIPO Performances and Phonograms Treaty, December 20, 1996, WIPO Publication No.22, (1997) 36 I.L.M. 76 (entered into force May 20, 2002) (WPPT).

cultural and technological developments”.³ Admittedly, the goal was fairly ambitious, especially as, at the time of the Treaties’ adoption, the dynamics of the digital networked space were largely unknown and policy-makers based any future-oriented strategy on the premise that proprietary incentives are the key precondition for creativity and innovation.⁴ There was little, or no, understanding of the fundamental and often disruptive ways in which digital technologies have changed the conventional modes of creating, distributing, accessing, using and reusing cultural content and knowledge.⁵ The constituencies behind the treaty change, overrepresented by the entertainment industries, were largely preoccupied with other implications of digital media, such as the ability to make perfect copies, or to distribute and consume copyrighted content without the limitations of distance and space.⁶

Despite the inherent utilitarianism of the WIPO Internet Treaties, it should be noted that the parties who sought stronger and better enforceable intellectual property rights in the digital space only partially achieved their goals.⁷ Early academic commentaries celebrated the balance between private and public interests that the treaties enshrined.⁸ Some of these voices may have been too euphoric, as it is now apparent that the “treaties were intentionally far less concerned with enabling new modes of creative enterprise than preserving the existing presumptions in favor of authorial prerogative”,⁹ and that:

“Given the unrestrained versatility of innovation in the digital arena, the WIPO Internet Treaties have fallen considerably short in what was to be their central mission, namely, to provide a relevant and credible source of norms to facilitate knowledge creation in the global digital context.”¹⁰

With the benefit of hindsight, it is also evident that the impact of the WIPO Internet Treaties has been long overshadowed by the national implementation initiatives and the emergence of further-reaching implementation models, notably that of the Digital Millennium Copyright Act (DMCA)¹¹ in the United States and the Information Society Directive¹² in the European Union, which have also been replicated in subsequent bilateral and regional preferential trade agreements.¹³

Scholarly literature has covered the WIPO Internet Treaties, their implementation and overall effect on the conditions for creativity in the digital networked environment, paying particular attention to the introduction of technological protection measures (TPMs) and the ban on circumventing such measures, which may have in effect limited fair use in digital media.¹⁴ One change, however, has received relatively less academic attention—the expansion of copyright to cover merely “making available”, as opposed to copying or transmitting, works and other subject-matter.

We argue that this expansion in the scope and exercise of owners’ rights in the digital space has crucial implications for the sustainability of that space itself,¹⁵ and is therefore deserving of closer scrutiny. Moreover, we also argue that it is essential to conduct not only textual and conceptual analyses of these treaty provisions and implementing domestic legislation, which several renowned scholars have already done,¹⁶ but also a comparative jurisprudential analysis considering the treaties’ practical impact on the outcome of litigated cases in different jurisdictions.

Making available is mentioned in two different articles of the WCT. Article 8 of the WCT states:

³ WPPT, Preamble; WCT, Preamble.

⁴ WCT, Preamble at para.4.

⁵ Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven, Ct: Yale University Press, 2006); James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven, Ct: Yale University Press, 2008); Manuel Castells, *The Rise of Network Society, The Information Age: Economy, Society and Culture, Volume 1*, 2nd edn (Malden, MA: Blackwell Publishers, 2000); Manuel Castells, *The Power of Identity, The Information Age: Economy, Society and Culture, Volume 2*, 2nd edn (Malden, MA: Blackwell Publishers, 2004); Manuel Castells, *End of Millennium, The Information Age: Economy, Society and Culture, Volume 3*, 2nd edn (Malden, MA: Blackwell Publishers, 2000).

⁶ Ruth L. Okediji, “The Regulation of Creativity Under the WIPO Internet Treaties” (2009) 77(5) *Fordham Law Review* 2379.

⁷ Okediji, “The Regulation of Creativity Under the WIPO Internet Treaties” (2009) 77(5) *Fordham Law Review* 2379.

⁸ See, e.g., John Browning, “Africa 1 Hollywood 0”, *Wired* 5:03 (March 1997); Pamela Samuelson, “Big Media Beaten Back”, *Wired* 5:03 (March 1997); Pamela Samuelson, “The U.S. Digital Agenda at WIPO” (1996) 37 *Virginia Journal of International Law* 369.

⁹ Okediji, “The Regulation of Creativity Under the WIPO Internet Treaties” (2009) 77(5) *Fordham Law Review* 2379, 2381.

¹⁰ Okediji, “The Regulation of Creativity Under the WIPO Internet Treaties” (2009) 77(5) *Fordham Law Review* 2379, 2380.

¹¹ Pub. L. No.105-304, 112 Stat. 2860 (October 28, 1998).

¹² Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (Information Society Directive).

¹³ See, e.g., Ahmed Abdel Latif, “From Consensus to Controversy: The WIPO Internet Treaties and Lessons for Intellectual Property Norm Setting in the Digital Age” in Mira Burri and Thomas Cottier (eds), *Trade Governance in the Digital Age* (New York: Cambridge University Press, 2012), p.367.

¹⁴ Peter K Yu (ed.), *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age, Volume 4, International Intellectual Property Law and Policy* (Westport, CT: Praeger Publishers, 2007); Nicola Lucchi, *Digital Media & Intellectual Property: Management of Rights and Consumer Protection in a Comparative Analysis* (Berlin: Springer, 2006).

¹⁵ Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008); Jonathan L. Zittrain, *The Future of the Internet and How to Stop It* (New Haven, Ct: Yale University Press, 2008); Ian Brown and Christopher T. Marsden, *Regulating Code: Good Governance and Better Regulation in the Information Age* (Cambridge, Mass: MIT Press, 2013).

¹⁶ See, e.g., Mihály Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation* (New York: Oxford University Press, 2002); Jörg Reinbothe and Silke von Lewinski, *The WIPO Treaties 1996: The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty, Commentary and Legal Analysis* (London: Butterworths LexisNexis, 2002); Simon Fitzpatrick, “Copyright Imbalance: US and Australian Responses to the WIPO Digital Copyright Treaty” [2002] E.I.P.R. 214; Jane C Ginsburg, “The (New?) Right of Making Available to the Public” in David Vaver and Lionel Bentley (eds), *Intellectual Property in the New Millennium: Essays in Honour of William R Cornish* (Cambridge, UK: Cambridge University Press, 2004), p.234; Andrew Christie and Eloise Dias, “The New Right of Communication in Australia” (2005) 27 *Sydney Law Review* 237; David Fewer, “Making Available: Existential Inquiries” in Michael Geist (ed.), *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005), p.267; David O. Carson, “Making the Making Available Right Available” (2010) 33 *Columbia Journal of Law & the Arts* 135.

“Article 8: Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”

Also, art.6 of the WCT states:

“Article 6: Right of Distribution

- (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.”

The agreed statements accompanying art.6 clarify that it applies, at a minimum, to copies that can be circulated as tangible objects. However, nothing prevents countries from applying the right of distribution *also* to intangible copies, as an additional and/or alternative means of providing authors the exclusive right to authorise the making available of works.¹⁷

The WPPT provides similar protection to performers and record makers, in arts 10 and 14 respectively, under a different heading, “Right of Making Available...”:

“Article 10/14: Right of Making Available of Fixed Performances/Phonograms

Performers/Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms/phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.”

A key point about these provisions is that the particular headings under which the treaties reference making available are not important. The placement of making available in art.8 of WCT, under the title “Right of Communication to the Public”, does not require countries to implement protection only or at least through this particular right. Nor does art.6 require signatories to only or at least address making available through the distribution right. And nor does the inclusion of performers’ and makers’ parallel rights in arts 10 and 14 of WPPT, entitled “Right of Making Available ...”, require countries to enact *sui generis* protection for a new right. Rather, signatories may protect making available in some instances through the distribution right, and in

other instances through the communication right, and in other instances through a combination of existing or *sui generis* rights. It is important that treaty Member States protect making available, not *how* specifically they do so.

The treaties’ flexible approach to making available, capable of different domestic implementations via various new or existing rights or combinations of rights, is known as the “umbrella solution”. Under the umbrella solution, how a country might address making available may depend upon different factors, including the nature of the use of the work made by a member of the public.¹⁸

This freedom of legal classification is the constructive ambiguity preserved in order to facilitate an agreement between jurisdictions with different conceptions of the bundle of rights that constitute copyright. Countries implementing the umbrella solution reflected in the WIPO Internet Treaties may choose to characterise making available as an authorisation, communication, distribution, reproduction, *sui generis* activity or some combination of those possibilities.

In the United States, no legislative changes were perceived necessary to implement the making available provisions. Although US law is not a focus of this particular article, the fact that this approach has led to some confusion and conflicting opinions about, for example, whether merely uploading files to a peer-to-peer network constitutes copyright infringement,¹⁹ demonstrates the crucial role of judicial interpretation in giving practical effect to the WIPO Internet Treaties.

The European Union has implemented the making available provisions of the WIPO Internet Treaties via the Information Society Directive.²⁰ Article 3 of that Directive reads as follows:

“Article 3: Right of communication to the public of works and right of making available to the public other subject-matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.
2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:
 - (a) for performers, of fixations of their performances;

¹⁷ Ficsor, *The Law of Copyright and the Internet* (2001), pp.499–500.

¹⁸ Ficsor, *The Law of Copyright and the Internet* (2001), p.499.

¹⁹ See generally Peter S. Menell, “In Search of Copyright’s Lost Ark: Interpreting the Right to Distribute in the Internet Age” (2011) 59 J. Copyright Soc’y U.S.A. 1.

²⁰ Information Society Directive [2001] OJ L167/10.

- (b) for phonogram producers, of their phonograms;
- (c) for the producers of the first fixations of films, of the original and copies of their films;
- (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.”

The Canadian treatment of making available is, we argue below, apparently a hybrid between the European and American approaches. Canada has amended its Copyright Act to add the following provision to the preexisting definition of communication:

“Communication to the public by telecommunication

- (1.1) For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.”

Supreme Court of Canada jurisprudence, however, suggests that there is a legal distinction between making available *for communication* and making available *for reproduction/distribution*. Both activities attract liability, but probably under different rights. As in the United States, arguably, no legislative amendment was necessary to protect making available for reproduction/distribution, i.e. downloading, because Canadian law already covered that activity through a combination of rights other than the communication right. Statutory reforms clarified, in case there was previously doubt, that the communication right includes making available for activities such as streaming.

These differing approaches demonstrate a central thesis of this article—that interpreting the treaty provisions alone is insufficient to understand and compare their practical impact across jurisdictions. The next section of the article engages more deeply in comparative jurisprudential analyses of making available in Canada and the European Union.

Implementing and applying making available in Canada

In July of 2012, a quintet of decisions of the Supreme Court of Canada shook the foundations of copyright.²¹ Among other things, these cases 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 to Canada’s copyright statute must be interpreted in that context. In November of 2012, the Copyright Modernization Act amended Canada’s Copyright Act.²² The Bill added, among many other things, a clause to the definition of “communication to the public by telecommunication” to clarify that communication of a work or other subject-matter:

“[I]ncludes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.”²³

These developments, in combination, could have profound implications on a variety of legal and economic issues arising owing to technological, commercial and social innovations in the creation and distribution of digital content. One of the hot-button issues will be copyright liability for hyperlinking—the same subject of a dispute before the CJEU concerning related provisions of the EU’s Information Society Directive.²⁴

Before outlining how Canadian law on that issue may evolve and comparing the EU approach, this article briefly explains relevant recent decisions and pending cases. Key Supreme Court cases include *SOCAN v Entertainment Software Association of Canada (ESA)*²⁵ and *Crookes v Newton*.²⁶ The first of the cases just mentioned, *ESA*, was part of the 2012 copyright quintet, while *Crookes* was a defamation decision issued the previous year. Combined with several ongoing appellate-court and administrative proceedings, these cases could determine whether and, if so, when hyperlinking might constitute copyright infringement in Canada.

ESA stemmed from a very drawn out administrative procedure before the Copyright Board of Canada to certify a tariff, proposed by the collective society representing composers and music publishers (called SOCAN), for the communication of musical works via the internet. The tariff, substantially revised since it was first proposed in 1996, has twice wound through appeals up to the country’s highest court, and still is not settled. The latest episode in the Supreme Court concerned copyright

²¹ Michael Geist (ed.), *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013).

²² Copyright Act, RSC 1985, c C-42.

²³ Copyright Act s.2.4(1.1).

²⁴ Information Society Directive [2001] OJ L167/10.

²⁵ *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada* 2012 SCC 34; [2012] 2 S.C.R. 231 (*ESA*). The author Jeremy de Beer discloses that he acted as co-counsel for the intervenor, Canadian Internet Policy and Public Interest Clinic, in the Supreme Court of Canada.

²⁶ *Crookes v Newton* 2011 SCC 47; [2011] 3 S.C.R. 269 (*Crookes*).

liability for streaming and/or downloading online music. In particular, online music service providers argued that while streaming triggers royalty obligations similar to conventional radio and television broadcasting, digital downloads are more like selling physical records, and should not therefore attract additional copyright liability for the communication as well as the distribution. The Supreme Court agreed.

For several decades until 2012, licensing practices in the Canadian digital music market were based on the premise that online music distribution triggered overlapping liability to both reproduction and communication right holders. This belief was based on earlier case law²⁷ that had suggested reproduction and communication rights were “separate and distinct” parts of a bundle of copyrights. Overruling, or rather, re-explaining previous cases, the Supreme Court held in *ESA* that “Internet delivery of copies” constitutes a single act, which could implicate either but not both separate and distinct reproduction and communication rights.²⁸

The *ESA* decision had two immediate effects. First, companies that had already paid royalties for the digital distribution of copies of music, such as ringtone downloads, sued to recover these amounts.²⁹ Secondly, the Copyright Board decided there was no basis for SOCAN’s proposed tariff on companies that sell “durable” copies, i.e. downloads. Communication royalties are only payable to SOCAN for streaming, by services such as Rdio or Spotify. For selling downloads, digital music retailers must only pay reproduction royalties, to a different collective society.

That, however, is not nearly the end of the matter. The scope and meaning of the addition of “making available” in s.2.4(1.1) via the Copyright Modernization Act is now an issue in a proceeding before the Copyright Board.³⁰ SOCAN argues that statutory reforms override the Supreme Court’s recent rulings, by defining “communication” to include “making available” for any unspecified purpose. Online music providers advance the contrary position that the right to communicate to the public by telecommunication includes the making available of works for access only by streaming, and does not include the making available of works for access by downloading.

Based on the latter interpretation of Canadian copyright law, a work or other subject-matter is made available when the work or the object of related rights is uploaded for interactive access irrespective of what kind of

interactive use (streaming or downloading) is made possible. The fundamental character of the interactive use determines not whether the person who made the work available is liable to pay royalties, but rather to *whom* the person is liable to pay royalties pursuant to *which* right. If the work or subject-matter is made available for downloading, the person making it available might be liable for reproducing, distributing or authorising the reproduction or distribution. If the work or other subject-matter is made available for streaming, the person might be liable for communication.

As implemented in Canada, making available is not a new “right” at all, but rather a definitional clarification of the existing communication right. In context, being part of the definition of communication arguably limits the scope of this particular definitional provision to making available *for communication*, not making available *for the distribution of copies*.

If making available for downloading were considered a communication, owners of reproduction or distribution rights would have no enforceable claim to payment. Although voluntary arrangements may exist to share royalties among collective societies administering communication and reproduction rights, relying on voluntary royalty-sharing agreements among collectives is inconsistent with the obligations to provide exclusive rights pursuant to the WIPO Internet Treaties. The treaties require that reproduction right holders be given greater protection than would be provided only secondarily via the distribution of royalties collected by performing rights societies. That is because, based on Supreme Court jurisprudence, the single act of making a work or other subject-matter available is not both a communication and reproduction at the same time.

In light of the Supreme Court’s decision in *ESA v SOCAN*, the act of transmitting a work via the internet probably does not infringe both the communication and reproduction rights.³¹ Whether the act of making available implicates the communication or reproduction right depends on the fundamental character of the intended interactive use, such as streaming or downloading. Making available for streaming would implicate communication; making available for downloading would implicate other rights including reproduction, distribution and authorisation.³²

While the pending cases before the Copyright Board do not *yet* raise the issue of “making available” liability for hyperlinking, given the litigious realities of copyright

²⁷ *Bishop v Stevens* [1990] 2 S.C.R. 467; 72 D.L.R. (4th) 97 (*Bishops*).

²⁸ Jeremy de Beer, “Copyright Royalty Stacking” in Geist, *The Copyright Pentology* (2013), p.335 at p.350.

²⁹ That case is in federal court: Plaintiff’s Statement of Claim in *Rogers Communications Partnership v SOCAN*, Federal Court File No.T-2046-12, (November 13, 2012), <http://www.scribd.com/doc/113244090/rogers-et-al-v-socan-claim-or-return-of-ringtone-payments> [Accessed December 3, 2013].

³⁰ The author Jeremy de Beer discloses that he provided expert opinion in this proceeding on behalf of several online music service providers. That opinion reflects parts of the text in this section of the article.

³¹ *ESA* 2012 SCC 34; [2012] 2 S.C.R. 231.

³² These requirements are also consistent with the decision of the Supreme Court of Canada in *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada* 2012 SCC 35, [2012] 2 S.C.R. 283 (*Rogers v SOCAN*).

tariff-setting procedures in Canada, that question will almost surely arise very soon. In fact, at least one collective society representing book publishers is already purporting to license linking by educational institutions and other users of published literary works.³³

This was also a live issue in a Canadian case, *Warman v Fournier*,³⁴ which held that linking to a photograph did not constitute copyright infringement, because the photograph had already been published with the approval of the copyright owner. That is, even if hyperlinking did constitute communication to the public (which the trial judge did not rule on), this hyperlink was not an infringement of copyright because any communication was not an unauthorised communication; it was made with the implied authorisation of the copyright owner who put the content online in the first place. Accessibility of the work always “was within the applicant’s full control and if he did not wish it to be communicated by telecommunication, he could remove it from his website, as he eventually did”.³⁵

The broader question of whether—in light of statutory reforms—linking constitutes “communication by making available” can be assessed, first, in light of the general policy and practical considerations that underpin recent Supreme Court jurisprudence, including balance, efficiency and neutrality. The same principles that justify reducing copyright royalty stacking also justify not imposing copyright liability for hyperlinking.

Additional insight on liability for hyperlinking in Canada comes from the *Crookes* case regarding defamation. While the question in that case—whether hyperlinking constitutes publication—was slightly different, the guiding principles are similar. Justice Abella wrote for the majority of the Supreme Court that hyperlinking, by itself, will not constitute publication for the purpose of defamation.

In refusing to impose liability for defamation through hyperlinking, Justice Abella cited with approval one of the Supreme Court of Canada’s seminal digital copyright cases, *SOCAN v CAIP*.³⁶ Interestingly, the *SOCAN v CAIP* decision in 2004 stemmed from the same tariff proceedings that also led to the *ESA* decision in 2012. In the 2004 case, the Supreme Court decided that merely providing internet connectivity or hosting copyright-infringing content did not create liability for communicating that content to the public by telecommunication. Analogously, “subordinate distributors”³⁷ who provide hyperlinks do not publish the

content they link to. Can the same principle be extended to hyperlinking, or should linkers be held liable for communication merely by making available, or making *more widely* available, hyperlinked content?

Paragraph 2.4(1)(b) of Canada’s Copyright Act states that only providing “providing the means of telecommunication necessary for another person to so communicate” is not itself a communication. While the Supreme Court hinted in its 2004 decision that “embedded links which automatically precipitate a telecommunication”³⁸ might lead to liability, it also held that caching content was not communication, but merely part of the means necessary to provide “faster and more economic service”.³⁹ Granted, caching was perceived to be “content neutral”; hyperlinking may not be so. However, if caching does not trigger liability, how could a court hold that hyperlinking, which is even more integral to the internet’s functionality, constitutes copyright infringement?

Crookes v Newton provides a good indication how to approach this issue: “Communicating something is very different from merely communicating that something exists or where it exists.”⁴⁰ Justice Abella’s reasons for differentiating hyperlinking from communicating (and publishing) centre on several crucial concepts, including especially “control over the content”. She characterised the participation of the hyperlinker as “merely ancillary to that of the original publisher”. All these comments about linking to already published defamatory content apply equally to linking to already available copyright-infringing materials.

Furthermore, the policy arguments that swayed the Supreme Court are equally forceful in both defamation and copyright contexts: “Given the core significance of the role of hyperlinking to the Internet, we risk impairing its whole functioning.”⁴¹ Justice Abella wisely noted that the internet cannot provide access to information without hyperlinks; it cannot work. More bluntly, she worried that liability for hyperlinking would break the internet. The Supreme Court ruling avoids a “potential chill” that could be “devastating” to how the internet functions, “seriously restricting the flow of information and, as a result, freedom of expression”.⁴²

We would advise courts considering copyright liability for hyperlinking to follow Justice Abella’s reasoning regarding the internet’s basic functionality. Just as linking does not constitute publication, nor is it a communication, especially in light of para.2.4(1)(b), which creates a safe

³³ For commentary on this controversial licensing practice, see Michael Geist, “Something for Nothing: The Non-Existent Benefit of Linking in the Access Copyright Deal” (May 4, 2012), <http://www.michaelgeist.ca/content/view/full/6458/125/>; Sam Trosow, “Once Again: Linking is Not Unauthorized Copying” (June 25, 2012), <http://samtrosow.wordpress.com/2012/06/25/once-again-linking-is-not-unauthorized-copying/>; Sam Trosow, Scott Armstrong and Brett Harasym, “Objections to the Proposed Access Copyright Post-Secondary Tariff and its Progeny Licenses: A Working Paper” (August 14, 2012), *FIMS Library and Information Science Publications*, <http://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1026&context=fimspub> [All accessed December 3, 2013].

³⁴ *Warman v Fournier* 2012 FC 803, 104 C.P.R. (4th) 21.

³⁵ *Warman v Fournier* 2012 FC 803, 104 C.P.R. (4th) 21 at [38].

³⁶ *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers* 2004 SCC 45; [2004] 2 S.C.R. 427 (*SOCAN v CAIP*).

³⁷ *Crookes* 2011 SCC 47; [2011] 3 S.C.R. 269 at [20].

³⁸ *SOCAN v CAIP* 2004 SCC 45; [2004] 2 S.C.R. 427 at [102].

³⁹ *SOCAN v CAIP* 2004 SCC 45; [2004] 2 S.C.R. 427 at [116].

⁴⁰ *SOCAN v CAIP* 2004 SCC 45; [2004] 2 S.C.R. 427 at [26].

⁴¹ *SOCAN v CAIP* 2004 SCC 45; [2004] 2 S.C.R. 427 at [36].

⁴² *SOCAN v CAIP* 2004 SCC 45; [2004] 2 S.C.R. 427 at [36].

harbour for providers of the means that make communication possible. There is no reason to believe that the implementation of the making available provisions of the WIPO Internet Treaties in subs.2.4(1.1) requires a different result.

Whether liability might arise under other aspects of Canadian law, such the authorisation right, or other newly added provisions designed to deal with providers of peer-to-peer file sharing services, indexes and other platforms, remains an open question. This particular article only compares Canadian and European Union law on the communication right and its incorporation of the concept of making available.

Recent developments in the European Union

The Court of Justice of the European Union (CJEU) has also tried to define the boundaries of the right of communication to the public. In the following section, we look at the key case of *Svensson*,⁴³ putting the entire development of the EU case law on the topic in perspective and sketching potentially far-reaching repercussions for digital copyright law, the conditions for creativity in the digital space and indeed the functioning of the internet itself. Case C-466/12, *Svensson*, referred to the CJEU for a preliminary ruling, asked one key question: whether putting a hyperlink on a website constitutes a “communication to the public” under the EU’s Information Society Directive.⁴⁴

Nils Svensson, a journalist, wrote an article for a Swedish newspaper that was published in print and on the newspaper’s website. Retriever Sverige AB, the defendant in the case, offers a subscription-based service, whereby customers can access newspaper articles; the articles are, however, not available on the Retriever website but merely linked to the original, third-party source.⁴⁵ Svensson sued Retriever for “equitable remuneration”, arguing that Retriever had made his article available through the search and alert functions on its website. This, he maintains, falls within the copyright

relevant acts of either communication to the public or the public performance of a work, for neither of which he has given consent. Retriever denies any liability to pay equitable remuneration. Retriever’s basic argument is that the linking mechanisms do not constitute copyright-relevant acts, so that no infringement of copyright law occurs.

While the facts may appear straightforward, the law is not. In many previous CJEU cases, a different type of technological platform, not the internet, was addressed. A seminal case in the jurisprudence is Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*,⁴⁶ which concerned a hotel that made broadcasting signals available over the hotel’s closed network. There, the CJEU adopted a broad interpretation of “communication to the public” under the Information Society Directive. It argued that:

“[W]hile the mere provision of physical facilities does not as such amount to communication ... the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of that directive.”⁴⁷

Further, the court pointed out that the “private nature of hotel rooms does not preclude the communication of a work by means of television sets from constituting communication to the public within the meaning of Article 3(1)”.⁴⁸ In a more recent case, however, *SCF Consorzio Fonografici*, the CJEU maintained that the free of charge broadcasting of phonograms in private dental practices does not fall under the definition of “communication to the public”, as the number of persons was small, the music played was not part of the dental practice, the patients enjoyed the music without having made active choice, and patients were in any case not receptive to the music under the dental practice’s conditions.⁴⁹ Equally importantly, the CJEU found in the case of *BSA* that the television broadcasting of a graphical

⁴³ *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB* (C-466/12) [2012] OJ C379/19 (*Svensson*).

⁴⁴ The actual questions referred in *Svensson* (C-466/12) [2012] OJ C379/19 are the following:

1. If anyone other than the holder of copyright in a certain work supplies a clickable link to the work on his website, does that constitute communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society?
2. Is the assessment under question 1 affected if the work to which the link refers is on a website on the Internet which can be accessed by anyone without restrictions or if access is restricted in some way?
3. When making the assessment under question 1, should any distinction be drawn between a case where the work, after the user has clicked on the link, is shown on another website and one where the work, after the user has clicked on the link, is shown in such a way as to give the impression that it is appearing on the same website?
4. Is it possible for a Member State to give wider protection to authors’ exclusive right by enabling ‘communication to the public’ to cover a greater range of acts than provided for in Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society?”

⁴⁵ It should be noted that Retriever’s customers needed to log in to the website. Upon search, customers were then provided with a list of hyperlinks to relevant articles. Clicking on a hyperlink opened a new window, which showed the article’s text as retrieved from the websites of third parties.

⁴⁶ *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (C-306/05) [2006] E.C.R. I-11519; [2007] Bus. L.R. 521 (*SGAE*).

⁴⁷ *SGAE* [2006] E.C.R. I-11519; [2007] Bus. L.R. 521 at [47], also in reference to Recital 27 of the Information Society Directive.

⁴⁸ *SGAE* [2006] E.C.R. I-11519; [2007] Bus. L.R. 521 at [54]. Similar conclusions have been reached in other cases: in *Organismos Sillogikis Diacheiristis Dimiourgon Theatrikon ki Optikoakoustikon Ergon v Divani Acropolis Hotel and Tourism AE* (C-136/09) [2010] E.C.R. I-37 (*OSDDTOE*), the CJEU said that a hotel owner who installs TV sets in hotel rooms that are connected to an antenna undertakes an act of communication to the public; in *Phonographic Performance (Ireland) v Ireland* (C-162/10) [2012] 2 C.M.L.R. 29 (*Phonographic Performance (Ireland)*), the same applied for a hotel operator, who provided televisions and radios to which it distributed a broadcast signal or other apparatus and phonograms in physical or digital form, which may be played on or heard from such apparatus. While the first case fell under the Information Society Directive, the second was under the Rental and Lending Directive 2006/115. Also, in *Football Association Premier League v QC Leisure* (C-403/08 and C-429/08) [2012] 1 C.M.L.R. 29 (*FAPL*), the court held that the transmission of the broadcast works through TV screen and speakers to the customers in a public house is covered by “communication to the public”.

⁴⁹ *Società Consortile Fonografici (SCF) v Marco Del Corso* (C-135/10) [2012] Bus. L.R. 1870 at [90] et seq. (*SCF*).

user interface (GUI)⁵⁰ does not constitute communication to the public, because the viewers are passive and do not have the possibility of intervening.⁵¹

Overall, despite the disparate practice of the court, it appears that several elements must be present to establish a “communication to the public” in accordance to art.3(1) of the Information Society Directive, which is as noted earlier an almost verbatim implementation of art.8 of the WCT.⁵² First, there must be a “transmission” of a protected work, although this transmission can happen irrespective of the technical means.⁵³ This has been made clear by the Information Society Directive itself, which explicitly states in the Preamble that the:

“[R]ight [of communication to the public] should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover *any such transmission or retransmission of a work* to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.”⁵⁴

Secondly, the communication must be an additional service aiming at some profit and not caught merely by coincidence by the users.⁵⁵ Thirdly, it appears the courts require a “fairly large number”⁵⁶ of potential listeners/viewers. The court has recently also clarified that a one-to-one service, such as streaming, qualifies too, as it does not prevent a large number of persons having access to the same work at the same time.⁵⁷

There must also be the so-called “new public”. In *SGAE*, the court referred to art.11bis(1)(ii) of the Berne Convention and noted that the transmission is to be “made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public”.⁵⁸ The court specified further in *FAPL* that this is a public “which was not taken into account by the

authors of the protected works when they authorised their use by the communication to the original public”.⁵⁹ It may very well be the case that the original public is in fact broader than the new one (but it would not have had access without an intervention). This has been maintained by a series of cases.⁶⁰

In *Airfield*—a case concerning satellite package providers—the court stressed that:

“Such activity ... constitutes an intervention without which those subscribers would not be able to enjoy the works broadcast, although physically within that area. Thus, those persons form part of the public targeted by the satellite package provider itself, which, by its intervention in the course of the satellite communication in question, makes the protected works accessible to a public which is additional to the public targeted by the broadcasting organisation concerned.”⁶¹

This last criterion seems, however, to depend on the facts of the case, as the most recent CJEU judgment in *ITV v TV Catchup*⁶² shows. In this case, the CJEU stated that it was not necessary to examine the requirement of “new” public. While the court justified such an examination in older cases, such as *SGAE*, *Football Association* and *Airfield*, it found the analysis irrelevant to the case at issue. The CJEU stated that:

“In those cases, the Court examined situations in which an operator had made accessible, by its deliberate intervention, a broadcast containing protected works to a new public which was not considered by the authors concerned when they authorised the broadcast in question.”⁶³

⁵⁰ Graphical user interface (GUI) is a type of user interface that allows users to interact with electronic devices using images rather than text commands.

⁵¹ *Bezpečnostní softwarová Asociace v Ministerstvo Kultury* (C-393/09) [2010] E.C.R. I-13971; (*BSA*).

⁵² The court said that art.3(1) “is inspired by art.8 of the WCT, the wording of which it reproduces almost verbatim” in *SCF* [2012] Bus. L.R. 1870 at [72]. The court therefore considers art.8 WCT as a guidance to defining “communication to the public”. See *SGAE* [2006] E.C.R. I-11519; [2007] Bus. L.R. 521 at [35]; *Peek & Cloppenburg KG v Cassina SpA* (C-456/06) [2008] E.C.R. I-2731, [2009] Bus. L.R. 149 at [31]; *SCF* [2012] Bus. L.R. 1870 at [51]–[55].

⁵³ *FAPL* [2012] 1 C.M.L.R. 29 at [193].

⁵⁴ Information Society Directive at Recital 23 (emphasis added).

⁵⁵ Although “a profit-making nature does not determine conclusively whether a retransmission ... is to be categorised as a ‘communication’ within the meaning of Article 3(1) of Directive 2001/29”, nor is the competitive relationship between the organisations: excerpted from *ITV Broadcasting Ltd v TV Catchup* (C-607/11) [2013] Bus. L.R. 1020 at [43], [46] respectively (*TV Catchup*).

⁵⁶ *SGAE* [2006] E.C.R. I-11519; [2007] Bus. L.R. 521 at [38]–[39].

⁵⁷ *TV Catchup* [2013] Bus. L.R. 1020 at [34].

⁵⁸ *SGAE* [2006] E.C.R. I-11519, [2007] Bus. L.R. 521 at [40]; see also *OSDDTOE* [2010] E.C.R. I-37 at [38].

⁵⁹ *FAPL* [2012] 1 C.M.L.R. 29 at [197]; referring also to *SGAE* [2006] E.C.R. I-11519, [2007] Bus. L.R. 521 at [40], [42], and *OSDDTOE* [2010] E.C.R. I-37 at [38].

⁶⁰ *SGAE* [2006] E.C.R. I-11519, [2007] Bus. L.R. 521 at [41]–[42]; *Airfield and Canal Digitaal v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)* (C-431/09 and C-432/09) [2012] E.C.D.R. 3 at [79]; *FAPL* [2012] 1 C.M.L.R. 29 at [98]–[99].

⁶¹ *Airfield* [2012] E.C.D.R. 3 at [79]. The case was under the decided under Satellite and Cable Directive (Council Directive 93/83 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L248/15). It concerned situations where the supplier of a digital satellite television service does not transmit its own programme but either receives the programme-carrying signals from a broadcasting station or instructs a broadcaster to transmit programme-carrying signals to a satellite from which they are beamed to subscribers of the digital television services. The CJEU decided that even indirect transmission requires authorisation, unless the right holders have agreed beforehand with the broadcasting organisation that the protected works will also be communicated to the public through that provider, and when the provider does not make those works accessible to a new public.

⁶² *TV Catchup* [2013] Bus. L.R. 1020. *TV Catchup* (TVC) operates an online platform that retransmits intercepted terrestrial and satellite TV channels, enabling subscribers to watch “near-live” television on their computers, tablets, mobile phones and other devices. TVC’s service is funded by advertising before the live stream is viewed, as well as by “in-skin advertising”. Several UK commercial broadcasters (including ITV, Channel 4 and Channel 5) brought proceedings before the English High Court contending that the streaming of their broadcasts is an unauthorised “communication to the public”. The English court took the view that it was not clear from previous CJEU case law that there was a “communication to the public” under circumstances such as this where works are streamed to subscribers who are already entitled to access the original broadcast signals via TVs in their own homes, and referred this question to the CJEU. The English court also asked whether it made a difference to the CJEU’s response if subscribers were only allowed a one-to-one connection to TVC server, and whether the fact that TVC was acting in direct competition with the commercial broadcasters, both in terms of viewers and advertising revenues, should have any effect on the decision.

⁶³ *TV Catchup* [2013] Bus. L.R. 1020 at [38].

The present case concerned, however, the transmission of works included in a terrestrial broadcast and the making available of those works over the internet. The CJEU found that:

“[E]ach of those two transmissions must be authorised individually and separately by the authors concerned given that each is made under specific technical conditions, using a different means of transmission for the protected works, and each is intended for a public.”⁶⁴

TV Catchup was a swift and confident judgment by the CJEU confirming the rights of broadcasters and clearly classifying online streaming as a restricted copyright category, which demands right holders’ authorisation.⁶⁵

It is still unclear how all these different criteria relate to each other.⁶⁶ Even more important for our discussion is the question of how the test would be applied to hyperlinking, and whether hyperlinking would then qualify as the copyright-relevant act of communication to the public. The European Copyright Society (ECS), which brings together renowned scholars to discuss and critically evaluate developments in EU copyright in seeking to promote the public interest, took the opportunity of *Svensson* to advise the court on its legal classification of hyperlinking.⁶⁷ It suggests in particular, based on the existing case law (but before *TV Catchup*), that hyperlinking should not be qualified as a communication to the public, because (1) there is no transmission involved; (2) even if transmission is not necessary for there to be a “communication”, the rights of the copyright owner apply only to communication “of the work”, and whatever a hyperlink provides, it is not “of a work”; and (3) the “new public” requirement is not fulfilled.

There is a host of scholarly literature that also strongly supports such a position—based on the interpretation of the law but also in full consideration of the absolutely vital role of hyperlinks to the architecture and the working of the web.⁶⁸ The ECS also makes references to the US jurisprudence, which provides a clear precedent with regard to internet links,⁶⁹ and to Canadian developments, explicitly citing Justice Abella’s reasoning in *Crookes v Newton*.⁷⁰

The International Literary and Artistic Association (L’Association Littéraire et Artistique Internationale—ALAI) also adopted an opinion on the hyperlinking and how it affects the right of communication to the public,⁷¹ which appears to be making a different case. ALAI argues that what really matters in finding a communication to the public is that:

“(i) the act of an individual person, directly or indirectly, (ii) has the distinct effect of addressing the public, irrespective of the tool, instrument or device that the individual has used to bring about that effect, and (iii) that elements protected by copyright or material protected by related rights thus become available to the public in a way that is encompassed by the discrete rights granted under copyright”.⁷²

ALAI stresses the notion of the public and finds that links which lead directly to specific protected material, thereby using its unique URL, would fall within the framework of a copyright use. This kind of linking is a “making available”, ALAI deems, regardless of whether the link takes the user to specific content in a way that makes it clear to the user that she has been taken to a third-party website, or whether the linking site retains a frame around the content, so that the user is not aware that she is accessing the content from a third-party website. While this is a strong statement, ALAI softens it somewhat by saying that a mere reference to a source where protected material can be accessed would not constitute a copyright relevant act.⁷³ ALAI also acknowledges the burden so placed upon actors on the internet, using hyperlinking, and deems that legislative or court action may find different assessment appropriate.⁷⁴

To be sure, the decision in *Svensson* will be crucial in clarifying the EU practice and providing legal certainty. It is also important to consider the existing, albeit scant, jurisprudence of the Member States. In the evolution of the national case law so far, there have been three important decisions that address the issue of hyperlinking under copyright law.

Two of the judgments have not classified hyperlinking as communication to the public. In Germany, the highest federal court (Bundesgerichtshof) found that the “paperboy search engine”, which searched newspaper websites and provided search results including hyperlinks

⁶⁴ *TV Catchup* [2013] Bus. L.R. 1020 at [39]; see also [24]–[26].

⁶⁵ Streamlining the practice in this regard after a somewhat different opinion expressed by Advocate General Kokott in the *Football Association* case, where she found that the FAPL’s copyright in the broadcast of live football matches have been exhausted. See *FAPL* [2012] 1 C.M.L.R. 29, Opinion of A.G. Kokott at [200].

⁶⁶ Annette Kur and Thomas Dreier, *European Intellectual Property Law: Text, Cases and Materials* (Cheltenham, UK: Edward Elgar Publishing Ltd, 2013), p.299.

⁶⁷ European Copyright Society, “Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*” (February 15, 2013), SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220326 [Accessed December 3, 2013].

⁶⁸ See, e.g., Jessica Litman, *Digital Copyright* (Amherst, New York: Prometheus Books, 2001), p.183; Tanya Aplin, *Copyright Law in the Digital Society: The Challenges of Multimedia* (Oxford: Hart Publishing, 2005), p.151; Lionel Bently and Brad Sherman, *Intellectual Property Law*, 3rd edn (Oxford: Oxford University Press, 2008), p.151.

⁶⁹ ECS, “Opinion” (February 15, 2013), pp.10–11, SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220326 [Accessed December 3, 2013] (citing *Perfect 10 v Google*, 487 F. 3d 701 (9th Cir. 2007)).

⁷⁰ ECS, “Opinion” (February 15, 2013), pp.8–9, SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220326 [Accessed December 3, 2013] (citing *Crookes* 2011 SCC 47; [2011] 3 S.C.R. 269 at [26], [30]).

⁷¹ ALAI, *Report and Opinion on the making available and communication to the public in the internet environment — focus on linking techniques on the internet*, adopted unanimously by the Executive Committee (September 16, 2013).

⁷² ALAI, *Report and Opinion* (September 16, 2013) (emphasis in the original).

⁷³ ALAI, *Report and Opinion* (September 16, 2013), p.9.

⁷⁴ ALAI, *Report and Opinion* (September 16, 2013), p.10.

to the original sources, did not constitute communication in the sense of German law and the Information Society Directive, and did not infringe copyright.⁷⁵ In the case of *Napster.no*,⁷⁶ the Supreme Court of Norway held that posting hyperlinks that led to unlawfully uploaded MP3 files did not constitute an act of making the files available to the public. The court dismissed the argument that the linking involved an independent and immediate access to the music. It stressed in addition that:

“It cannot be doubted that simply making a website address known by rendering it on the internet is not making a work publicly available. This must be the case independent of whether the address concerns lawfully or unlawfully posted material.”⁷⁷

The case was decided on the basis of secondary liability, which is not harmonised at the EU level, and referred to unlawful content of the target website, as well as to the knowledge of the person posting the particular link.⁷⁸

Yet these rulings do not match a recent Dutch decision in *Sanoma and Playboy v GS Media*.⁷⁹ There, the Dutch District Court vaguely referred to the existing EU case law on communication to the public and found a company liable for a communication to the public when that company put a hyperlink on its website.⁸⁰ The court found all three elements of the test (which it itself extracted somewhat flippantly from the CJEU’s jurisprudence)—that is, an intervention, a (new) public, and the intention to make a profit—present. With regard to the first element, the court stated that:

“[T]he placing of a hyperlink which refers to a location on the internet where a specific work is made available to the public is, in principle, not an independent act of publication. The factual making available to the public occurs on the website to which the hyperlink refers.”

Yet, in that specific case, the website containing the photographs was not indexed by search engines, and the court believed that in order to be able to see the pictures, users would have to type in the specific URL, so that without the additional intervention of hyperlinking, the public would not have had access to the photographs. The court supported its view also by the fact that the

defendant’s website attracted substantial traffic (some 230,000 visitors a day) and the hyperlink had ensured that the public knew about the photographs even before they were published in the claimant’s magazine, *Playboy*. The court also found the criterion of “new public” fulfilled as initially only a very small audience had known about the series of photographs (not all of which had been published) and the placing of the hyperlink had enabled a large and indeterminate circle of people to know about the series of photographs—a public other than the one which the copyright holder had in mind when giving consent for the publication of the photo story.⁸¹

Svensson will address the question of whether hyperlinking constitutes communication to the public and what sort of copyright liability is therewith triggered. It will clarify the scope of art.3(1) of the Information Society Directive, which fully harmonises “communication to the public” as one of the palette of economic rights of the copyright holder,⁸² and thus also of how art.8 WCT is to be implemented and interpreted EU-wide. The EU approach with regard to digital copyright cases has been in contrast to Canada not so bold and more incremental—this has to do perhaps with the fact that not all elements of copyright have been harmonised at the EU level. So, for instance, creating hyperlinks could trigger different types of liability, such as (1) accessory liability, in particular with respect of knowingly facilitating the making of illegal copies⁸³; (2) unfair competition; (3) moral rights infringement; or liability for (4) circumvention of technological protection measures. Yet only the latter has been the subject of harmonisation at a European level, and thus falls within the CJEU competence.⁸⁴

We endorse the ECS opinion and stress yet again the critical role of hyperlinking for the working of the internet. In light of the case law, we think in particular that there has been no *transmission*, which is clearly a prerequisite for the communication to the public.⁸⁵ Much more in the line of the German Supreme Court’s reasoning in *Paperboy*, we consider the hyperlink is a mere reference, comparable to quotation, in particular as the operator of the target website still possesses full control over the making available of the works.

⁷⁵ ALAI, *Report and Opinion* (September 16, 2013), pp.9–10, excerpting from *Paperboy*, Case I ZR 259/00 (July 17, 2003) [2005] E.C.D.R. 67 at 77: “The Information Society Directive ... has not changed the assessment of hyperlinks, as are in question here, under copyright law ... According to Art.3(1) of the Information Society Directive Member States are obliged to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, including the making available to the public of their works in such a way that members of the public may access them from a place and a time individually chosen by them. This provision refers to the use of works in their communication to the public. The setting of hyperlinks is not a communication in this sense; it enables neither the (further) keeping available of the work nor the on-demand transmission of the work to the user.”

⁷⁶ ALAI, *Report and Opinion* (September 16, 2013), p.10, citing *Tono v Frank Allan Bruvik d/b/a Napster* [2006] I.I.C. 120 (Supreme Court of Norway, January 27, 2005).

⁷⁷ ALAI, *Report and Opinion* (September 16, 2013), p.10.

⁷⁸ See also similarly Amsterdam Court of Appeal, June 15, 2006, *BREIN v Techno Design* [2006] E.C.D.R. 21.

⁷⁹ Stephen Vouden, “Case C-466/12, Svensson — Hyperlinks and Communicating Works to the Public” (January 20, 2013), EU Law Radar, <http://eulawradar.com/case-c-46612-svensson-hyperlinks-and-communicating-works-to-the-public/> [Accessed December 3, 2013].

⁸⁰ The defendant’s website had a hyperlink that directed users to a website in Australia. The Australian website had a set of copyright-protected photographs—a series of nudes of a person who appears on Dutch television.

⁸¹ Vouden, “Case C-466/12, Svensson” (January 20, 2013), EU Law Radar, <http://eulawradar.com/case-c-46612-svensson-hyperlinks-and-communicating-works-to-the-public/> [Accessed December 3, 2013].

⁸² Ansgar Ohly, “Economic Rights” in E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright* (Cheltenham: Edward Elgar Publishing, 2009), pp.212–241.

⁸³ See, e.g., *Brein v Techno Design* [2006] E.C.D.R. 21 (Netherlands); *Universal Music v Cooper* [2006] FCAFC 187 (Full Federal Court of Australia); *Napsterno* [2005] I.I.C. 120 (Norway). See also Ohly, “Economic Rights” in *Research Handbook on the Future of EU Copyright* (2009).

⁸⁴ ECS, “Opinion” (February 15, 2013), p.2, SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220326 [Accessed December 3, 2013].

⁸⁵ ALAI shares a somewhat different opinion arguing that the “making available” of art.8 WCT encompasses not only the transmission of a work to members of the public, but also the *offering* to the public of the work for individualised streaming or downloading. ALAI, *Report and Opinion* (September 16, 2013), p.3.

Comparisons and conclusions

The factual issues in Canadian and European cases are different, but the economic considerations and policy implications are remarkably similar. While an important goal in resolving copyright is to protect right holders, courts also need to think of the overall sustainability of the digital networked space and protect broader public interest. An interpretation and application of the European Union or Canadian laws implementing the making available provisions of the WIPO Internet Treaties that threatens rather than enhances the viability of digital distribution mechanisms would be problematic.

Moreover, enhancing creativity no longer means ensuring absolute authorial control over digital content. Rather, creativity increasingly requires flexible systems that embrace the new modes of peer production that characterise the networked information economy.⁸⁶ The drafters of the WIPO Internet Treaties discussed the possibilities that digital technologies might provide, but could not have been fully aware of all the deep societal implications of the internet. For that very reason, the Treaties leave room for purposive interpretation, flexible implementation and sensible application.

Andrew Christie and Eloise Dias observe that:

“[B]y leaving the detail of the interpretation of the WCT Article 8 right to national regulation, member states did not realise the prospect of achieving greater uniformity of copyright law, but rather, deferred debate as to what a valid interpretation should entail.”⁸⁷

Similarly, Ruth Okediji suggests that:

“[F]ar from harmonizing copyright law with respect to rights in the digital arena, the WCT instead introduced a greater deference to national copyright laws that the Berne Convention had long sought to diminish with respect to traditional copyright.”⁸⁸

She adds:

“[T]he new rights were in some ways prematurely recognized given the lack of agreement among states as to the specific form of the right to control digital transmissions and public access to protected works.”⁸⁹

As others have argued too, the WIPO Internet Treaties appear to be a generation of international norms that are “less dependent upon prior national experimentation”,⁹⁰ and the debate has evolved differently blurring the lines between the national and international discourses.⁹¹

Based on our comparative jurisprudential analysis, we praise the preservation of flexibility through constructive ambiguities and the freedom of legal characterisation provided by the umbrella solution reflected in the WIPO Internet Treaties. These flexibilities and freedoms now enable legal institutions like the Supreme Court of Canada and the Court of Justice of the European Union to derive technologically neutral and context appropriate responses to opportunities for new kinds of commerce and creative expression that could not have been foreseen at the time the treaties were concluded. Although this may come at the cost of certainty at the global level and the possibility for private parties to choose legal fora, this still reflects in our opinion better the natural and legitimate processes of intellectual property lawmaking.⁹²

Agreements on intellectual property protection date back over a century, but it was only with the establishment of the World Trade Organization (WTO) and the creation of the TRIPs Agreement in 1995—that is, comparatively recently—that international lawmaking started “to replace country-based assessments and domestic policymaking as the predominant mode of intellectual property lawmaking”.⁹³ The process of international harmonisation is, however, not even but experiences its ups and downs and multi-directional developments, or as Peter Yu calls them “currents and crosscurrents”: “While the currents of multilateralism push for uniformity and increased harmonization, the crosscurrents of resistance ... protect national autonomy and international diversity.”⁹⁴

Rapid technological developments, especially those related to the internet and associated with complex economic, social and cultural implications, appear to strongly support the flow of the crosscurrents. Our Canadian and European Union case studies have illustrated the virtues of adaptability in the ever-evolving digital environment.

⁸⁶ Benkler, *The Wealth of Networks* (2006).

⁸⁷ Christie and Dias, “New Right of Communication in Australia” (2005) 27 *Sydney Law Review* 237, 239.

⁸⁸ Okediji, “The Regulation of Creativity Under the WIPO Internet Treaties” (2009) 77(5) *Fordham Law Review* 2379, 2382.

⁸⁹ Okediji, “The Regulation of Creativity Under the WIPO Internet Treaties” (2009) 77(5) *Fordham Law Review* 2379, 2399.

⁹⁰ Graeme B. Dinwoodie, “The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking?” (2007) 57(4) *Case Western Reserve Law Review* 751, 762.

⁹¹ Dinwoodie, “The WIPO Copyright Treaty” (2007) 57(4) *Case Western Reserve Law Review* 751, 762.

⁹² Dinwoodie, “The WIPO Copyright Treaty” (2007) 57(4) *Case Western Reserve Law Review* 751, 762.

⁹³ Peter K. Yu, “Five Disharmonizing Trends in the International Intellectual Property Regime” in *Intellectual Property and Information Wealth* (2007), p.73 at p.89.

⁹⁴ Yu, “Five Disharmonizing Trends in the International Intellectual Property Regime” in *Intellectual Property and Information Wealth* (2007), p.73 at p.96.