

Transatlantic Copyright Convergence

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Copyright law is notoriously statist. U.S. copyright law applies to copyright issues arising within its borders, and other jurisdictions' laws similarly govern copyright issues within their boundaries. Yet international copyright law, including specific copyright treaties, have long influenced—and even dictated—certain aspects of U.S. copyright law. In fact, arguably a bigger hurdle to reforming a number of important areas of U.S. copyright law lies in the U.S.'s international treaty obligations, rather than the U.S. Constitution or any other domestic requirement.

International copyright law may be poised to exert additional influence on U.S. copyright law in the near future. The European Union (EU) recently passed a new Copyright Directive that many believe fundamentally alters how copyright law applies to online contexts. Article 15 (previously Article 11), the so-called “link tax,” would require online aggregators such as Google News to pay for previewing snippets of copyrighted content within their services. Article 17 (previously Article 13) would impose direct copyright liability on sites such as YouTube when its users upload copyrighted material onto the service. While the Copyright Directive obviously does not apply in the U.S., it may end up affecting how U.S. based companies operate worldwide, while also persuading U.S. lawmakers to adopt similar measures. In fact, recent European privacy regulations are having precisely such an effect on U.S. based companies and U.S. lawmakers in the privacy law and policy arena.

This Article argues that unlike in the privacy context, U.S. companies and lawmakers are unlikely to, and should not, follow Europe's copyright lead. This is so for at least three reasons. First, important doctrinal differences, such as the U.S.'s fair use doctrine and the Digital Millennium Copyright Act, make such mimicking neither plausible nor desirable. Second, important philosophical disparities between the two jurisdictions regarding the purposes behind copyright also make the contemplated changes simply untenable in the U.S. And while philosophical disparities exist between U.S. and European visions of privacy, those disparities have an easier time coexisting in the privacy context than in the copyright realm. Finally, the political dynamics that helped motivate the Copyright Directive—namely, simmering dissatisfaction with the dominance and outsized influence of large, U.S.-based tech behemoths in Europe—take a different form in the U.S. While these same large tech companies have been the target of criticism in the U.S. as well, they still enjoy a homecourt advantage that is likely to prevent the dramatic copyright changes in the U.S. that the EU's Copyright Directive envisions for Europe. The Article concludes by assessing to what extent transatlantic copyright convergence might be a normatively desirable thing.