EIPIN Innovation Society Methods Training – Comparative Law and Methodology

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Structure

• Classic Comparative Law
• Purpose, Methodologies: general debates, uncertain boundaries
• Comparison in Modern IP Law:
  I. Examples: IP Comparison in Non-Harmonised Areas and Multi-Layered Systems
     I. Comparing Concepts in non-harmonised areas (Publicity Rights)
     II. Evolution of Law in Multi-Layered Systems (IP in Supranational Law)
Presenting a Comparative Analysis

• Topic? Purpose?
• Social/economic conflict to be regulated
• Micro and Macro Comparison (normative, conceptual)
• Country reports and general reports
• Presentation and Exploration: country reports plus comparative assessment or mixed presentation
Some Theory: Overview

- Today: difference between “pure” comparison (two or more national jurisdictions), influence of supranational law (more later)
  - Functional Comparison
  - Conceptual Comparison
  - Alternatives
- Legal Families
- Aspects to be considered:
  - Determining the applicable rules and principles (bottom up or top down approach)
  - Functional equivalents
  - Influence of legal culture (for example, the role of juries): statutory and case law, normativity or flexible evolution, means of judicial interpretation and methodology, influence
  - IP → typically, more complex structure: (1) first principles: free/fair competition, influence of international convention law, EU law (harmonisation), historical aspects, social realities.
Functional and Conceptual Comparison

• What is functional comparison? (Zweigert/Kötz)
• (1) Identification of rules; (2) comprehension of rules; (3) comparison
  – Single comparison (normative)
  – Comparison can only work where legal systems provide similar functions (same problem, different solutions) without recourse to national doctrine
  – Criticism (example): purpose of freedom of speech rules → US (UK?) (marketplace of ideas) vs Germany (dignitarian)
  – Cultural context, extreme positivism...
• Conceptual: (two phase model): (1) distilling a general concept from different legal systems by posing a general question first; (2) qualitative and quantitative analysis
• Example: utility models = (1) comparison only between jurisdictions offering protection → disregard alternative forms of protection, compare different national concepts. (2) systematic comparison including doctrinal divergences.
Alternative Methods

• (1) Economic Analysis as *tertium comparationis*
• Criticism: the notion of efficiency: use of economic models, monetization vs justice
• (2) Broadening the view: systems theory...
• Theories of transnational law, human rights
• Norm creation in “autonomous” legal orders
• Example:

A is administrator of a freely accessible chat room on the internet. User X allegedly uses the forum to leave inappropriate and offensive postings. A consequentially excludes X, who sues.
Legal Families

- Attempt to categorise legal families according to certain characteristics
- For example, common law (US/UK..) vs civil law (Romanic, Germanic, Dutch, Scandinavian...); mixed systems (South Africa, Japan, Turkey...)
- interpretation, systematic or flexible approaches, sources of law, binding nature of decisions); religious vs non-religious laws; legal transplants.
- But: almost all legal systems may combine features that are typical of other systems
- For IP, the “legal family” classification has little value as such (cf. protection of utility models, limitations in copyright, design/copyright interface).
Typologies and Perils

• Comparing problems of concepts?
• Conditions of functions
• Limits of functional comparison
• Misunderstanding foreign laws: doctrine, role of law, realities, preconceptions
• Perils: problems of translation; interpretation of laws; pre-conceptions of common normative terminology (example: parodies vs copyright/trade mark rights);
• Evolution of Law: Self – perception of decision making bodies (domestic courts, CJEU, ECHR); private bodies of “private” rules (lex mercatoria, lex informatica); historical narratives
• Same rules, different rationales: design vs copyright interface; trade mark functions (Example: Arsenal v Reed (2002); L’Oreal v Bellure (2009) → reasons?
Scope and Presentation: Comparing three jurisdictions in non-harmonised fields

- **Starting point:** Douglas v Hello as an “extreme” hard case
- **Q:** Do the laws of Germany, the UK and US protect the economic interests of an exclusive licensee where no property right has been transferred?
- “Celebrity Rights”? US: publicity rights as property rights; Germany: personality rights as transferrable commodities or functional equivalent; UK: breach of confidence, equity.
- What is the fundamental conflict in this example? Whose interests are at stake?
- How could a comparative approach be adopted, and which levels need to be assessed:
• First step: collecting possible approaches
• US “IP style” publicity rights → in rem effect of licensing agreement
• Germany: “in between”, no general “IP” rule re image right but (mostly) academic debate – unfair competition as “functional equivalent” compared to US law?
• UK → absence of image/personality rights, Human Rights Act 1998 re privacy → commercial tort (common law) and/or breach of commercial confidentiality (equity)
• Second step: evaluation and assessment → deduction of national positions according to first principles or guiding “basic” norms (reward/investment theories (US), self determination)
• Third step: summation, structured comparison of individual elements and overarching principles → informed conclusion according to (comparative) hypothesis
Thus: clear identification and presentation of specific conflict, here: generally between three stakeholders (celebrity, licensee, media) → final analysis can entail:

- Collecting and grouping:
- Differences in application of law to case at hand (and formulating similar scenarios)
- Character of rules, doctrines and principles;
- Differences between underlying rationales and constitutional factors
- Differences between influencing factors
- Purpose: clarifying reasons for divergences
Convergence of Legal Systems and Multi-Layered Comparison

- Modern IP law cannot be “compared” according to national systems only
- Influenced by numerous factors that affect the evolution of IP law → globalization, harmonisation, digitisation, data revolution... on the one hand – divergent legal systems (international IP conventions, EU law (market integration, EU human rights), emergence of “transnational” laws and transnational constitutionalism)...
- EU Case Law → CJEU (Art 267 TFEU)
- Teleological/purposive interpretation (meaning in this context?)
- Factually based on precedent
- In particular, amalgamation of “precedent” style (reading CJEU judgments by national judges) and infiltration of continental style broader and more flexible doctrines (margin of appreciation, doctrine of proportionality)
But...

- Only one (initial) aspect
- Evolution of Law from divergent preconditions:
  - A. EU Directives: aims of directives (harmonisation) and general policy aims (internal market) → autonomous interpretation
  - B. Directives incorporating international convention law and principles
    - Character of international convention law
    - Domestic or autonomous interpretation, for example limitations/defences/exceptions to infringement
  - C. Outside written IP law: human rights, competition law (Art 102 TFEU), abuse of rights,
• Different self perceptions of supranational courts: CJEU vs ECHR vs National Doctrine
• Example: evolution of copyright law → *music sampling*
  – Standard answer?
  – Rome Convention → protection of any sound recoded
• Domestic German law: purposive interpretation of copyright (should sound recordings be protected more extensively than authored works) possible (ie solution within the copyright “system”);
• Inter-systemic Relationships:
• Here: domestic copyright law and constituional guarantees – EU secondary law (Directive denying reliance on “balancing” in light of EU Charta rights – Rome Convention as binding instrument – conflicts between EU secondary law + THREE assertions from PRIMARY law:
  • 1. Market integration and harmonisation of copyright as reflected by Directive
  • 2. International convention binding the EU and MS
  • 3. Conflicting human rights guarantees under EU Charta
• Hierarchies in national law (ordinary (copyright) law vs constitutional guarantees

• Regulating the conflict under national law via broad general clauses (free use); (domestic) arsenal of methodologies → ??

• Role of CJEU → autonomous interpretation (meaning??), full harmonisation (??)
  – Secondary law in conflict with primary law (EU Ch)? Or “full harmonisation”?

• Application of EU Charta by national judges?
• Relationship Convention Law and EU Charta?
• The view from the ECHR (and its relationship with the CJEU!)?
Synopsis

• Classic comparison is of limited value in IP
• Can provide inroads but no “box ticking” methodology
• Important: relevance of understanding evolutionary patterns in different systems
• Comparative methodology is however useful when comparing avenues to solutions
• Domestic decisions are more detailed compared to CJEU
• But requires a sound understanding and analysis of the system within which a decision is made