# EIPIN Innovation Society Methods Training – Comparative Law and Methodology

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# Structure

- Classic Comparative Law
- Purpose, Methodologies: general debates, uncertain boundaries
- Comparion in Modern IP Law:

I. Examples: IP Comparison in Non-Harmonised Areas and Multi-Layered Systems
   I. Comparing Concepts in non-harmonsied 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 posistivism…
- Conceptual: (two phase model): (1) distllling 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 accesoible 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” publiity 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 assesment → deduction of national positions according to first principles or guiding “basic” norms (reward/investment theories (US), self determination)
- Third step: summation, structured comparison of indiviudal elements and overarching principles → informed concluision according to (comparative) hypothesis

- Thus: clear identification and presentation of specific conflict, here: generally between three stake holders (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) → autonomus 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