

A Call for Strengthening the Role of Comparative Legal Analysis in the United States

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A CALL FOR STRENGTHENING THE ROLE OF COMPARATIVE LEGAL ANALYSIS IN THE UNITED STATES

IRENE CALBOLI[†]

INTRODUCTION

This Essay highlights the importance of comparative legal analysis with particular emphasis on the role that this methodology could play for intellectual property scholarship in the United States. In particular, the theme of this Symposium aims at addressing “values,” “questions,” and “methods” in intellectual property law. In line with this theme, this Essay would like to make the case that comparative legal analysis could play a more prominent role as a scholarly methodology in the U.S. legal academy in the field of intellectual property. In turn, this could have a relevant impact on the questions addressed by scholars and provide the opportunity for broader—or partially different—answers. Thus, comparative analysis can enrich the discussion over the values to be promoted or protected as part of the intellectual property debate in the U.S. In other words, this

[†] Professor of Law, Texas A&M University Law School; Lee Kong Chian Fellow, Visiting Professor, and Deputy Director, Applied Research Centre for Intellectual Assets and the Law in Asia, Singapore Management University School of Law. This Essay builds upon on my research in this area and in a previously published book chapter: *The Role of Comparative Legal Analysis in Intellectual Property Law: From Good to Great?*, in *METHODS AND PERSPECTIVES IN INTELLECTUAL PROPERTY* 3 (Graeme B. Dinwoodie ed., 2014). Accordingly, several portions of this Essay adapt parts of that chapter and cite several of the same sources in the footnotes. I would like to thank Jeremy Sheff and the *St. John's Law Review* for the invitation to participate in the Symposium “Values, Questions, and Methods in Intellectual Property,” St. John's Law School, April 22, 2016. I also thank the Symposium's participants for useful conversation, comments, and suggestions, and the editors of the *St. John's Law Review* for their editing and revisions. The (hopefully not controversial) views expressed in this Essay, and any mistakes, remain my own.

Essay suggests that U.S. scholars could consider turning with more frequency to comparative legal analysis as an additional methodology to use in their research.¹

Certainly, as other contributions in this Symposium volume highlight, U.S. legal scholars have pioneered and excelled in a large number of scholarly methodologies that are very relevant in the study of intellectual property law. These are methodologies, such as law and economic analysis,² empirical—quantitative and qualitative—analyses,³ critical legal theories,⁴ and a range of interdisciplinary methodologies including law and anthropology, cognitive science, and legal philosophy, just to name a few.⁵ Yet, comparative legal analysis seems to be a methodology that, especially in recent years, is less frequently used by mainstream scholars in the U.S., even though several U.S. intellectual property academics teach international intellectual property law

¹ See generally Ugo Mattei, *An Opportunity Not To Be Missed: The Future of Comparative Law in the United States*, 46 AM. J. COMP. L. 709 (1998); see also MATHIAS SIEMS, *COMPARATIVE LAW* (2014); *COMPARATIVE LAW: A HANDBOOK* (Esin Orücü & David Nelken eds., 2015); *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* (Pierre Legrand & Roderick Munday eds., 2011); *NEW DIRECTIONS IN COMPARATIVE LAW* (Antonina Bakardjieva Engelbrekt & Joakim Nergelius eds., 2010); *THE OXFORD HANDBOOK OF COMPARATIVE LAW* (Mathias Reimann & Reinhard Zimmermann eds., 2008). For additional references, see the secondary sources cited in this Essay.

² See, e.g., Stacey L. Dogan & Mark A. Lemley, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, in *TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH* 65 (Graeme B. Dinwoodie & Mark D. Janis eds., 2009); 1 RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF THE LAW: THE COLLECTED ECONOMIC ESSAYS OF RICHARD A. POSNER* (Francesco Parisi ed., 2001); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989); William M. Landes & Richard A. Posner, *The Economics of Trademark Law*, 78 TRADEMARK REP. 267 (1988).

³ See, e.g., JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (2015); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008); Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581 (2006); Christopher Buccafusco et al., *Experimental Tests of Intellectual Property Laws' Creativity Thresholds*, 92 TEX. L. REV. 1921 (2014); Christopher J. Sprigman et al., *What's a Name Worth?: Experimental Tests of the Value of Attribution in Intellectual Property*, 93 B.U. L. REV. 1389 (2013).

⁴ See, e.g., Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. GENDER SOC. POL'Y & L. 551 (2006); Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER, SOC. POL'Y & L. 273 (2007).

⁵ See, e.g., *DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS* (Irene Calboli & Srividhya Ragavan eds., 2015); ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011); MADHAVI SUNDER, *FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE* (2012).

in U.S. law schools.⁶ Moreover, comparative legal analysis seems to be used by U.S. scholars to a lesser extent than scholars in other jurisdictions. This consideration is not unique to intellectual property scholarship.⁷ Hence, more attention could be paid by U.S. scholars to foreign jurisdictions—in terms of scholarship discourse, but also foreign legislation, judicial decisions, and legal practice—as this could only benefit research in the U.S. As Martha Minow pointedly noted in 2010, “[n]eglecting . . . comparative law could vitiate the vitality, nimbleness, and effectiveness of [national] law or simply leave us without the best tools and insights as we design and run institutions, pass legislation, and work to govern ourselves.”⁸ While this observation was not directed in particular to the intellectual property scholars in the U.S., it is certainly an important observation also in this respect.

Yet, while this Essay supports that comparative legal analysis could currently play a more prominent role as scholarly methodology among U.S. intellectual property scholars, its objective is not to suggest that U.S. scholars should engage in comparative legal analysis in lieu of other types of research methodologies, or that U.S. scholars are not generally interested in comparative legal analysis or the study of foreign laws. As a U.S. scholar by adoption, I have never found a more welcoming and generous community toward foreign scholars than the academic community in the U.S. This community is, in fact, to be applauded and imitated abroad because of its generosity in sharing knowledge openly with scholars—both junior and senior scholars—from all over the world. Instead, this Essay simply supports that comparative legal analysis could play a larger role compared to the one that it currently seems to play amongst U.S.

⁶ For an overview related to the teaching of international intellectual property in the U.S., see Peter K. Yu, *Teaching International Intellectual Property Law*, 52 ST. LOUIS U. L.J. 923 (2008). See also Roberta Rosenthal Kwall, *The Intellectual Property Curriculum: Findings of Professor and Practitioner Surveys*, 49 J. LEGAL EDUC. 203 (1999); Kenneth L. Port, *Intellectual Property Curricula in the United States*, 46 INTELL. PROP. L. REV. 165 (2005).

⁷ For criticism towards the lack of engagement of U.S. scholars and students with comparative law, see generally Vivian Grosswald Curran, *Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives*, 46 AM. J. COMP. L. 657 (1998).

⁸ Martha Minow, *The Controversial Status of International and Comparative Law in the United States*, HARV. INT'L L.J. (Aug. 27, 2010), http://www.harvardilj.org/2010/08/online_52_minow.

intellectual property academics, and that a larger number of U.S. scholars could turn to comparative legal analysis in some instances in conjunction with other research methodologies while conducting research in intellectual property law. This would allow more scholars in the U.S. to consider the experiences of other jurisdictions as additional examples—positive, negative, relevant, or perhaps ultimately not relevant—while elaborating their research questions in the field of intellectual property and developing the answers to these questions.

In this respect, this Essay also advocates that, in order for a larger number of scholars to engage in comparative legal analysis in the area of intellectual property law, the barriers to entry to conduct this analysis should be kept low—that is, scholars should not be required to necessarily conduct research in other languages or spend lengthy periods of time visiting foreign institutions, at least initially. In particular, this Essay disagrees with the position of some comparative law scholars who have supported an increasingly complex set of methodologies and requirements in the field of comparative law, including the fact that scholars desiring to engage in comparative legal analysis should be fully immersed in the foreign culture, spend time in foreign countries, read texts in foreign languages, and so forth.⁹ Certainly, such full immersion in foreign cultures is to be welcome when scholars have the opportunity, the time, and the foreign language expertise to do so. However, this Essay argues that fewer scholars may be able to conduct comparative legal analysis at all if the requirements to engage with this methodology become too complex. Instead, this Essay supports a simpler approach, one based upon incremental steps, in which any U.S. scholar should feel welcome to conduct—and be praised for conducting—some degree of comparative legal analysis as part of her or his research in the area of intellectual property law. With time, it is the conviction of this author that many scholars will certainly also deepen their interest and further immerse themselves in the local legal culture, language, etc. Hence, such full immersion should not become a *sine qua non* for scholars who desire to conduct comparative legal analysis, in

⁹ See discussion *infra* Part II.

particular at an early stage of their research and when this analysis is combined with and used to support other research methodologies.

Finally, this Essay does not advocate that comparative legal analysis should be used to lead to a convergence of scholarly positions between U.S. and foreign intellectual property scholars. Certainly, comparative legal analysis may lead to convergence of opinions when the models of foreign jurisdictions could be usefully applied into national contexts. In several instances, comparative analysis can also positively influence legal reforms or the adoption of new laws nationally. Still, comparative legal analysis can, and at times should, lead to divergence in positions, or to the reinforcement of the fact that diverging national positions may be the best suited in several circumstances. Ultimately, this Essay only supports that the importance and true objective of this methodology lies on the fact that it can raise awareness about, and increase the knowledge of, the norms, cases, and theoretical debates about certain topics in more than one jurisdiction. In turn, this additional set of information can offer to scholars the possibility to conduct a better informed scholarly analysis of a variety of issues. But, it remains up to individual scholars to decide how to use this additional information, based on their specific research topic and other circumstances of their research question.

I. A BRIEF PRIMER OF COMPARATIVE LAW AND COMPARATIVE LEGAL ANALYSIS

What is comparative law? And what is the difference, if any, between comparative law and comparative legal analysis? As I elaborate below, these questions encapsulate one the most debated issues among comparative law scholars—the scope of comparative law as its own independent legal field—and the answer to these questions is not a straightforward one.

At the outset, the general definition of comparative law is the “comparison of different legal systems of the world.”¹⁰ Building on this definition, comparative legal analysis is defined as the method used by scholars, or other legal experts, in order to conduct such comparison. These definitions originate from the observation that those who engage in comparative legal analysis are required to conduct a comparison between the laws, judicial decisions, or legal practices of two or more different legal systems.¹¹ And, generally, this comparison leads to drawing some specific conclusions about the systems compared. Thus, the definition of comparative law reflects the element of comparison, which is required in this field of law.

Methodologically, those who engage in comparative law can compare any specific legal topic or set of issues—from constitutional law to criminal law to intellectual property, and so forth. In particular, this comparison is conducted by first analyzing one or more foreign legal systems and later juxtaposing these systems against other legal systems. This often includes the national systems of those conducting the comparison,¹² even though, in several instances, scholars may compare two or more foreign systems without any reference to their national jurisdictions.¹³ With respect to those areas of the world that have undergone, or are undergoing, international or regional harmonization—such as in the field of intellectual property or European Union (“EU”) law—experts also frequently analyze and juxtapose the international or regional system with one or more national systems that have undergone the process of international or regional harmonization of laws.¹⁴

¹⁰ Irene Calboli, *The Role of Comparative Legal Analysis in Intellectual Property Law: From Good to Great?*, in *METHODS AND PERSPECTIVES IN INTELLECTUAL PROPERTY* 6 n.5 (Graeme B. Dinwoodie ed., 2014) (quoting KONRAD ZWEIGERT & HEIN KOTZ, *AN INTRODUCTION TO COMPARATIVE LAW: THE FRAMEWORK* 7 (1977)). For a general overview and the academic debate on the definition of comparative law, see the contributions published in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* (Mathias Reimann & Reinhard Zimmermann eds., 2006). See also, e.g., *COMPARATIVE LAW: AN INTRODUCTION* (Vivan Grosswald Curran ed., 2002).

¹¹ For an exhaustive overview of how to conduct comparative legal analysis, see Edward J. Eberle, *The Methodology of Comparative Law*, 16 *ROGER WILLIAMS U. L. REV.* 51, 52 (2011).

¹² *Id.*

¹³ See *id.*

¹⁴ For example, the implications and application of comparative legal analysis in the area of European Union law is well detailed in MARKKU KIIKERI, *COMPARATIVE LEGAL REASONING AND EUROPEAN LAW* (Francisco Laporta et al. eds., Springer

Yet, despite its importance, and the fact that comparative legal analysis is routinely used in a large variety of legal fields and contexts in today's integrated world, some considerable uncertainty still dominates this field. In particular, no agreement has been reached—and perhaps never will—over whether comparative law has developed into an independent substantive field of law or simply constitutes a “legal method” for comparing the laws of different countries.¹⁵ In this respect, the main criticism against comparative law as an independent field of law rests precisely on the fact that comparative law requires objects of comparison and that, unlike other fields of law, does not have, nor relies on, specific sets of written rules. This criticism originates primarily from the civil law system, a system that generally uses codes to “legitimize[] legal discourse.”¹⁶ Hence, comparative law lacks its own set of rules or codes. Instead, scholars engaging in comparative legal analysis generally compare national or regional rules, judicial decisions, legal reforms, and so forth. In other words, comparative law scholars engage with already existing rules that are part of the specific—national or regional—legal norms applicable in the countries that are the objects of the scholarly comparison.¹⁷

Against this observation, however, several experts have underscored that there is a large amount of epistemological debate that has been generated by comparative law scholars to date, regardless of the absence of an independent set of written norms in this field.¹⁸ Notably, these experts have supported that

Science+Business Media Dordrecht 2001), and REINHARD ZIMMERMANN, *COMPARATIVE FOUNDATIONS OF A EUROPEAN LAW OF SET-OFF AND PRESCRIPTION* (2010).

¹⁵ See, e.g., James Gordley, *Is Comparative Law a Distinct Discipline?*, 46 AM. J. COMP. L. 607, 611 (1998); Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 673 (2002).

¹⁶ Fabio Morosini, *Globalization & Law: Beyond Traditional Methodology of Comparative Legal Studies and an Example from Private International Law*, 13 CARDOZO J. INT'L & COMP. L. 541, 544 (2005). For a comprehensive introduction to the civilian tradition, see JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* (3rd ed. 2007), and REINHARD ZIMMERMANN, *ROMAN LAW, CONTEMPORARY LAW, EUROPEAN LAW: THE CIVILIAN TRADITION TODAY* (2004).

¹⁷ See Morosini, *supra* note 16, at 543 (citing RENÉ DAVID, *LES GRANDS SYSTEMES DE DROIT CONTEMPORAINS (DROIT COMPARE)* 1 (1964)).

¹⁸ See the contributions published in *EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW* (Mark Van Hoecke ed., 2004).

this “epistemological debate” is sufficient to categorize comparative law, at a minimum, as a legitimate and scientifically based model for comparative legal studies if not as its autonomous field of law.¹⁹

Despite these disputes over the nature of this field of law, scholars seem to nevertheless agree on the main objectives of comparative law: (1) to investigate the historical, philosophical, economic, and social aspects related to national laws; (2) to use this information to further understand different national or regional legal systems, which may be the legal systems of the scholars, but also unrelated systems; and (3) to better understand different legal systems, which may ultimately benefit the development of national laws, as much as regional and international laws, and in turn international relations.²⁰ To achieve these objectives scholars should thus engage in comparative legal analysis. Still, while the objective of comparative law seems less controversial, scholars do not necessarily agree on how to achieve these objectives²¹—that is, on the specific methods and requirements on how to conduct comparative legal analysis. Not surprisingly, this has led to additional controversy in this area.²²

For example, scholars frequently disagree on whether comparative legal analysis should primarily—or exclusively—consider the written law, including judicial decisions, of the countries that are compared, or whether comparative scholars should instead also consider the countries’ social, cultural, and

¹⁹ Morosini, *supra* note 16, at 544.

²⁰ See, e.g., Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 ARIZ. ST. L.J. 737, 739–40 (1999); Eberle, *supra* note 11, at 52–53; see also, e.g., Pierre Legrand, *The Same and the Different*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* (Pierre Legrand & Roderick Munday eds., 2003); Pierre Legrand, *On the Singularity of Law*, 47 HARV. INT’L L.J. 517, 524–25 (2006); Pierre Legrand, *Foreign Law: Understanding Understanding*, 6 J. COMP. L. 67, 68 (2011).

²¹ For a critical review of the objectives of comparative law and legal analysis, see Vernon Valentine Palmer, *From Lertholi to Lando: Some Examples of Comparative Law Methodology*, 53 AM. J. COMP. L. 261 (2005) (advocating against a single methodology for comparative law and for a sliding scale of options depending on the specific research). “Mainstream comparative lawyers . . . seem to be caught in the pincers of three developments, each pulling in a different direction.” *Id.* at 263. The observations developed in this Essay with respect to comparative legal analysis in the field of intellectual property have been particularly inspired by this article.

²² *Id.* at 264; see also Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 IOWA L. REV. 1025, 1066 (1999).

anthropological environments. Moreover, scholars tend to disagree over whether the role of comparative law should be limited to comparing existing legal systems, or whether comparative law ought to play a larger role in understanding public policy issues and the political/historical/sociological background related to the national legal systems that are being studied. Scholars are also divided on whether comparative legal analysis should focus on the similarities between the legal systems that are compared, or on their differences.²³ For example, some scholars support focusing on the similarities of varying legal systems because the solutions to similar problems are frequently similar across different systems—the “convergence approach.”²⁴ Other scholars have argued, instead, that different systems should be read within their different cultural framework—the “non-convergence approach.”²⁵ In this respect, one of the few points of agreement seems to be that comparative legal analysis should not focus merely on legal texts or case law, but also on the “law in action,” including the underlying “legal formants.”²⁶

The result of the existing controversies has been that comparative law scholars have developed a variety of increasingly more complex methodologies to conduct comparative legal analysis. These methodologies go from “historical [to] functional, evolutionary, structural, thematic, empirical, and statistical comparison, and all . . . can be carried out from a micro or macro point of view.”²⁷ In the same context, some scholars

²³ See the insightful chapter by H. Patrick Glenn, *Legal Cultures and Legal Traditions*, in *EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW* 7 (Mark Van Hoecke ed., 2004). See also Günter Frankenberg, *Stranger Than Paradise: Identity and Politics in Comparative Law*, UTAH L. REV. 259, 260 (1997); Curran, *supra* note 7, at 661.

²⁴ For a detailed argument in defense of this approach, see BASIL MARKESINIS, *FOREIGN LAW AND COMPARATIVE METHODOLOGY* 6 (1997). See also Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 383 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

²⁵ In this respect, see Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L & COMP. L.Q. 52, 55 (1996). See generally PIERRE LEGRAND, *FRAGMENTS ON LAW-AS-CULTURE* (1999).

²⁶ Demleitner, *supra* note 20, at 741; see also Mark Van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT'L & COMP. L.Q. 495, 498 (1998).

²⁷ Palmer, *supra* note 21, at 263.

have also developed a functionalist approach²⁸ and a law and economics approach to comparative law.²⁹ Hence, this proliferation of methodologies has—rightly for this author—been denounced as a deterrent and additional challenge against a wider acceptance of comparative legal analysis.³⁰ In particular, critics have pointed out how conducting comparative legal analysis, even at a most fundamental level, is already complex due to the extra challenge of acquiring and analyzing information about foreign laws.³¹ Accordingly, the already not indifferent challenges that characterize comparative legal analysis should not transform into an excessive burden for those attempting to engage in legal comparison. As I elaborate below, this Essay supports that we should instead accept that comparative analysis can be conducted at different levels of expertise, and in different ways, and that scholars may extend their comparative analysis skills and methods incrementally and with time, as they achieve satisfactory results and become more comfortable with the methodology themselves.³² In particular, as noted by one commentator, this Essay supports that comparative legal

²⁸ A functional approach to comparative legal analysis has been defined as an approach that proposes a “flexible, inductive process of preliminary hypotheses, investigation of functional values, checking of preliminary results and reformulation of hypotheses.” David C. Donald, *Approaching Comparative Company Law*, 14 *FORDHAM J. CORP. & FIN. L.* 83, 88 (2008) (citing KONRAD ZWEIGERT & HEIN KOTZ, *INTRODUCTION TO COMPARATIVE LAW* 33–34 (3d ed. 1998)); see, e.g., Ralf Michaels, *The Functional Method of Comparative Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 339 (Mathias Reimann & Reinhard Zimmermann eds., 2008); see also Michele Graziadei, *The Functionalist Heritage*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 101 (Pierre Legrand & Roderick Munday eds., 2011).

²⁹ In this respect, see the leading publication by UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* 1, 10 (2004).

³⁰ Palmer, *supra* note 21, at 263; see also Catherine A. Rogers, *Gulliver's Troubled Travels, or the Conundrum of Comparative Law*, 67 *GEO. WASH. L. REV.* 149, 150–51, 163 (1998).

³¹ For example, some of the additional challenges that are part of comparative legal analysis are: unfamiliarity with different legal systems, intrinsic differences between the common law and the civilian traditions, language barriers, and the difficulties in effectively understanding a foreign legal system due to language translations are just system. See generally Vivian Grosswald Curran, *Comparative Law and Language*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 675 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (highlighting the importance of learning foreign languages).

³² Palmer, *supra* note 21, at 263 (noting that some of the proposed scholarly methodologies “overlook the comparative law needs of the legislatures, reform commissions, and judges and seem entirely unworkable at the practical level”).

analysis should be based on methods that “are not only enlightening, but [are] feasible and nonthreatening.”³³ In this way, a larger number of scholars may—hopefully—become interested in this methodology and feel welcome to engage with it. With time, this incremental approach may lead to more comparative legal analysis, which in turn could lead to the creation of a larger group of scholars and experts valuing legal comparison as a methodological tool in their research.

II. THE IMPORTANT ROLE OF COMPARATIVE LEGAL ANALYSIS IN INTELLECTUAL PROPERTY LAW GLOBALLY

Unquestionably, comparative legal analysis is a widely adopted academic research methodology in the field of intellectual property law in many jurisdictions today. The popularity of comparative legal analysis compared to other fields of law is certain in this respect, despite the many differences that still apply to how individual scholars may conduct this analysis based on their topics of research and the jurisdictions that they are comparing.³⁴ Besides academic research, the importance of understanding foreign legal systems is widely recognized by intellectual property practitioners, lawmakers, and members of the judiciary in a large number of countries. Academic institutions and professional training centers across many countries have also long realized the importance of comparative

³³ *Id.*

³⁴ The literature in this respect is very extensive, and it is not possible to cite the many excellent works that have been published by many colleagues in various countries, and in many different languages. To review some examples in English, see Andrew F. Christie & Amanda Lim, *Reach-through Patent Claims in Biotechnology: An Analysis of the Examination Practices of the United States, European and Japanese Patent Offices*, INTELL. PROP. Q., Vol. 3, 236 (2005); Giuseppina D'Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use*, 53 MCGILL L.J. 309, 309 (2008); Daniel J. Gervais, *Feist Goes Global: A Comparative Analysis of The Notion of Originality in Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 949, 951 (2002); Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1071 (2003); see, e.g., Estelle Derclaye, *Can and Should Misappropriation Also Protect Databases? A Comparative Approach*, in COPYRIGHT LAW: A HANDBOOK OF CONTEMPORARY RESEARCH 83 (Paul Torremans ed., 2007); Irene Calboli, *Recent Developments in the Law of Comparative Advertising in Italy—Towards an Effective Enforcement of the Principles of Directive 97/55/EC under the New Regime?*, 33 INT'L REV. INDUS. PROP. COPYRIGHT L. 415 (2002).

legal studies, and generally offer a large array of academic subjects in international and comparative intellectual property rights in their curricula.³⁵

The rise of comparative legal analysis as an important legal methodology in the field of intellectual property—at least modern intellectual property—dates back to the nineteenth century. Almost one-and-a-half centuries ago, the need to facilitate trade by securing similar protections for products that were distributed internationally resulted in the adoption of wide-reaching international agreements that set minimal national standards for intellectual property protection. The most relevant agreements in this respect were the adoption of the 1883 Paris Convention for the Protection of Industrial Property³⁶ and the 1886 Berne Convention.³⁷ These agreements were soon followed by the adoption of several additional international agreements.³⁸ Thus, it does not come as a surprise that, shortly after their adoption, scholars started to invest significant ink in analyzing these agreements and their history, negotiations, and process of implementation into national laws. In turn, scholars extensively compared national legal systems with the international rules.³⁹ Throughout the twentieth century many scholars engaged in a variety of comparative legal analyses in the area of intellectual

³⁵ The World Intellectual Property Organization (“WIPO”) Academy in Geneva offers a comprehensive list of academic and professional intellectual property centers. See WORLD INTELLECTUAL PROPERTY ORGANIZATION, THE WIPO ACADEMY EDUCATION AND TRAINING PROGRAMS PORTFOLIO (2016), http://www.wipo.int/edocs/pubdocs/en/wipo_pub_467_2016.pdf.

³⁶ Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 13 U.S.T. 2, 828 U.N.T.S. 107, as last revised at the Stockholm Revision Conference July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 303.

³⁷ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

³⁸ See *WIPO-Administered Treaties*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/treaties/en> (last visited Oct. 22, 2016), for an exhaustive list, the legal texts, and a comprehensive summary of the various international treaties currently administered by the World Intellectual Property Organization (WIPO). See also WORLD INTELLECTUAL PROPERTY ORGANIZATION, *WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE* (2004), http://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf.

³⁹ See G.H.C. BODENHAUSEN, *GUIDE TO THE APPLICATION OF THE PARIS CONVENTION FOR THE PROTECTION OF INTELLECTUAL PROPERTY* (1968); SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986* (1987); 1 SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND* (2d ed. 2006).

property law. This trend continued and intensified after the adoption of the 1994 Agreement on the Trade-Related Aspects of Intellectual Property Rights (“TRIPS”).⁴⁰ In particular, post-TRIPS, a large number of scholars have compared the implementation of TRIPS into the national laws of their countries or other countries members of the World Trade Organization.⁴¹ More recently, scholars have started to discuss the impact of the gridlock in multilateral negotiations on national legislation, such as the impasse in the WTO negotiations and the subsequent shift towards bilateralism and plurilateralism—that is, the rise of intellectual property discussion in international trade agreements (“FTAs”).⁴²

Besides comparing international intellectual property law and national laws, a large number of scholars have also compared separate national legal systems in past years and decades. These comparisons have interested a large variety of intellectual property topics and jurisdictions.⁴³ Unfortunately, I

⁴⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS]; see also DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* (3d ed. 2008).

⁴¹ For an example of national implementation of TRIPS, see generally George Wei, *Comparison of TRIPS Provisions with the Current Intellectual Property Laws of Singapore*, 1 SING. J. INT’L & COMP. L. 154 (1997). See also ASSAFA ENDESHAW, *INTELLECTUAL PROPERTY IN ASIAN EMERGING ECONOMIES: LAW AND POLICY IN THE POST-TRIPS ERA* (2010); Gail E. Evans, *Substantive Trademark Law Harmonization: On the Emerging Coherence Between the Jurisprudence of the WTO Appellate Body and the ECJ*, in *TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH* 177 (Graeme B. Dinwoodie & Mark D. Janis eds., 2009); 2 *RESEARCH HANDBOOK ON THE INTERPRETATION AND ENFORCEMENT OF INTELLECTUAL PROPERTY UNDER WTO RULES* (Carlos M. Correa ed., 2012).

⁴² For an example of analysis of an international trade agreement including intellectual property provisions, see United States-Singapore Free Trade Agreement, U.S.-Sing., May 6, 2003, , https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf. See generally *INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS IN THE ASIA-PACIFIC REGION* (Christoph Antons & Reto M. Hilty eds., 2015); *TRIPS PLUS 20: FROM TRADE RULES TO MARKET PRINCIPLES* (Hanns Ullrich et al. eds., 2016); Ng Siew Kuan Elisabeth, *The Impact of the Bilateral US Singapore Free Trade Agreement on Singapore post-TRIPS Patent Regime in the Context of Pharmaceuticals*, 16 INT’L TRADE LAW AND REGULATION 121 (2010); Ng-Loy Wee Loon, *Time to Rethink the Ever Expanding Concept of Trademark: The Careful Re-calibration in Singapore Trademark Law after the Controversial US/Singapore FTA*, 30 E.I.P.R. 5 (2008).

⁴³ See, e.g., Herman Cohen Jehoram, *Harmonising Intellectual Property Law Within the European Community*, 23 INT’L REV. INTEL. PROP. & COMPETITION L. 622 (1992); Jean-Luc Piotraut, *European National IP Laws Under the EU Umbrella:*

cannot comprehensively elaborate on nor mention all these excellent comparative works in this Essay. Yet the large amount of comparative scholarship available today—in several different languages—confirms the scholarly interest in, and the relevance of, this methodology in the field of intellectual property.

Still, from the existing body of works in this area, the following general criteria could be observed with respect to scholars engaging in this methodology. Namely, similar to scholars in other fields, intellectual property scholars tend to turn to comparative legal analysis in order to: (1) acquire information about foreign legal systems; (2) compare this information with domestic law or the law of another legal system; and (3) attempt to draw conclusions with respect to the foreign or national legal systems. More specifically, scholars tend to compare different legal systems to support or reject legislative changes at the national level by adapting, fully embracing, or rejecting as unsuccessful the findings of comparative analysis. Scholars also compare different legal systems in order to determine the effectiveness of regional and international harmonization efforts. In turn, these determinations provide a basis to support or reject further harmonization efforts with respect to a specific topic at the national political level.⁴⁴ With respect to the scope of their research, scholars generally seem to investigate written laws and judicial decisions as well as, in some instances, the legislative history and ongoing legislative reforms with respect to a specific topic. These results are then compared and applied to their findings on similar issues at the national or regional level in different countries worldwide.⁴⁵

From National to European Community IP Law, 2 LOY. U. CHI. INT'L L. REV. 61 (2005); see also Max Planck Institute for Intellectual Property and Competition Law, *Study on the Overall Functioning of the European Trade Mark System*, EUROPA (Feb. 2, 2011), http://ec.europa.eu/internal_market/indprop/docs/tm/20110308_allensbach-study_en.pdf (presenting the results of a study commissioned by the European Commission with respect to trademark law harmonization in the EU).

⁴⁴ See, e.g., MIREILLE VAN EECHOUD ET AL., HARMONIZING EUROPEAN COPYRIGHT LAW: THE CHALLENGES OF BETTER LAWMAKING (2009); see also Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 762–77 (2001); see generally Christophe Geiger et al., *The Three-Step Test Revisited: How To Use the Test's Flexibility in National Copyright Law*, 29 AM. U. INT'L L. REV. 581 (2014).

⁴⁵ For discussion on judicial use of foreign precedents, see Edward Lee, *The New Canon: Using or Misusing Foreign Law To Decide Domestic Intellectual Property Claims*, 46 HARV. INT'L L.J. 1, 4–5 (2005).

Still, and remarkably different than in the general debate between other comparative law scholars, intellectual property law scholars who engage in comparative legal analysis tend to be largely immune from methodology related disputes with respect to their research. In other words, the methodological controversies vexing mainstream comparative law scholarship do not seem to be found, in general, in intellectual property comparative legal scholarship. Instead, intellectual property scholars seem to engage in comparative intellectual property analysis motivated by a genuine desire to find more information about foreign legal systems and to compare these systems with their national laws to find actual solutions to existing problems. At times, intellectual property scholars are driven to comparative legal analysis by the necessity to acquire information with respect to the legal treatment of a specific subject matter in other legal systems to fill a vacuum in the national law that they are investigating or in which they are operating.⁴⁶ In some instances, intellectual property scholars simply compare legal texts and judicial decisions in order to acquire the desired information. In other instances, scholars adopt more complex methodologies, like comprehensively examining a foreign law as it is actually applied in that jurisdiction. Another method is to compare the cultural, economic, and social environments in which the foreign legal systems being studied operate.⁴⁷ Yet, at least to the knowledge of this author, intellectual property scholars do not seem to have criticized other scholars' methodology because the scholars did not have a sufficient immersion in the foreign legal system, or was not able to read sources in the original language, and so forth.⁴⁸ Overall, it seems

⁴⁶ Again, due to the vast amount of contributions in this respect, it is not possible to cite all relevant publications focusing on comparative legal analysis in this field. The analysis and the reading of these publications—as well as many unpublished doctoral and master dissertations—corroborate, however, the conclusion that intellectual property scholars engage in comparative legal analysis in large numbers, and do so to assess the status quo of their national and foreign laws respectively, and then draw conclusion including with respect to possible legal reforms.

⁴⁷ See Joahan Bärlund, *The Regulation of Comparative Advertising and Cultural Variations*, in *PRIVATE LAW AND THE MANY CULTURES OF EUROPE* 269 (Thomas Wilhelmsson et al. eds., 2007).

⁴⁸ To date, it does not seem that any intellectual property scholar has openly criticized, at least in a scholarly publication or even in an online newsletter or blog, the methodology used by other scholars in conducting comparative legal analysis.

that scholars from many countries recognize the importance of using comparative legal analysis and the fact that, at some point in their research, they may need to investigate comparative principles, even when their primary focus is national law.

Still, even in the absence of known controversies over the “perfect” methodology to follow in their research, intellectual property scholars engaging in comparative legal analysis also face challenges familiar to comparative law scholars. These challenges include navigating the possible theoretical differences that exist between national legal systems—for example, the differences between civil law and common law.⁴⁹ Moreover, even though intellectual property laws have largely been harmonized at the international level, the process of harmonization has afforded some latitude to individual countries to craft the boundaries of their national systems based on their traditional approaches in the field. Some areas are also far less harmonized than other areas. For example, national laws still diverge considerably with respect to protection of moral rights in copyright law;⁵⁰ patent protection and access to medicine—particularly with respect to compulsory licensing; the nature of trademark rights as a property right;⁵¹ the protection of geographical indications of origin, traditional knowledge, and

This author has conducted a search in several scholarly databases and has not found any publication including criticism. The same applies with respect to website. In fact, the author was probably the first scholar that wrote a contribution on comparative legal analysis applied to intellectual property law as part of the book, *METHODS AND PERSPECTIVES IN INTELLECTUAL PROPERTY 3* (Graeme B. Dinwoodie ed., 2014). This book included presentations from the thirty-first Congress of the International Association for Teaching and Research in Intellectual Property (ATRIP) held at Chicago Kent College of Law in July 2012.

⁴⁹ For a comprehensive analysis of the differences between the common law and civil law, see Helge Dedek, *From Norms to Facts: The Realization of Rights in Common and Civil Private Law*, 56 MCGILL L.J. 77 (2010); E. Allan Farnsworth, *A Common Lawyer's View of His Civilian Colleagues*, 57 LA. L. REV. 227 (1996); John Henry Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INT'L L. 357 (1981).

⁵⁰ See, e.g., Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 993 (1990); Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 17–33 (1985).

⁵¹ See J. Thomas McCarthy, *Dilution of a Trademark: European Union and United States Law Compared*, 94 TRADEMARK REP. 1163, 1164 (2004).

traditional cultural expression;⁵² exceptions and limitations;⁵³ and the principle of exhaustion of intellectual property rights and the legality of parallel imports.⁵⁴ In addition, language barriers may create further challenges to fully grasp the meaning of the legal terminology used in foreign laws, and this may not necessarily be clarified with the aid of legal translations. Cultural differences, as well as economic and social elements of the foreign country, also may complicate scholars' research and assessment of the foreign intellectual property system.

Overall, however, despite all the challenges, it seems that many scholars across the globe agree that the benefit of comparative legal analysis outweighs the costs of obtaining the information about foreign legal systems. These costs will necessarily vary based on the circumstances, and some scholars in various countries may have higher costs than others due to greater difficulties in retrieving this information.⁵⁵ In addition, some scholars have a greater incentive, or need, to engage in legal comparison because of their personal interests in conducting comparative legal analysis regardless of the costs of conducting this analysis. This may be, for example, the case of scholars in countries that are former colonies and that have inherited the legal systems of the countries that once colonized

⁵² See J. Janewa Osei-Tutu, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 MARQ. INTELL. PROP. L. REV. 147, 149–50 (2011).

⁵³ See, e.g., COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS (Ruth L. Okediji ed., 2016); Lisa P. Ramsey, *Free Speech and International Obligations To Protect Trademarks*, 35 YALE J. INT'L L. 405, 435 (2010); Weijun Zhang & Yanbing Li, *Content Review and Copyright Protection in China After the 2009 U.S. v. China WTO Panel Ruling*, 62 J. COPYRIGHT SOC'Y U.S.A. 437 (2015).

⁵⁴ See the contributions published in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY EXHAUSTION AND PARALLEL IMPORTS (Irene Calboli & Edward Lee eds., 2016); Irene Calboli, *Market Integration and (the Limits of) the First Sale Rule in North American and European Trademark Law*, 51 SANTA CLARA L. REV. 1241 (2011); Vincent Chiappetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPs, International IPR Exhaustion and a Few Other Things*, 21 MICH. J. INT'L L. 333 (2000).

⁵⁵ In this respect, it should be noted that access to books and scholarly materials can be a challenge in many countries with respect to foreign sources, particularly old texts, case reports, and legislative history. Scholars in developing countries, or in countries with limited resources for academic libraries—today, many countries—may face further challenges in seeking foreign materials. Even though many materials may be found today on online repositories, this is not always the case, especially with respect to peer review journals and books, which remain predominantly available only via subscription fees.

them, or countries that have modeled their legal system after foreign jurisdictions, or countries that have harmonized their laws following other national systems or regional systems, such as the EU.⁵⁶ Still, while some scholars will have a higher incentive or need, the majority of scholars seem to agree on the general benefit of conducting comparative legal analysis, at least to some degree, in their research.

As noted in the Introduction, however, recognizing the importance of comparative legal analysis does not imply that comparative legal analysis should lead to convergence of scholars' opinion on the issues that is researched, or that the interpretation of national legal principles of intellectual property should become more harmonized across different national laws.⁵⁷ Rather, this simply means that, by recognizing the importance of comparative legal analysis, intellectual property scholars can gain a more comprehensive perspective of relevant foreign laws, and be on a stronger position to draw better informed conclusions on their research questions, as this analysis would raise awareness about foreign rules, cases, and different scholarly opinions. This awareness has become crucially important in our global economy to better understand the background of foreign legal system, and in turn, the economic and social conditions of other countries. In other words, comparative awareness has become a necessity for modern scholars of intellectual property law, and scholars who do not engage, at least to a minimum, in comparative legal analysis may miss important insights in a field of law that is so global and dynamic and that has been heavily harmonized at the international and regional level.

III. THE CASE FOR INCREASING THE RELEVANCE OF COMPARATIVE LEGAL ANALYSIS IN THE UNITED STATES

As mentioned in the Introduction, despite the overall success of comparative legal analysis as scholarly methodology across many continents, U.S. legal scholars do not seem to have

⁵⁶ For example, scholars from countries that were, in the past, British colonies, and who have an interest in exceptions and limitations in copyright law may need to review their national laws but also British law to comprehensively understand the origin of their national provisions. See D'Agostino, *supra* note 34, at 313–14; David Tan, *The Unbearable Lightness of Fair Dealing: Towards an Autochthonous Approach in Singapore*, 28 SING. ACAD. L.J. 124, 124–25 (2016).

⁵⁷ See *supra* Introduction.

embraced this methodology with the same enthusiasm or frequency that are often seen in other jurisdictions. This lack of enthusiasm—or, perhaps, just lower level of general interest—for comparative legal analysis generally seems to be common across most legal disciplines in the U.S., including intellectual property law,⁵⁸ even though, at this time, this statement is mostly based on the intuition and personal experience of the authors rather than on a rigorous empirical analysis and count of all publications published in the U.S. by scholars on intellectual property-related topics in the past decades. Moreover, this author would like to highlight that, even though many U.S. legal scholars seem to engage with less frequency and to a lesser extent with comparative legal analysis than non-U.S. scholars, several prominent intellectual scholars do indeed regularly conduct, and have conducted very important comparative analyses also in the U.S. In the past decades, these scholars have certainly published some of the most authoritative studies in this field in the U.S. and also internationally.⁵⁹

Still, when compared with Europe or Asia, the engagement of U.S. scholars in comparative legal analysis does remain a less widely used scholarly methodology compared with other methods of legal research.⁶⁰ This statement is corroborated also by the fact that many academic conferences, including those dedicated to the presentation of scholarly works-in-progress, tend to have

⁵⁸ For a general critique, see Ugo Mattei, *Some Realism about Comparativism: Comparative Law Teaching in the Hegemonic Jurisdiction*, 50 AM. J. COMP. L. 87 (2002).

⁵⁹ See generally JANE GINSBURG & EDOUARD TREPPOZ, INTERNATIONAL COPYRIGHT LAW: U.S. AND E.U. PERSPECTIVES: TEXT AND CASES (2015); INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP (Rochelle Cooper Dreyfuss & Jane C. Ginsburg eds., 2014); INTELLECTUAL PROPERTY IN ASIA (Paul Goldstein & Joseph Strauss eds., 2009); INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY: UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME (Keith E. Maskus & Jerome H. Reichman eds., 2005).

⁶⁰ Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought?*, 49 AM. J. COMP. L. 429, 429–30 (2001) (noting a lack of engagement between intellectual property scholars and scholars of conflicts of laws). This limited interest may also derive from a traditional internal vision of the United States as exceptional. See Minow, *supra* note 8, nn.59–60 (citing ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1987) (1831); Abraham Lincoln, President of the United States, Gettysburg Address (Nov. 19, 1863), in THE COLLECTED WORKS OF ABRAHAM LINCOLN (Ray P. Basler ed., 1953)).

fewer numbers of interventions and presentations focusing on comparative and international intellectual property than those focusing on national law.⁶¹

There are several possible reasons that, most likely inadvertently, may have led to this situation of lack of perceived relevance of comparative legal analysis as a mainstream research methodology by U.S. intellectual property scholars. In the view of this author, none of these reasons include, however, an intentional skepticism toward comparative legal analysis as such on the part of U.S. scholars. Instead, the reason for this status quo seem to be primarily systemic reasons based both on the general characteristics of U.S. legal education as well as the development of intellectual property law as a field highly dominated by anglo-saxon theories, in particular utilitarian theories, and principles not only at the national level but also worldwide.

With respect to the latter, for example, the general principles of U.S. intellectual property laws have, in fact, been widely disseminated across many jurisdictions as part of the process of international harmonization of national laws that has taken place since the nineteenth century. In this respect, it is, in fact, not a secret that TRIPS and other international agreements have been heavily influenced by the U.S. delegations. Often, these delegations proposed, and obtained, to introduce verbatim language from existing U.S. intellectual property laws as part of the international agreements.⁶² This process, which could be

⁶¹ In this respect, the very limited number of comparative and international intellectual property related scholarly presentations by U.S. scholars at the more popular works-in-progress conferences for U.S. law professors is remarkable, at least based on the experience of the author of this Essay. These conferences include: (1) the Intellectual Property Scholars Conference (IPSC), held annually on a rotation basis between University of California at Berkeley, Cardozo University, DePaul University, and Stanford University; (2) the Works-in-Progress in Intellectual Property Conference (WIPIP), held annually but at different academic institutions—the 2016 edition was hosted by the University of Washington and the 2015 edition was hosted by George Washington University and the U.S. Patent and Trademark Office; and (3) the Internet Law Works-in-Progress Conference, held annually, rotating between New York law School and Santa Clara University. Still, these conferences provide an unmatched forum for scholars—junior and senior—to present their works-in-progress in the U.S., and the author of this Essay is deeply grateful to the comments and feedback on her presentations, and the welcoming atmosphere that always distinguishes these events.

⁶² For instance, the origin of the fundamental copyright treaty, the Berne Convention, are the bilateral agreements by some European states. For a

referred to—with a slightly negative connotation—as “intellectual property standards colonization,” has intensified in the post-TRIPS times with the adoption of bilateral or plurilateral FTAs. Again, these FTAs are heavily influenced by U.S. laws and legal principles, which results in these principles being adopted by other parties to the FTAs.⁶³ Accordingly, since many of the U.S. national standards in the area of intellectual property law have been “exported” and “transplanted” into the laws of many countries, this may have increased the perception among U.S. scholars that legal comparison between the U.S. and foreign law is unnecessary, as the laws of foreign countries frequently is, in essence, a U.S. law transplant. In addition, the existence of international treaties in so many areas of intellectual property law, and in turn the assumption that national laws are already almost identical as a result, may have contributed to the perception amongst U.S. legal scholars that engaging in comparative legal analysis is now irrelevant because all countries now adopt virtually the same principles.⁶⁴

Prominent comparative scholars have expressed additional observations that could assist in explaining the lower level of engagement of U.S. scholars in comparative legal analysis in this field, and in general.⁶⁵ To a large extent, these observations refer to some common criticism towards the U.S. education system, including undergraduate and postgraduate university education. Notably, it has been observed that, similar to scholars in other English speaking countries, U.S. scholars tend to have a lesser command of foreign languages compared to other nationals—who must learn at least English as a necessity to write in international journals.⁶⁶ In turn, this may impact the degree of

comprehensive historical introduction in this regard, see 1 SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND* ¶¶ 1.29–1.41 (2d ed. 2006). Another example is the substantial influence of the U.S. on the international harmonization of computer program protection in the copyright regime, so that Article 10(1) of the TRIPs Agreement, as the first provision in any multilateral instrument that confirmed the protection of computer program as literary works under the Berne Convention. See GERVAIS, *supra* note 40, ¶¶ 2.143–2.153 (4th ed. 2012).

⁶³ Dinwoodie, *supra* note 60, at 435.

⁶⁴ *But see* Graeme B. Dinwoodie, *The New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 518–19 (2000).

⁶⁵ *See, e.g.,* Curran, *supra* note 7, at 665–67.

⁶⁶ This consideration should not be taken as a criticism. However, it should be admitted, at least in the experience of this author, that U.S. scholars tend to have,

accessibility that U.S. scholars may have with respect to foreign laws, even though it is increasingly more common to find most legal documents, cases, and scholarship related to foreign laws also in English.⁶⁷ Moreover, more specifically with respect to U.S. legal education—and the curriculum in U.S. law schools—it has been observed that law schools generally do not include the teaching of “Comparative Law” or “International Law” as a core subject in their curricula.⁶⁸ This approach is considerably different than the one adopted in most foreign academic institutions that include these subjects as core subjects, if not as compulsory course, for students to graduate. Along the same lines, it has been observed that only few U.S. academics seem to pursue masters of laws (“LL.M.”) in the U.S. or abroad after completing a law degree (“J.D.”), whereas foreign academics tend to complete LL.M. courses more frequently, and these courses tend to emphasize comparative laws to a higher degree than J.D. courses, also when the LL.M. courses are taught in the U.S.⁶⁹

on average, a less proficient command of foreign languages compared to scholars from other parts of the world. Still, some U.S. scholars do engage in learning languages as part of Fulbright Programs, or in order to visit foreign institutions for extended periods of time. In fact, several of the U.S. colleagues of the author of this Essay are proficient in many foreign languages. However, differently than in other non-English speaking countries, the value of speaking foreign languages, reading legal texts in their original language, and writing and publishing in another language does not seem to be perceived with the same importance in the U.S. compared to foreign countries. In contrast, non-English speaking scholars increasingly more often write and research in English, and usually command well two, if not more, foreign languages.

⁶⁷ In this matter, WIPO has established a WIPOLex database. WIPO Lex, WORLD INTELL. PROP. ORG., <http://www.wipo.int/wipolex/en> (last visited Nov. 8, 2016). In this database, a large volume of English literature as well as English translations of updated IP laws in the member states can be found.

⁶⁸ See the very revealing figures collected by Mattei, *supra* note 58, at 95–96 (noting, based on a series of questionnaires, that “in roughly 50% of the U.S. law schools, comparative law is a significant part of education of lawyers” and that “about 23% of the lawyers produced by these schools receive exposure to comparative law, which makes a general figure of about 12% of the general U.S. law graduates population,” which leaves “more than 90% of . . . U.S. trained lawyers . . . [with] no contact with comparative law during their legal education”). See also Ryan Scoville, *International Law in National Schools* (Marquette Law Sch. Legal Studies, Paper No. 16-07, 2016), <http://ssrn.com/abstract=2570979>.

⁶⁹ For example, information about master of laws and postgraduate course in intellectual property are widely advertised by several U.S. law schools. See *Study Patent Law & Intellectual Property Law in United States*, MASTERSPORTAL, <http://www.mastersportal.eu/study-options/269778993/patent-intellectual-property-law-united-states.html> (last visited Nov. 8, 2016). U.S. law schools also compete over their intellectual property programs and refer to their intellectual property

Similarly, it seems that U.S. academics also rarely pursue a doctorate in law—S.J.D. or Ph.D in law—a type of degree that aspiring academics in foreign countries generally have to complete to be considered for a faculty position. Pursuing a doctorate degree in law generally requires comparing different legal systems as part of the completion of a doctoral dissertation. Instead, many U.S. legal academics obtain doctorate degrees in other fields—such as history, statistics, sciences, and so forth⁷⁰—but not doctorate degrees in law. Accordingly, the fact that many U.S. intellectual property scholars, and U.S. scholars in general, are not exposed to comparative law as law students or as part of their doctoral studies could contribute to create the impression of a perceived lesser importance of conducting legal comparison as part of one’s research agendas later on as a faculty member.⁷¹

Yet, as noted above, even in the post-TRIPS era—the era of FTAs and Mega-Regional Agreements—the International Community has not achieved a full harmonization of intellectual property laws. Instead, many variations in legislations, and interpretation of those legislations, still exist at the national level. As a result, either because the lack of harmonization in certain areas, or the existence of international flexibilities in the national implementation, or the diverging judicial interpretation of similar provisions at the national level by national courts,

curriculum and masters program as part of several distinguishing features of their programs. See *Intellectual Property Law*, U.S. NEWS & WORLD REP., <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/intellectual-property-law-rankings> (last visited Nov. 8, 2016).

⁷⁰ See Lynn M. LoPucki, *Down of the Discipline Based Law Faculty*, 65 J. LEGAL EDUC. 506, 539 (2016); Justin McCrary et al., *The Ph.D. Rises in American Law Schools, 1960-2011: What Does It Mean for Legal Education?*, 65 J. LEGAL EDUC. 543, 544 (2016).

⁷¹ Moreover, it should be underlined that the publication system that governs, to a large extent, U.S. legal academia does not favor articles addressing comparative law topics. In particular, comparative law articles are rarely published in more prestigious and sought after U.S. law reviews, which are the mainstream law reviews and not the specialty journals that are also published by U.S. law schools. There is a wide range of reasons for this, including the fact that the selection to be published in U.S. law reviews is primarily a process driven by student editors, who may not be familiar with comparative law and, thus, less interested in these topics. In addition, peer reviews are not considered equally prestigious, in general, by U.S. scholars—and tenure committees—which deters scholars from seeking publications in peer journals that may be more interested in comparative law. For information about the publication process in the U.S., see June Casey, *Publishing in Law Reviews and Journals*, HARV. L. SCH. LIBR. (Dec. 8, 2015), <http://guides.library.harvard.edu/c.php?g=309907&p=2070141>.

national laws are not fully harmonized, and will unlikely reach full harmonization.⁷² Accordingly, scholars should always consider engaging in comparative legal analysis to study and understand the differences that remain between national intellectual property laws.⁷³ In this respect, despite its challenges, comparative legal analysis will always bring important benefits to the understanding of the subject of inquiry to any scholar, and thus also to U.S. scholars. In addition, by gaining a specific knowledge of foreign legal systems in a variety of legal topics, scholars may turn this knowledge into more effective scholarship. In turn, this more effective scholarship could better inform other experts, who could use this additional information for more effective advocacy, policy making, and legal practice at the national level.

Overall, by engaging in comparative legal analysis to a larger degree, U.S. intellectual property scholars could learn more about “the different”—that is, foreign legal systems, legislations, case law, etc.—and become more receptive of different perspectives and ways of addressing similar issues and questions. In turn, this could promote not only more international convergence, but also, and more importantly, more international understanding as a whole and respect for alternative approaches.

As I noted also in my earlier scholarship, the fact that the benefits of comparative legal analysis generally justify the challenges of conducting such analysis, is particularly true in the context of intellectual property law. In the field of intellectual property law today, understanding foreign legal systems is a necessity for law professors, legal scholars, judges, and legal practitioners. In particular, the enforcement of intellectual property laws remains largely territorial,⁷⁴ and thus it is crucial

⁷² See discussion *supra* Part III.

⁷³ See discussion *supra* Part III.

⁷⁴ *But see* Alexander Peukert, *Territoriality and Extra-territoriality in Intellectual Property Law*, in BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION 189 (Günther Handl et al. eds., 2012); Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 506 (1997); Graeme B. Dinwoodie, *Developing a Private International Intellectual Property Law: The Demise of Territoriality?*, 51 WM. & MARY L. REV. 711, 765–66 (2009); Graeme B. Dinwoodie, *Trademarks and Territory: Detaching Trademark Law from the Nation-State*, 41 HOUS. L. REV. 885, 887–88, (2004).

for individuals and businesses interested in securing and enforcing intellectual property rights in multiple countries to be aware of the details of the various national legal systems in which they seek protection. The ability to understand the differences among various legal systems is also crucial in the case of multinational or transnational litigation, especially with respect to the issue of forum shopping and the choice of law to be used in these proceedings.⁷⁵ Understanding the differences between applicable foreign laws has also become a necessity with respect to intellectual property transactions.⁷⁶ Moreover, even though the widespread use of the Internet has profoundly challenged “the concepts of *locus* and national borders,”⁷⁷ the solution to Internet-related disputes still remains a matter to be resolved at the national level by applying national laws.⁷⁸ In other words, whether comparative legal analysis is used to identify the national rules that apply in a specific jurisdiction to protect intellectual property assets, or to resolve a dispute taking place in cyberspace, comparative legal analysis certainly plays a fundamental role in most research questions that are addressed as part of intellectual property research.⁷⁹

⁷⁵ For a detailed discussion, see Graeme W. Austin, *Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation*, 23 COLUM.-VLA J.L. & ARTS 1, 3 (1999).

⁷⁶ This includes the management of intellectual property portfolios internationally and the exploitation of intellectual property assets across multiple jurisdictions, for example, with respect to licensing, assignments, or the use of intellectual property assets as security interests in financial transactions. See RUSSELL L. PARR & GORDON V. SMITH, *INTELLECTUAL PROPERTY: VALUATION, EXPLOITATION, AND INFRINGEMENT DAMAGES* 376–77 (2005); see generally RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY LICENSING (Jacques de Werra ed., 2013); THE LAW AND PRACTICE OF TRADEMARK TRANSACTIONS: A GLOBAL AND LOCAL OUTLOOK (Irene Calboli & Jacques de Werra ed., 2016).

⁷⁷ Raquel Xalabarder, *Copyright: Choice of Law and Jurisdiction in the Digital Age*, 8 GOLDEN ST. U. SCH. L. ANN. SURV. INT’L & COMP. L. 79, 81 (2002); see Graeme W. Austin, *Social Policy Choices and Choice of Law for Copyright Infringement in Cyberspace*, 79 OR. L. REV. 575, 575–76 (2000).

⁷⁸ Austin, *supra* note 75, at 4 (“[A]t least for the time being, the preferable approach is for domestic courts to apply relevant foreign law to each instance of foreign infringement.”); Dinwoodie, *supra* note 60, at 447; see also Christian A. Camarce, Comment, *Harmonization of International Copyright Protection in the Internet Age*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 435, 446 (2007); Ted Solley, Note, *The Problem and the Solution: Using the Internet To Resolve Internet Copyright Disputes*, 24 GA. ST. U. L. REV. 813, 816 (2008).

⁷⁹ In particular, comparative legal analysis enables scholars to identify foreign legal information, which is necessary to understand foreign systems and the potential impact of these systems on national laws. See Dan L. Burk, *Transborder*

Not surprisingly, businesses and legal practitioners in the U.S. have realized the importance of comparative legal analysis in intellectual property law for a long time and have been very active in creating large international networks of professionals to collaborate, learn, and share information about foreign legal systems.⁸⁰ The increasing importance of, and professional demand for, comparative legal skills for intellectual property lawyers has prompted academic institutions to offer specialized postgraduate courses in international and comparative intellectual property law, as well as to introduce these subjects as part of the regular law school curriculum.⁸¹ Post-TRIPS, scholars have used comparative legal analysis to comment on FTAs and Mega-Regional Agreements, to a large extent to criticize the “ratcheting up” of intellectual property protection on a global scale.⁸²

Ultimately, whether it is used to support, criticize, or propose amendments to the current international or national systems, comparative legal analysis generally leads to considerable advancements in the legal discourse both at the international and national levels. Accordingly, it is important that comparative legal analysis becomes more widely accepted by U.S. intellectual property scholars as a mainstream scholarly methodology.

Certainly, many U.S. intellectual property scholars already travel abroad and spend time as visiting academics in foreign countries. As mentioned before, several of them also engage in very important comparative legal analysis. Yet, in many instances, U.S. scholars travel abroad primarily to present and/or

Intellectual Property Issues on the Electronic Frontier, 6 STAN. L. & POL'Y REV. 9, 15 (1994); Dinwoodie, *supra* note 64, at 554 n.263; see generally Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273 (1991).

⁸⁰ Organizations such as the International Trademark Association (“INTA”) or the International Association for the Protection of Intellectual Property (“AIPPI”) are just two examples of these networks. For a directory of intellectual property professional associations, see *Resources*, A.B.A., http://www.americanbar.org/groups/intellectual_property_law/resources.html (last visited Nov. 8, 2016).

⁸¹ See Port, *supra* note 6, at 170–71.

⁸² See TRIPS PLUS 20, *supra* note 42, at 19; see also Charles T. Collins-Chase, Comment, *The Case Against TRIPS-Plus Protection in Developing Countries Facing AIDS Epidemics*, 29 U. PA. J. INT'L L. 763, 780 (2008); Maria Julia Oliva, *Intellectual Property in the FTAA: Little Opportunity and Much Risk*, 19 AM. U. INT'L L. REV. 45, 60–61 (2003) (noting that draft chapters on IPRs would enact heightened standards and deprive countries of the ability to take further measures).

teach materials related to U.S. law. Similarly, U.S. law school courses taught abroad often focus on U.S. law and do not seem to involve a large comparative component.⁸³ These experiences are certainly interesting—and important to advance international and comparative understanding both from a cultural and academic standpoint. Still, U.S. scholars could “dive in” in the “comparative law world” a little more, and engage more directly with foreign legal systems, including studying foreign judicial decisions, different types of legal education, judicial and legal training, and so forth. By doing so, U.S. scholars would engage to a larger degree with the legal differences of intellectual property systems across different countries and the related foreign scholarship. Similarly, U.S. scholars could increase their interactions with foreign scholars not only by traveling abroad, but also with the scholars who come to the U.S. as visiting scholars or to attend L.L.M.s or doctoral programs. Usually, foreign scholars travel to the U.S. to study U.S. law and frequently engage in legal comparison between their national systems and U.S. law. A larger number of U.S. scholars could take a similar approach and become more acquainted with the legal systems of foreign scholars by interacting more frequently with these scholars.

As mentioned before, the result of strengthening the role and the perceived importance of comparative legal analysis in the U.S. could have a positive impact beyond increasing awareness of the foreign laws in scholarly writings by U.S. scholars. In particular, a growing group of U.S. scholars would become better acquainted with the cultural, social, and environmental differences that still exist across various countries and their legal landscapes. In turn, a growing group of U.S. scholars could have relevant influence on national and foreign policy makers, international trade negotiators, and practitioners. In the current—controversial—status of international intellectual property law, this could even bring about a renewed mutual respect for national differences, which could perhaps assist in

⁸³ For a similar critique, see Ryan Scoville & Milan Markovic, *How Cosmopolitan Are International Law Professors?* 13 (Mich. Journal Int'l Law, forthcoming; Marquette Law Sch. Legal Studies Paper No. 16-09; Tex. A&M U. Sch. of Law Legal Studies Research Paper No. 16-38, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2768302 (highlighting how professors of international law in the U.S. have little international experience, especially outside the West, and tend to teach international law from a national and Western perspective).

advancing the dialogue between the various members of the International Community, especially between the U.S. and other countries, as the U.S. is often perceived as the country that wants to impose its will on others with respect to intellectual property standards—and much more—regardless of different opinions in foreign countries.

Beyond academics, lawmakers and members of the judiciary in the U.S. could also benefit from engaging with comparative legal analysis to a higher degree compared to today. Here, again, this should not translate to advocating that lawmakers should follow other laws when adopting national legislation, nor that judges should consider foreign judicial precedents as persuasive authority. National legal systems do remain distinct, and the judicial-making process and the validity of judicial precedents greatly vary among countries and legal systems—for example, common law and civil law. Moreover, modeling national laws after foreign laws could easily result in the adoption of inappropriate legal transplants, that is, legal irritants, which may be later rejected or not properly enforced.⁸⁴ Similarly, foreign judicial precedents may prove incorrect and unworkable for national judges, even in cases dealing with the same plaintiffs and defendants, because of the different facts of each national scenario.⁸⁵ Still, lawmakers, judges, and other legal actors would nonetheless benefit by engaging in comparative legal analysis simply by becoming aware of existing foreign laws, cases, and relevant legal precedents. Gathering a greater awareness about “the different” always translates into providing different perspective, which in turn can serve to better define the contours of specific legal issues at the national level.

⁸⁴ See David Nelken, *Comparatists and Transferability*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 437, 441 (Pierre Legrand & Roderick Munday eds., 2003); see also Roberto Garza Barbosa, *The Philosophical Approaches to Intellectual Property and Legal Transplants. The Mexican Supreme Court and NAFTA Article 1705*, 31 *HOUS. J. INT'L L.* 515, 564 (2009); Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 *U. LOUISVILLE L. REV.* 693, 699 (2010) (discussing the complicated nature of transplantation).

⁸⁵ See RICHARD A. POSNER, *LAW AND LEGAL THEORY IN ENGLAND AND AMERICA* 21–30 (1996) (describing differences in American and European judiciary systems); see also Jeffrey L. Friesen, *When Common Law Courts Interpret Civil Codes*, 15 *WIS. INT'L L.J.* 1, 12–13 (1996). But see Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 *HARV. L. REV.* 31, 84–90 (2005) (criticizing the use of foreign law in *Roper v. Simmons*).

Finally, in order to welcome a large number of scholars, it remains important that intellectual property scholars worldwide continue to avoid requiring complex methodologies for those conducting, or attempting to conduct, legal comparison. As mentioned earlier, to date, intellectual property scholars have been largely immune to the doctrinal quibbles that have characterized other areas of comparative law. This is an important strength of the comparative intellectual property academic community, which should be maintained.⁸⁶ Of course, comparative legal analysis should be conducted with rigor and scholarly precision, but we should not dictate a specific, “perfect” or “single exclusive method,” to follow for scholars who engage in comparison, especially at the beginning.⁸⁷ For example, we should not impose the requirement that scholars necessarily turn to the original language documents when scholars do not speak that language; English translations of many legal documents are already appropriate and sufficient sources to conduct comparative legal analyses. More specifically, all scholars who desire to conduct some comparative analysis should be welcome to do so. Scholars should, instead, be led to follow an incremental approach in their analyses, or “a sliding scale of methods,”⁸⁸ and select the best approach that scholars would prefer based on “the specific purpose of the research . . . and the affordability of the costs.”⁸⁹ Ultimately, engaging in comparative legal analysis always benefits intellectual property scholars, at every level of engagement, and those already engaging in comparative legal analysis should facilitate that more scholars enter the field and encourage them.

CONCLUSION

This Essay has highlighted the important role of comparative legal analysis as a scholarly methodology and advocated that the relevance of this methodology could be strengthened amongst intellectual property scholars in the U.S. In particular, this Essay has supported that comparative legal analysis can offer additional information about diverse perspectives on the justification of intellectual property norms

⁸⁶ See *supra* Part II.

⁸⁷ Palmer, *supra* note 21, at 290.

⁸⁸ *Id.*

⁸⁹ *Id.*

and the application of these norms in different national contexts. This information is relevant to all scholars, including all of us in the U.S., for a more comprehensive evaluation of a variety of intellectual property issues, as intellectual property laws remain territorial laws despite decades of intensive international harmonization.

Certainly, comparative legal analysis brings about challenges, such as the need to search for and the use of foreign legal materials, understanding foreign languages or navigate possible ambiguities in legal translation, or even the need to become exposed to foreign legal systems from a cultural and sociological standpoint. Hence, in the majority of instances, the benefits of comparative legal analysis compensate for the challenges created, primarily the ability to better understand legal and cultural differences. This understanding is crucial to promote additional collaboration amongst scholars, policy makers, judges, and other legal actors in different countries.

Ultimately, comparative legal analysis teaches us about possible alternatives and different insights. Some of these are necessarily provocative and controversial. Moreover, comparative legal analysis may take many of us outside our comfort zone and the comfort of our national legal system. Yet, it always teaches us something new and valuable, and thus it should become an important methodology for all of us in the field of intellectual property law.