COMPARATIVE LEGAL RESEARCH IN COPYRIGHT IN THE DIGITAL AGE: NATURE, SIGNIFICANCE AND METHODOLOGICAL STEPS

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Abstract

The law of Copyright, like all areas of Intellectual Property Law, is governed by the principle of territoriality, i.e., the Copyright legal framework of a particular nation is applicable only within its territorial limits. However, with the ushering of the digital age, the creation, utilisation and dissemination of information in general and copyrighted works in particular, have become transnational in character. Therefore, while endeavouring to research in the field of Copyright in the digital age, it has become pertinent to understand and examine legal institutions, provisions and jurisprudence across plural jurisdictions to achieve relevant research outcomes. This paper seeks to explore the nature and significance of comparative legal research in the area of Copyright law in the digital age, and understand its efficacy in attaining the short-term as well as long-term objectives. The paper further seeks to elucidate the various methodological steps to be employed while undertaking comparative legal research in the area of Copyright law in the digital age.

I. Introduction

A NOTEWORTHY trend in legal research methodology is the coming of age of comparative law in the present century.[1] It is said that society is increasingly being governed, not by domestic laws, or international law, but by transnational law. Transnational law is defined as "*the pluralistic order of various principles and rules from divergent customs, cultures, and communities that draws its lexicon from competing philosophical discourses and not from top-down, coercive commands of states or sovereigns.*"[2] Transnational law has also been

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[1] W.J. Kamba, "Comparative Law: A Theoretical Framework" 23 *International and Comparative Law Quarterly* 485 (1974).

[2] Allen Porter Mendenhall, *Transnational Law: An Essay in Definition with a Polemic Addendum* 6 (Libertarian Alliance, London, 1st edn. 2011), *available at*: http://www.libertarian.co.uk/?q=node/326 (last visited on Dec. 8, 2020).

described as "*the law of global democracy, the law of global governance.*"[3] This century has also been crowned as "*the age of comparative law*."[4]

Another trend, propelled by similar reasons as those responsible for the palpable prominence of comparative legal research, *i.e.*, globalisation and digitisation, has been the transforming paradigms of Copyright law in the digital age. The predominant cause of such transformation is that traditional copyright principles conceived in the analog world of hard copy, simply do not work when applied to the Internet.[5] For instance, prior to the digital technological advances, the accepted view was that private copying for personal use is harmless, which no longer holds true for personal uses on the Internet.[6] The Internet is a transnational space[7] which is characterised by the interplay between transnational legal spheres resulting in a continuous exchange of norms which in turn creates a newer, altered form of normative order. The interaction of these norms with the black-lettered Copyright legislations has impelled legal research in the arena of Copyright in the digital age.

A conjoint comprehension of the aforementioned twin trends in legal research drives home a presumption that while endeavouring to research in the field of Copyright law, whether to formulate a theory, analyse any aspect of the Copyright law, or to conduct an impact-assessment of a legal amendment, restricting the study to a single legal jurisdiction may neither be sufficient for a researcher to conduct a comprehensive research, nor enable him/her to derive accurate conclusions. It may become pertinent to understand and examine the legal institutions, provisions and jurisprudence across plural jurisdictions to achieve relevant research outcomes leading to the employment of comparative legal research while researching Copyright in the digital age. This paper seeks to explore the nature and significance of comparative legal research in the area of Copyright law in the digital age, and understand its efficacy in attaining the short-term as well as long-term objectives. As comparative legal research has often been criticised for having no settled principles,

[3] Harold Hongju Koh, "Why Transnational Law Matters" 24 *Penn State International Law Review* 750 (2006).
[4] Esin Orucu, "Developing Comparative Law", in Esin Orucu and David Nelken, *Comparative Law: A Handbook* 44 (Hart Publishing, Oregon, 1st edn., 2007).
[5] Diane Leenheer Zimmerman, "Finding New Paths through the Internet: Content and Copyright" 12 *Tulane Journal Of Technology And Intellectual Property* 145 (2009).
[6] Lewis A. Kaplan, "Copyright in the Digital Age" 49 *Journal of the Copyright Society of the U.S.A* 1 (2001).
[7] Joseph A. Cannataci and Jeanne Pia Mifsud Bonnici, "Can Self-Regulation Satisfy the Transnational Requisite of Successful Internet Regulation?" 17(1) *International Review of Law Computers & Technology* 51 (2003).

standards, guidelines or rules,[8] the paper further seeks to elucidate the various methodological steps to be employed while undertaking comparative legal research in the area of Copyright law in the digital age.

II. Copyright in the Digital Age: Breeding Ground for Research Problems

The choice of research methodology is guided by the nature and objectives of a particular research endeavour. Hence, it is not plausible to understand the significance of employing comparative research methodology for researching Copyright in digital era without having first developed an understanding of the nature of the subject matter of research.

The digital era has metamorphosed the architecture within which knowledge is generated, exploited and disseminated, and has posed unprecedented challenges to the governance of intellectual property rights generally, with the biggest conundrums being encountered in the field of Copyright law. Limitations and exceptions to copyright has been at the heart of the flux that Copyright law is undergoing in the digital age. The reasons for the same range from the wide scope of copyright protection, both in terms of subject-matter qualified for protection as well as the exclusive economic rights bestowed upon the owner, to the rampant activities in the digital space worthy of being permitted uses of copyrighted works.

The emergence of new technology and business models have necessitated the broadening of the scope of limitations and exceptions to copyright in order to allow legitimate uses and to respect the interests of the users as much as those of the owners,[9] for example, 'cloud' or internet music locker services allow their users to upload their music to the services' internet servers in order to listen to it from anywhere in the world.[10] Moreover, in the digital age or the "*age of access*", there is a fundamental shift in our understanding of the logic of production, distribution and consumption, with a shift from conventional notions of the market to the idea of networks.[11] Digital technologies have resulted in decentralized production, bolstering a shift from centralized to small and local production, and lowering of

[8] Charles Manga Fombad, "Comparative Research in Contemporary African Legal Studies" 67 *The Journal of Legal Education* 984 (2018).
[9] Bruce Kilpatrick, Pierre Kobel, *et al.* (eds.), *Anti-Trust Analysis of Online Sales Platforms & Copyright Limitations and Exceptions* 292 (Springer Publishing, New York, 1st edn., 2018).
[10] Brandon J. Trout, "Infringers or Innovators - Examining Copyright Liability for Cloud-Based Music Locker Services" 14 *Vanderbilt Journal of Entertainment & Technology Law* 729 (2012).
[11] Lawrence Liang, "Copyright, Cultural Production and Open-Content Licensing" 1 *Indian Journal of Law and Technology* 96 (2005).

transactions costs.[12] Thus, a strict interpretation of copyright law can easily make every single act of reading, viewing or listening to copyrighted materials an interminable series of copyright infringements.[13] Perhaps there is a need for recalibration of the balance between owners' rights and users' interests, as when we try to balance rights against exceptions, the scales are already weighted on one side.[14]

Evidently, a plethora of questions relating to the limitations and exceptions to copyright, currently operative across legal systems, deserves critical attention- are they efficacious in tackling the situations and challenges in the digital era? Are they hindering legitimate trade and business interests? Are they unfairly skewing the balance of copyright in favour of owners? Must they be flexible or rigid? Must the list of limitations and exceptions be open-ended like the American 'fair use' model or closed-ended like the Indian 'fair dealing' model? Must all of them be mandatory or some may be optional?[15] The scenario presents an exciting opportunity for legal researchers in the field of Copyright law as the fundamentals of the subject are in a state of renovation and the field is, therefore, a breeding ground for research problems.

III. Comparative Legal Research Methodology in Study of Copyright in the Digital Age

Nature of Comparative Legal Research

Comparison among legal systems is as old as law itself, with the goals of such comparison ranging from investigation of historical and philosophical aspects of law, or improving one's own legal system, to improving one's position in international relations.[16] However, the researchers of pre-modern times hardly discussed the methodology of comparative law theoretically. It was only in the modern period that a systematic method capable of claiming

[12] Deven R. Desai, "The New Steam: On Digitization, Decentralization, and Disruption" 65 *Hastings Law Journal* 1469 (2014).
[13] Amira Dotan, Niva Elkin-Koren, *et al.*, "Fair Use Best Practices for Higher Education Institutions: The Israeli Experience" 57 *Journal of the Copyright Society of the U.S.A* 447 (2010).
[14] David Vaver, "Copyright and the Internet: From Owner Rights and User Duties to User Rights and Owner Duties" 57 *Case Western Reserve Law Review* 731 (2007).
[15] *Supra* note 9 at 293.
[16] Fabio Morosini, "Globalization & Law: Beyond Traditional Methodology of Comparative Legal Studies and an Example from Private International Law" 13 *Cardozo Journal of International and Comparative Law* 541 (2005).

to be scientific in theory and practice was put forward.[17] As Globalisation created conditions for forming a single social, political, economic, and cultural space and fuelled debates for forming of a single legal space[18], it also generated renewed interest in the development of a newer, more systematic approach towards conducting comparative legal research. The development of a new economy on the basis of advanced information technologies only helped further this trend towards methodological development of comparative legal research.[19]

Comparative jurisprudence is now acknowledged as a scientific discipline having its own subject-matter and methodology.[20] Any comparative legal research would normally be designed for a specific purpose, and thus, the exact methodology adopted would depend on the specific purpose to be served. Also, comparative research methodology would differ according to the type of the researcher, so, the methodology employed by academics, by courts, by advisors to a parliamentary committee, or by a legislature involved in drafting a new statute, may differ significantly.[21] The nature of comparative legal research shares three central characteristics of legal research in general, albeit with some specificities: It is hermeneutic, *i.e.*, it takes the insider's view on all the legal systems under comparison; it is institutional, *i.e.*, it extracts the desired legal knowledge from the structures and functioning of the relevant institutions; and it is interpretative, *i.e.,* it entails the interpretation of both the target legal system as well as one's own.[22]

Comparative legal research witnessed a tendency among post-globalisation researchers to advocate for harmonisation or unification of laws for the entire globalised world.[23] This tendency was representative of the convergence approach[24] of comparative legal research that focuses more on cultivation of similarities, than the understanding of differences among legal systems. However, it was soon realised that it would be unrealistic to expect the whole world

[17] Li Fang, "The Methodology of Comparative Law" *Asia Pacific Law Review* 31 (1994).
[18] Kh. N. Bekhruz, "Comparative Legal Research in an Era of Globalization" 5 *Journal of Comparative Law* 94 (2010).
[19] *Ibid.*
[20] H. Behruz, "Comparative International Law: Interaction of Comparative Jurisprudence and International Law" 11 *Journal of Comparative Law* 76 (2016).
[21] Mark Van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* 123-24 (Hart Publishing, Oxford, 1st edn., 2004).
[22] Mark Van Hoecke (ed.), *Methodologies of Legal Research- Which Kind of Method for What Kind of Discipline?* 167 (Hart Publishing, Oxford, 1st edn. 2011).
[23] *Id.* at 157-158.
[24] *Supra* note 9.

to follow one rule system, one language and culture, or one law. While global uniformity was an idealistic vision, it would rob the world all the colourful differences of human existence, making it both boring, as well as repressive.[25] The convergence approach stands in contrast to the non-convergence approach that emphasises that legal diversity be cherished.[26] There is a growing acceptance of the non-convergence approach in wake of postmodern globalisation, not necessarily because of an enlightened embrace of diversity, but because of the realised experience of the persistence of pluralising particularities.[27] With the augmentation of transnational activities, conflicting laws of concurrent jurisdictions are increasingly being compared. Therefore, it is pertinent for a legal researcher to understand the exact method for such comparative legal research, the objectives that comparisons serve, the phenomena to be compared, and how to actually compare them.[28]

Significance of Comparative Legal Research in Researching Copyright in the Digital Age

Any legal research conducted in the field of Copyright in the digital age, would commonly entail the examination of the nature of the digital space, the analysis of the operation of existing Copyright laws in the digital space, and examination of their efficacy or otherwise in tackling the unique problems faced in the digital space. This being the case, it is of utmost relevance to understand that while Copyright laws are territorial, their operation, as well as the digital space, is not.

The digital space is a virtually connected and transnational space which pervades the globalised, interconnected world, going beyond impregnable physical territoriality; it is also instantaneous, facilitating communication to the entire world at the click of a button, such that a single act of communication can violate some national Copyright laws, while conforming to others. Let us consider the case of the imposition of a "*link-tax*" for online content sharing by the European Union Directive on Copyright in the Digital Single Market.[29] While the said tax is to be imposed only within the European Union cyberspace, the European Union cyberspace is accessed and utilised by users across the globe, affecting their

[25] Werner Menski, *Comparative Law in a Global Context- The Legal Systems of Asia and Africa* 3-4 (Cambridge University Press, London, 2nd edn., 2006).
[26] *Supra* note 9.
[27] *Supra* note 25 at 46.
[28] Hiram E. Chodosh, "Comparing Comparisons: In Search of Methodology" 84 *Iowa Law Review* 1025 (1999).
[29] European Commission, *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, COM/2016/0593 final-2016/0280 (COD), Brussels (2016).

users' rights with respect to copyrighted content in the digital space. In such a scenario, a research endeavour assessing the appositeness of the concept of link tax is required to gauge the concept and its impact on the Copyright users' rights not only in light of the European Union Copyright law, but also other countries laws, as the link tax will impact the users' rights of non-European citizens alike. Further, in case the researcher concludes against the adoption of the link tax, it would be judicious to put forward an alternative remedy for copyright infringement caused by linking, for which it would be important to observe and analyse remedies adopted by other nations, as linking would create similar problems to Copyright enforcement everywhere.

Let us consider another example of a research on the principle of exhaustion or the 'first sale' doctrine in Copyright in the digital age, focusing on a country following the principle of national exhaustion. The research would entail an assessment of challenges encountered by the country under study, in regulating transactions of copyrighted digital content. These transactions are likely made among nationals of different countries, subject to different national copyright legislations. Therefore, the research would seek to determine the impact of the principle of national exhaustion of the country under study, on regulation of transactions of Copyrighted digital material over the internet, thereby requiring a comparative understanding of the exhaustion principles of different countries. Another example would be a research analysing the challenges of Copyright enforcement in the digital age. The research would engage in understanding the various types of infringements of Copyright over the internet. An analysis of infringement by 'communication to public' of a Copyrighted work over the internet without the authorisation of the Copyright owner cannot be restricted to a single country. The extent and impact of infringement can be understood only after taking into consideration the successive and/ or simultaneous 'communication' of such work made to a 'public' transcending several national borders, thereby including within the ambit of the research, infringements committed in various national jurisdictions. Therefore, the significance of comparative research in undertaking research in Copyright in the digital age cannot be denied, and prompts a detailed enunciation of the methodological steps involved.

Mapping the Methodological Steps Involved

Broadly speaking, methodology is the way in which a researcher conducts research or the manner in which he chooses to deal with a particular question.[30] Comparative research methodology is "*not only…a method of thinking…but also a method of working*".[31] The methodological steps in undertaking a comparative legal research in Copyright law in the digital age would involve finding answers to the following four questions:

Why are we comparing?

The first step would be to understand why comparative legal research is the best-suited methodology in view of the research objectives envisaged, and research questions or hypotheses contrived. Every research can be said to constitute a "*Research Pyramid*" which consists of four levels: research paradigms (how the researcher views reality), research methodology (a way to conduct the research that is tailored to the research paradigm), research methods (specific steps of action that need to be executed in a certain order), and research techniques (practical tools for generating, collecting and analysing data).[32] The research paradigm or perceived reality of the researcher and the way in which he wishes to alter this reality would determine the requisite methodology.

In any scientific discipline, reliable and verifiable knowledge would only be possible by means of the application of a critically justifiable methodology.[33] The type of legal research to be undertaken should be the basis on which an appropriate evaluation of different methodological approaches should be carried out. The sole criterion which should permit the assessment of different methodological approaches is the criterion of efficiency. Efficient problem-solving would mean "*methodological optimised problem-solving by way of the application of a logical, precise and clear work order*."[34]

[30] Jan Jonker and Bartjan Pennink, *The Essence of Research Methodology* 17 (Springer Publishing, London, 1st edn., 2010).
[31] Simone Glanert, "Method?", in Pier Giuseppe Monateri (ed.), *Methods of Comparative Law* 61 (Edward Elgar Publishing, Cheltenham, 1st edn., 2012).
[32] *Supra* note 30.
[33] T.P. van Reenen, "Philosophical Underpinnings of Modern Comparative Legal Methodology" 7 *Stellenbosch Law Review* 37 (1996).
[34] Lutz-Christian Wolff, "Structured Problem Solving: German Methodology from a Comparative Perspective" 14 *Legal Education Review* 33 (2003).

According to Otto Kahn-Freund, comparative law "*is the common name for a variety of methods of looking at law, and especially of looking at one's own law*".[35] Comparative research methodology may be appropriate for research studies which entail the examination of parameters which are inherently transnational in character, like the impact of internet technology on a phenomenon like the prevailing legal paradigm of copyright, and also for studies in fields which have been at the centre of legal reform in most countries around the globe, as in the case of limitations and exceptions to Copyright.

Whom are we comparing?

The second step, after having ascertained the utility of comparative research methodology for the research underway, would be to select the subjects of comparison or the entities to be compared. The entities under comparison should satisfy the test of comparability. Comparability means some point of commonality among the subjects, as apparent from the research paradigm, against certain parameters relevant to reach the research outcomes. Comparability is part and parcel of positive legal reality.[36] The comparability of subjects, or *tertium comparationis*, may be determined according to the following six criteria- the subjects of comparison must be appropriate for finding answers to the research questions; they must be effective, *i.e*., they must have properties which are factually in consonance with the research paradigm; these properties must be independent of the context so as to enable neutral comparison; these properties must be accurately termed; these properties must be such that they remain constant over a significant period of time; and they must be verifiable statistically or in any other objective manner.[37]

This stage would be primarily concerned with the identification of subjects of comparison according to their comparability, which would then be followed by their systematic comparison, where these subjects are analysed against each of the aforementioned properties in order to see whether these subjects conform to or deviate from these properties, and how they deviate from one another.[38] The comparability of countries to be identified for

[35] Geoffrey Samuel, "Comparative law and its methodology" in Dawn Watkins and Mandy Burton (eds.), *Research Methods in Law* 100 (Routledge, Oxon, 1st edn. 2013).
[36] T.P. van Reenen, "Major Theoretical Problems of Modern Comparative Legal Methodology" 28 *Comparative and International Law Journal of South Africa* 175 (1995).
[37] Oliver Brand, "Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies" 32 *Brooklyn Journal of International Law* 405 (2007).
[38] *Ibid.*

researching Copyright in the digital age could be decided against the following properties: the term of protection of Copyright, the subject-matters of protection, the exclusive economic rights comprised in Copyright, the permitted uses of protected works, the licensing provisions and the technology protection measures, and most importantly, their legislative and judicial response to alteration of the functioning of Copyright in the digital era.

How are we comparing?

The third step, after having aptly selected the subjects of comparison, would be to employ the precise method to carry out the aims of the comparative legal research. This step would predominantly involve descriptive research. Descriptive research involves different kinds of surveys and fact-finding enquiries. The major purpose of descriptive research is description of the state of affairs as it exists at present.[39] This step entails a detailed description of internal dynamics and principles of the legal concepts, institutions, legislations, judicial decisions, and scholarly opinions of the countries being compared. Description would be followed by a normative inquiry where questions are raised regarding the justifiability of legal rules or principles and their efficacy in achieving the goals of law.[40] The method employed for description would be a key methodological step. It is contended that the description of subjects of comparison may be carried out by applying the functional method of comparison, not in its classical form, but by synthesising it with other methods as put forth henceforward.

In 1971, Konrad Zweigert hypothesised, "*The basic methodological principle of all comparative law is that of functionality.*"[41] The functional method of comparison has been dubbed the "*basic methodological principle of comparative law*" and "*the centre of all methodological discussions*"[42]. Functional method is a genus, and not a species; all functional comparative methods share certain characteristics. Firstly, the method emphasises on actual facts, rather than on doctrinal structures and arguments. Therefore, the functional method would tend to place more importance on the impact of law or 'law-in-action', than on its bare provisions. Judicial responses to actual situations thus assume great significance, and

[39] C.R. Kothari, *Research Methodology- Methods and Techniques* 2 (New Age International Publishers, New Delhi, 2nd edn. 2004).
[40] *Supra* note 22 at 157-158.
[41] Konrad Zweigert, "Methodological Problems in Comparative Law" 7 *Israel Law Review* 465 (1972).
42 A.V. Tkachenko, "Functionalism and the Development of Comparative Law Cognition" 5 *Journal of Comparative Law* 71 (2010).

countries are compared by assessing similar or different judicial responses to similar situations. Secondly, the functional comparative method assesses these facts as per their societal context. Law and society are considered to be distinguishable but functionally related. Thirdly, institutions, both legal and non-legal, even when they are doctrinally distinct, are considered comparable provided they are functionally equivalent in different countries. Finally, the method supposes that functionality is the criterion for determining the efficacy of a particular law, *i.e.*, whichever law is performing its intended function in a more efficient manner is the better law.[43]

The functional method, when employed to the research of Copyright in the digital age, would be likely to focus on comparing those aspects which determine its functional efficacy in the digital age, for instance, the magnitude of infringements in the digital sphere, the legislative amendments made to bring the law in tune with technological advancements, and the judicial interpretation of such reforms. These aspects would then be assessed in light of the particular national culture as a sub-culture of the pervasive internet culture. The existing legal provisions of Copyright in the countries under comparison would be evaluated to check their efficiency in tackling the challenges posed to Copyright by digital developments.

Although the functional method has often been criticised for its particularism (the fact that it is unrelated to the socio-economic and historical circumstances), externalism (marked by a lack of "*immersion*", *i.e.*, a failure in understanding the underlying ideas existing in foreign countries from an insider's point of view), and ethnocentricity (excessive focus on the comparison of American and European legal systems, while neglecting other societies),[44] it is contended that all these lacunae may be overcome by employing supplementary methods.

The lacuna of particularism maybe overcome by employing "*conceptual comparisons*" which uses fundamental legal concepts as parameters for comparison, and not legal concepts as they exist in a particular country. Conceptual comparisons operate in two phases. The first phase is that of "*conceptual orientation*", where the researcher constructs logically precise, abstract, and unambiguous models or "*comparative concepts*". The main objective of the first phase is to establish a standard for comparability in the form of a concept. The second phase is that of

[43] Ralf Michaels, "The Functional Method of Comparative Law", in Mathias Reimann and Reinhard Zimmermann (eds.), *Oxford Handbook of Comparative Law* 342 (2006).
[44] *Supra* note 37.

"*systematic comparison*", where the laws or judicial decisions or institutions of each country under comparative study are matched and assessed against these concepts. The final goal of conceptual comparisons is to assess how these different concepts converge or diverge.[45]

The lack of immersion of functionalism may be nullified by describing the functional characteristics of each subject of comparison or each country, using the approach of "*differential comparison*" as proposed by Ute Heidmann which emphasises that the researcher should beware of falling prey to "*perceived commonness*" or prima facie similarities among countries being compared, and should take into account "*fundamental differences*" in their cultural contexts.[46] Critics of differential comparison, like Zweigert and Kotz, contend: [47]

> As a general rule developed nations answer the needs of legal business in the same way or in a very similar way and indeed it almost amounts to a "*praesumptio similitudinis*", a presumption that the practical results are similar.

However, the approach of *praesumptio similitudinis* may be fatalistic for a comparative legal study as it may inflict the researcher with a 'similarity bias' and make him lose sight of pivotal differences, thereby affecting the veracity of the research outcomes. It is absolutely imperative that the comparative legal researcher respects the internal coherence of other systems and makes a sincere effort to understand and evaluate them on their own terms[48]; contextualisation of the analysis of legal rules and case law is must for a purposeful comparison between countries.[49] The essence of comparative research methodology is to acquire deep and genuine understanding of different legal systems by overcoming the barriers of cultural differences, while still keeping our understanding honest and unbiased. Thus, comparative law should have a cosmopolitan goal, and comparative legal researchers must

[45] *Supra* note 37.
[46] Geoffrey Samuel, "Comparative Law and its Methodology" in Dawn Watkins and Mandy Burton (eds.), *Research Methods in Law* 100 (Routledge, Abingdon, 1st edn., 2013).
[47] *Id.* at 104-105.
[48] Gillian Hadfield, "The Strategy of Methodology: The Virtues of Being Reductionist for Comparative Law" 59 *University of Toronto Law Journal* 223 (2009).
[49] Sanne Taekema and Wibren van der Burg, "Introduction: The Incorporation Problem in Interdisciplinary Legal Research" 8 *Erasmus Law Review* 39 (2015).

abandon prejudiced views and cultivate a genuine understanding of a different legal system as much as possible.[50]

The criticism on the ground of ethnocentricity laments the fact that majority of functional comparative research studies compare countries such as America and the European countries; they tend to hail their laws and legal systems as functionally proficient and seem to suggest that other countries adopt their laws, showcasing an oppressive desire to dominate the world with their own legal rules and chest-thumping their self-proclaimed legal superiority. However, this seems to be a critique of the dominant trend in functional comparative legal research, and not of the functional comparative method itself. Thus, when the method is applied in unbiased manner ethnocentricity should have no bearing on the quality of the method. Further, ethnocentricity may be countered by conducting "*vertical comparison*". The functional approach would also be conducive for both horizontal as well as vertical methodologies of comparative legal research.[51] Vertical comparison would not only include the analysis of successive forms of the same legal system, but also the comparison between systems, or legal institutions, that belong to different tiers. Moreover, vertical comparison could aid in the development of a "*common zone of impact*", *i.e.*, "*local events can have global consequences, and that on the other hand global developments materialize locally*".[52] This would make the approach squarely suited for researching the digital space which represents a common zone of impact.

What to do after comparing?

The fourth and final step, after the completion of the task of comparison, would be to draw inferences and conclusions to ultimately test the hypotheses. This step would engage in an analytical research of the similarities and differences among subjects of comparison as described in the previous step. Analytical research makes use of facts or information already available, and scrutinises them to make a critical evaluation of the material.[53]

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[50] Siyi Huang, "The Cosmopolitan Goal (Ideal) of Comparative Law: Reassessing the Cornell Common Core Project" 3 *Cambridge Journal of International and Comparative Law* 795 (2014).
[51] Roberto Scarciglia, "Comparative Methodology and Pluralism in Legal Comparison in a Global Age" 6 *Beijing Law Review* 42 (2015).
[52] R. Michaels., "Globalization and Law: Law Beyond the State", in R. Banakar and M. Travers (eds.), *Law and Social Theory* 3 (Hart Publishing, Oxford, 2nd edn., 2013).
[53] *Supra* note 39.

Comparative legal researchers, especially those adopting the functional approach, tend to ask causal questions, make causal claims, and rely on causal assumptions; and should also draw causal inferences.[54] Further, comparative legal analysis should be made with a modest realisation that as a comparative legal researcher is seeking to evaluate a foreign law or legal system, his conclusions would be a mere interpretation of the comparative reality rather than the absolute truth. Such an interpretation would be the result of a painstaking intercession between the law-text, the interpreter and the reader, making the interpretation capable of contradiction or invalidation.[55]

The completion of comparative analysis would lead up to the step of writing or presenting the research report. The "*methodology of communication*" of the results of the comparative research is as significant and meticulous as the "*methodology of enquiry*" and though the former is separable from the latter, there must be a thread of coherence connecting them. While the "*methodology of enquiry*" focuses on distillation of objective facts from the cultural contexts of different legal systems, "*methodology of communication*" focuses on the target audience.[56]

IV. Conclusion

It is undisputed that no methodology, no method, no technique can ever be said to be the champion for researching a subject. This paper has analysed the nature, significance and methodological steps of comparative research methodology when employed for undertaking a legal research in Copyright in the digital age.

Globalisation and digitisation has transfused into every walk of life, which has given birth to two distinctive trends; one, the increased emphasis on comparative legal research as the go-to methodology for conducting meaningful research in the contemporary era; and two, the upheaval in the operation of Copyright law as it existed prior to the digital age. The two trends in legal research, when read together, may lead to a conclusion that while researching in the field of Copyright law in the digital age, limiting the research to a single legal jurisdiction may not suffice as a relevant approach or lead to relevant conclusions. Copyright

[54] Christopher A. Whytock, "Legal Origins, Functionalism, and the Future of Comparative Law" *Brigham Young University Law Review*1879 (2009).
[55] Pierre Legrand, "Negative Comparative Law" 10 *Journal of Comparative Law* 405 (2015).
[56] *Supra* note 22 at 172.

law around the world has been witnessing legislative reform as well as judicial attempts at bringing the existing law in congruence with technological advancements, and reconciling the Copyright owners' rights and users' interests in the digital space. Limitations and exceptions to copyright has been at the centre of Copyright law reform in the digital age, with increasing advocacy for strengthening users' interests than bolstering owners' rights in the digital space. The scenario has raised a multitude of questions regarding the implementation of Copyright law in the digital space which require urgent and comprehensive answers. Copyright law in the digital age has, thus, become a seedbed of research problems. This paper has dealt with the methodological issues in research endeavours where answers to these questions are sought to be found by employing comparative legal research methodology.

The methodology of comparative law wasn't addressed adequately by pre-modern comparative researchers theoretically. It was only in the modern period that a systematic comparative methodology began evolving. Globalisation changed the outlook towards comparative research methodology by creating conditions for the formation of a single socio-politico-economic-cultural, and potentially a single legal space. Advanced information technologies only boosted the trend towards methodological development of comparative legal research. It is now accepted that legal research may not always be confined to a single legal system, but may also be required to contain a comparative component.

Although, Copyright laws are territorial in application, the operation of the Copyright laws, as well as the digital space, are transnational in character. Therefore, it would not be credible to understand the digital space by restricting its study to the digital space of a single country. Transnational spaces, facing transnational challenges, may be best dealt with by a transnational methodology. Comparative legal research in Copyright in the digital age is proposed to follow a methodology that would stand on four pillars: a soundly reasoned choice of methodology, carefully identified subjects of comparison, painstakingly employed functional methodology, supplemented by differential comparison conceptual comparison and vertical comparison methods, and a sagacious analysis of the similarities and differences among subjects of comparison. Finally, a concise research report communicating the comparative analysis in an effective manner would conclude the methodological exercise.