Weird Science: The Empirical Study of Legal Writing/Describing Law’s Enterprise: Moving from theory to research question to research design and implementation

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Describing Law’s Enterprise

Moving from theory to research question to research design and implementation

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Zeroing in on a research question

• Dissonance: Theory conflicts with theory or facts.
• Unknown: What knowledge would help resolve the unknown?
• Originating question: This is your BIG question.
• Rationale: This is the reason answering your big question is important.
• Originating question: This is the manageable question you can answer with this study.
Dissonance: Theoretical background & lit review

- Theoretical frame and lit review appears in article:
  Law’s Enterprise: Argumentation Schemes & Legal Analogy
  [http://tiny.cc/legalanalogy](http://tiny.cc/legalanalogy)
  SSRN Abstract # 3205907
  Or use QR code to left

- My dissonance:
  - Legal philosophers deny, transform, or mystify legal analogy
  - Lawyers and judges use it every day without comment
  - We teach it as fundamental skill without theory
Unknown: How lawyers & judges use legal analogy on a day-to-day basis

Originating question: Do lawyers and judges use legal analogy on a day-to-day basis in a manner that reflects normative standards of reasonableness and rationality?
Rationale

• We expect lawyers and judges use it thousands of times per day.
• We teach it as a basic skill.

BUT

• We don’t know how the practice matches to the theory.
• Previous theorists focused usually on appellate decisions, often Supreme Court or high court.
The best account I can give...

**ARGUMENTATION SCHEME: ARGUMENT BY LEGAL ANALOGY**

**Major Premise:** Cited Case and Instant case are relevantly similar in that both have features $f_1 \ldots f_n$, and features $f_1 \ldots f_n$ are relevant to legal category $A$.

**Minor Premise:** Legal category $A$ applies to Cited Case.

**Conclusion:** Legal category $A$ applies to Instant Case.
The rest of the story...

**Critical Questions: Argument by Legal Analogy**

*CQ1 Acceptable Scheme Question:* Do the circumstances of this argument permit application of a Cited Case?

*CQ2 Similarity Question:* With regard to each feature \( f_1 \ldots f_n \), is the feature present both in the Cited Case and the Instant Case?

*CQ3 Relevance Question:* On what basis are features \( f_1 \ldots f_n \), relevant to legal category \( A \)?

*CQ4 Precedent Outcome Question:* Did Cited Case really assign legal category \( A \)?

*CQ5 Relevant Dissimilarity Question:* Are there dissimilarities \( g_1 \ldots g_n \) between Cited Case and Instant Case that are relevant to legal category \( A \)? (These may be differences in facts or in the law that was applied.)

*CQ6 Inconsistent Precedent Question:* Is there some other case that is also similar to Instant Case in that both have features \( f_1 \ldots f_n \), except that legal category \( A \) is not applied in that case?

*CQ7 Binding Precedent Question:* To what extent is the Cited Case binding on the court in the Instant Case?

*CQ8 Precedent Quality Question:* Was the Cited Case wrongly decided?
Specifying question narrows the originating question to a manageable level

- To what extent and how have judges and lawyers used legal analogy in arguments about fair use in copyright cases in the last six years in 200 court opinions and parties’ briefs?
  - Focusing on one body of law and one part of brief/opinion—copyright/fair use—prevents noise from having different bodies of law.
  - Fair use is factor test, so a priori likely to exhibit legal analogy.
  - Recency matters.
  - Sample size large enough to make claims about statistical significance.
  - Opinions from Westlaw and briefs (PDFs) from Bloomberg.

- Downsides
  - 2d and 9th Circuits over-represented.
  - Copyright is statutory body of law (common law might be more canonical)
Pros and cons

• Pros
  • Focusing on one body of law and one part of brief/opinion—copyright/fair use—prevents noise from having different bodies of law.
  • Fair use is factor test, so a priori likely to exhibit legal analogy.
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• Cons
  • 2d and 9th Circuits over-represented.
  • Copyright is statutory body of law (common law might be more canonical)
  • Others?
Unit of analysis?

• “Case use”
  • Use of a case in a segment of the author’s argument.
• More granular than case-cited/document.
• Less granular than every citation.

• This requires:
  • Segmenting texts into argument segments.
  • Assessing use of each case in an argument segment.
Argument segments

(1) Purpose and Character of the Use

[The purpose and character of the use factor strongly favors the rights holder. Coder note: This is a subissue to the fair use issue.] The first factor in a fair use inquiry is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1). A work that adds "further purpose or different character, altering the first with new expression, meaning or message," is often described in the case law as "transformative."\[4\] Campbell, 510 U.S. at 579 (citing Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105 (1990) ("Leval") (coining the term "transformative")). Transformation, in this sense, has a particular meaning. As Judge Leval explains it, a work is transformative if it is "productive"; if it adds "new insights and understandings" for the "enrichment of society." Transformative uses of a copyright work may include, for example, "criticizing the quoted work, exposing the character [*11] of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it." Leval at 1111.

Here defendants' argue that their Guides are potentially transformative in three respects: (1) they abridge plaintiffs' Novels by substantially shortening them; (2) they modify plaintiffs' Novels for a younger audience by removing adult themes; and (3) they add to plaintiffs' Novels by adding a page or two of analysis, two pages of quiz questions, and a few pages of background information.
Argument segments

[Secondary user’s abridgement does not make secondary work transformative. Coder note: This is a subissue to the first factor of fair use.] None of these alterations are sufficient to sustain defendants' fair use claim. As an initial matter, U.S. law no longer protects abridgements as fair use, even in cases where the shortening involves, as Justice Story put it, "real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors." Folsom v. Marsh, 9 F.Cas. 342, 344-45, F. Cas. No. 4901 (C.D. Mass. 1841). Instead, under the Copyright Act, abridgements are generally considered to be derivative works, and the right to prepare them is reserved exclusively to the copyright holder. See Twin Peaks, 996 F.2d at 1376.
Coding case uses

• Rule: Identification of an operative fact or set of them and the normative consequence that flows from them. (“If a secondary use is a fair use, there is no liability for infringement.”)

• Generalization: Assertion by the court that other courts generally do or have held in a certain way on an issue. (“Second Circuit courts require...”)

• Policy: Assertion of a reason underlying a rule. (“Fair use supports the goals of copyright law by...”)

• Quotation: The cited case is quoted.

• Example: The cited case is compared to the instant case. (At least outcome or facts from cited case must be identified.)
While some transformative uses may change the original work, that is not necessary, as a “transformative use can also be one that serves an entirely different purpose.” *The Authors Guild, Inc. v. HathiTrust*, No. 11-cv-6351(HB), 2012 WL 4808939, at *11 (S.D.N.Y. Oct. 10, 2012) (full copies of books made by digital archive were transformative “because the copies serve an entirely different purpose than the original works”); accord *Bill Graham*, 448 F.3d at 609 [(2d Cir. 2006)] (use is transformative where the defendant’s purpose in using images “is plainly different from the original purpose for which they were created”); *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 324 (S.D.N.Y. 2008) (defendants’ use “transformative because they put the song to a different purpose”); A. V. *ex rel Vanderhye v. iPandigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009) (a use “can be transformative in function or purpose without altering or actually adding to the original work”).
Use a relational database

- Excel does not cut it when you have complex data.
Relational database allows many-to-one, one-to-many, and many-to-many relationships.