

Interpretive Complexity in Copyright and Trademark: Comparing Substantial Similarity and Likelihood of Confusion

Zahr K. Said

Assistant Professor, University of Washington School of Law

This paper builds on existing scholarship that argues variously, that copyright law’s method for determining substantial similarity is inconsistent, not transparent, unfair, and/or otherwise flawed. In my version of this critique, copyright cases appear routinely to make determinations about works without acknowledging that they are in fact deploying a particular method of interpreting the works. In so doing, judges in copyright cases are denying what I have elsewhere termed “copyright complexity,” and proceeding as though expressive works need no interpretation, or at least none worth explaining. At key “interpretive pressure points,” judges in copyright cases concerning expressive works confront questions about their interpretive methods that may determine crucial legal issues. By not acknowledging these interpretive pressure points, judges submerge important elements in their decision-making that could matter to the outcome at bar and to future courts wishing to assess the weight and substance of the precedent. This is perhaps nowhere truer than with respect to copyright’s substantial similarity analysis. This paper looks at trademark law’s likelihood of confusion standard and argues that—in spite of the criticism it routinely receives—it may be doing a pretty good job, methodologically speaking. As with copyright, trademark law requires substantive comparison of two things, one of them an allegedly infringing thing (work, or mark), the other, the complainant’s prior-existing thing. Both areas of law must, at more than one point in ongoing litigation, compare two things to determine how to allocate rights in those things. Trademark law has developed a robust—if imperfect, especially in application—set of factors that are intended to be balanced in particular ways in considering whether two works are so similar as to be found infringing under trademark law. Granted, the factors are not consistently applied. On the contrary, both empirical and doctrinal work has argued that these factors are often set aside in favor of other rationales. Still, such departures from methodology are more readily visible precisely because of the steps the court should be taking, but isn’t. That is, trademark acknowledges its complexity, and has a set of enumerated tools for managing it (or trying to do so). Copyright, by contrast, fails almost entirely to acknowledge its interpretive complexity, let alone the interpretive moves judges make when confronted with this complexity. I argue that juxtaposing the two critical tests illuminates that difference in interpretive aptitude, and suggests the importance of developing some ways for judges to make their responses to copyright complexity fairer, more rigorous, more competent, and more consistent.