

Substantial Similarity and Psychological Similarity: Perfect Strangers

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Questions of similarity and dissimilarity are central to both the study and practice of intellectual property law. Trademark law's basic consideration in determinations of infringement is consumer confusion. Similarity of marks is a basic measure of the likelihood of confusion and the concept of confusion itself – the misidentification of one object with another – is, in some ways, a very basic measure of the psychological concept of similarity. Copyright law explicitly uses similarity (and its extent) as the benchmark for infringement.

Although copyright law protects against unauthorized copying that wholly reproduces an original work, it goes significantly further than absolute reproduction and extends to the copying of protected expression that renders a new work substantially similar to the original. In most questions involving substantial similarity, and, in fact, if the test is to have any real reach and significance, the question of copying moves further from cases of pure identity (through absolute reproduction of a copyrighted work) toward works that are similar to some greater or lesser extent in their material attributes or, in certain cases, their structure and arrangement: this is true whether the basis of the complaint alleging infringement is that the copying violates the right of reproduction or the right to prepare derivative works. In other words, the test moves from protection of the whole as the whole (absolute reproduction), to protection of the whole through its features or attributes. It is this movement that describes the boundary of protection for a particular work. Although the integrity of the test for substantial similarity ultimately lies in its diagnostic capacity in cases where something less than the total work has been copied, current doctrine fails to provide a full and satisfying explanation of the underlying concept of similarity and its components, considerations, and distinctions.

Similarity is also fundamental in the study of cognitive psychology and a large body of research in that field suggests that judgments of similarity depend more upon the existence and extent of common or disparate organization (relational similarity), than the existence and extent of common or disparate features (attributional similarity). Though works exhibiting originality in their structure and arrangement are copyrightable, the kinds of structural characteristics that are typical of relational similarity are ordinarily more idea than expression. Nevertheless, works often exhibit relational similarity of a different type which is highly predictive of perceived similarity and which is revealed only when common higher-order relationships are explored. These similarities and differences are much more likely to affect individual judgments of similarity than common features with little to no analogical relationship.

Because copyright law protects against unauthorized reproductions and derivative works that are substantially similar to the original work, it would be useful for the doctrine to take into account the different ways in which works exhibit similarity and more clearly distinguish among different aspects of perceived similarity. The goal of this article will be to identify some of those distinctions and consider whether the current doctrine does or should account for them.