Comparing Substantial Similarity and Likelihood of Confusion:  
A Metacritical Analysis of Copyright and Trademark

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This paper builds on existing scholarship that argues, variously, that copyright law’s method for determining substantial similarity is riddled with aesthetic judgments; biased; not transparent; inconsistent; methodologically unprincipled; 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, thus submerging important elements that could matter to the outcome at bar and to future courts assessing the weight and substance of the precedent. This paper takes the counterintuitive position that trademark law could offer copyright some lessons about methodological transparency. Specifically, it 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.

Notwithstanding the very real differences in the purposes of trademark and copyright law, the two analytical patterns share some common features and assumptions, even while diverging in important ways. Significantly, however, trademark law possesses what is—or what could be, as applied—a much more methodologically transparent way to approach this legally determinative analysis of two things. Where they depart from trademark law’s methodologies, courts can thus more clearly be seen to be favoring certain rationales or purposes—what Greg Lastowka has termed trademark’s “daemons”—rather than following methodological consistency. Copyright, by contrast, fails almost entirely to acknowledge its own methodological priors. In this project, I juxtapose the two critical tests, substantial similarity for copyright and likelihood of confusion analysis for trademark law, to offer a metacritical examination of their respective methodologies, with a normative view of the importance of methodological transparency.