

Close and Distant Reading in Copyright's Infringement Analysis

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As everybody who's ever come near a copyright law scholar knows, infringement doctrine is all messed up. Substantial similarity isn't what it sounds like to the jury—the party often charged with determining it in the highest-stakes cases—and among the parties and judges there is often significant confusion over what the test requires and measures, and why. In prior work, I have argued that judges often gloss over important analytical steps they necessarily make in their adjudications, interpretive choices that require that they choose to focus on text or context, and that they use intuition or analysis as their mode of approach. These choices affect their own decisionmaking as well as shaping how they determine what the jury will see, and potentially, whether a case might need to go to a jury in the first place. This Article argues that one crucial piece of the puzzle that has been overlooked is a shift in kinds of reading—broadly taken to include all forms of reception—that happen in copyright trials, whether infringement is decided ultimately by the judge or jury. In many cases, the kind of reading required is “close” reading, which possesses certain interpretive rules, capacities and limitations. In other cases, the reading is “distant,” which likewise has its own hermeneutic profile. An excellent article by Margot Kaminski and Guy Rub identified one part of this change in focal distance in their article on “zooming in” and “zooming out” of copyright law. Their work illuminates the chicanery that can result from manipulations of focus. Important work by Mark McKenna and Mark Lemley likewise highlights the unfairness created by the malleability of scope with respect to the protected elements in IP generally. There is an additional as yet unremarked piece, however, that implicates the jury. Distant reading typically requires not just a different lens for ascertaining the thing and the scope of its protection, but also reference to a corpus (of knowledge or art or law). That is, distant reading requires familiarity with a body of work or familiarity with a body of precedents. This corpus is outside the frame of the case, yet crucial to the acts of reading required in the case. Of course, litigation makes this plain, from John Fogerty's playing his guitar for the jury to show them how he sounds to Robin Thicke and Pharrell Williams's attempts to situate their work in a lineage whose similarities could thus be seen as shared with, rather than copied from, the work of Marvin Gaye. The shifts between close and distant reading hold some promise for clarifying the substantial similarity mess. They also could provide welcome guidance on when a case should be allocated to the jury in copyright law."