

## *Overlapping Rights: When Works Become Brands (and What is Wrong With It)*

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Copyright and trademark law supposedly serve different purposes and protect different subject matters: copyright law protects works of authorship while trademark law protects distinctive signs used in the course of trade to signal commercial origin. Because of their different purposes, copyright and trademark law have different origins and follow different rules on ownership, formality requirements, duration, and infringement. Still, copyright and trademark protection may overlap. Areas where the traditional contours of copyright and trademark law may overlap are, in general but not exclusively, the protection of logos and other artistic signs or emblems used in the course of trade; the protection of slogan and short sentences also used in the course of trade; the protection of fictional characters used as indicators of commercial origin, sponsorship, or affiliation; the protection of the aesthetic or artistic features of objects of industrial or fashion design; and so on. When these overlaps occur, however, some unexpected consequence may arise, especially where one form of protection permits to prolong or reinforce the intellectual property monopoly on a specific item—a logo, a character, a slogan, etc.—by exploiting the differences between copyright and trademark protection. Not surprisingly, intellectual property practitioners have been quick at noticing the “opportunities” created by the possibility of cumulating copyright and trademark protection for the same items. They frequently advise clients that copyright and trademark law aim at protecting different aspects of an item and can be complementary, thus it is in the client best interest to own both. Yet, this opportunistic exploitation of overlapping copyright and trademark protection is problematic. In this paper, I criticize the practice of using trademark law in addition to, or instead of, copyright law to protect exclusive rights in creative works in the United States. Notably, I argue that, regardless of whether creative works can theoretically fit under both sets of copyright and trademark protection, extending trademark protection to creative works may inevitably result in breaching the societal bargain upon which copyright law and policies were originally built. My analysis focuses both on the “upstream” debate on overlapping rights—whether or not overlapping trademark rights for creative works should be permitted in the first instance—as well as on the “downstream” debate in this area—the extent to which courts have countered, and can further counter, the negative effects of overlapping rights by strictly enforcing trademark defences and perhaps developing additional defences.

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