The Curious Divergence of Patent and Copyright Law

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At the beginning of the nineteenth century, the contours of federal patent and copyright protection were remarkably similar. Inventors and authors both enjoyed perpetual common-law protection of their creations when kept as trade secrets or unpublished works; the federal system concerned protection upon disclosure to the public. Inventions and books both needed to be registered to gain federal protection, but neither was subject to administrative examination. Patents and copyright were both granted for a 14-year period, renewable once. The boundaries of both rights were not claimed in advance but rather were determined during infringement litigation by testing the defendant's and plaintiff's works for "substantial identity" or "substantial similarity." The similarities between the two systems were so strong that judicial opinions deciding issues involving one form of right frequently looked to the other body of law for analogies. None of this survives today. Patent la w and copyright law now take strikingly different approaches to subject matter, procedure, term, and delineation of rights. The differences are so great that few useful analogies can be drawn between the two fields. This paper traces the divergence between the two bodies of property law, considers the possible causes of that divergence, and relates the historical change to modern theory on the development of property rights.