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The grammar of intellectual property: Copyright is a noun, trademark is an adjective

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Many people, journalists, and judges use language loosely, contributing confusion rather than precise precedent and clear communication. Prominent are the malapropisms of intellectual property: confusion among patent, trademark, and copyright; confusion between the intellectual property right and a government registration.

Copyright. Since 1978 in the United States, an author automatically obtains a copyright to original copyrightable subject matter fixed in a tangible medium of expression. 17 USC § 102(a). Subject to various statutory and equitable exceptions, the copyright owner has the exclusive rights for the work to reproduce, prepare derivations, distribute copies, publicly perform, publicly display, and for sound recordings publicly perform by digital audio transmission. 17 USC § 106.

The owner of a copyright or of any exclusive right in the work may obtain registration of the copyright by applying to the US Copyright Office. 17 USC § 408. Registration is not a condition of copyright protection. Id. However, registration of a copyright claim provides public notice and significant other advantages. Most significantly, copyright registration is a prerequisite to court standing and to most remedies for copyright infringement. 17 USC §§ 411, 412.

A copyright owner may apply to register a copyright claim, and the US Copyright office may issue the registration. An author, grammatically, does not "copyright" the work, it is copyrighted automatically if the original authorship meets the statutory requirements. "Copyright" is a noun, not a verb.

Trademark. In the United States, trademark rights are obtained by public use of a distinctive symbol—word, phrase, design, sound, smell, touch—that uniquely describes the source of the good or service. Subject to various statutory exceptions and equitable defenses, the trademark owner has an exclusive right to use the trademark with the goods or services and to prevent junior users from use of similar marks likely to cause source confusion, mistake, or deception. 15 USC §§1114, 1125 (Lanham §§ 32, 43).

The owner of a trademark may obtain registration of the trademark for particular goods and services by applying to a state or federal Trademark Office. 765 ILCS 1036/. For a registration to issue, there must be actual use of the trademark in the applied-for jurisdiction. If the trademark examiner approves the application, and for federal applications if no one timely opposes the registration after publication in the Official Gazette, then a trademark registration will issue.

A federal trademark registration on the principal register is prima facie evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate, subject to any conditions or limitations stated in the certificate. 15 USC § 1057(b) (Lanham §7).

A trademark is an adjective describing a noun, the common name for the goods and services. KLEENEX brand tissue, COKE soda pop, KODAK photographic film. When a trademark no longer indicates a single source but the public considers the term to be a name for the goods or services, it loses its trademark status and becomes a generic term. CELLOPHANE, YO-YO, ESCALATOR

once were trademarks but now are generic terms. Generic and functional symbols cannot be proprietary trademarks, they are in the public domain. 15 USC § 1052(e) (Lanham §2).

A trademark is obtained by use. A trademark owner may apply to register the trademark. If the trademark registrar finds the owner is entitled to register the asserted trademark, a registration will issue. A trademark registration provides substantive and procedural advantages over an unregistered, common law, trademark. Trademark is an adjective, not a verb.

Patent. In the United States, the inventor(s) of a novel, non-obvious, useful invention may apply to the US Patent and Trademark Office for a patent. 35 USC §§ 102, 103. Patents may be issued for processes, machines, manufacture, composition of matter, their improvements (collectively utility patents), for plants, and for designs. 35 USC §§ 101, 161, 171. However, Patents are not issued for abstract theories, mathematical principles, or impossible devices (perpetual motion machines).

Patents grants are patently manifest, and a reaction to the earlier secret monopolies granted by the Crown. Under King James I, 1623, the statute of Monopolies openly (patently) declared monopolies could only be granted for projects of new invention. However, there was no requirement to publicly describe the invention. Under Queen Anne (1702-1714) a written description of the invention was required.

The current patent system in the United States, and many other jurisdictions, is an exchange. The inventor provides a description of the invention and the state grants a limited-term monopoly on the use, sale, offering for sale, and import of the invention.

The sovereign, not the inventor, issues the patent. An invention is patented by the state. The inventor applies for the patent, but does not patent it. An inventor receives (passive verb voice) the patent, which was issued (active verb voice) by the state.

Informal Usage. Informally, many people ask for a Coke, make a Xerox copy, and cite Bates numbers, when more formally the request is for a Coke soft drink, a xerographic or reproduced copy, and a sequential identification alphanumeric character string. Such technical transgressions may be relatively harmless as long as people still recognize that COKE, XEROX, and BATES are federally registered trademarks. But in a legal dispute there are often significant differences between a copyright and its registration, between a trademark and its registration.

Implications. Many organizations and individuals have more copyright and trademark rights than they realize, for they confuse the underlying copyright or trademark right with its governmental registration. Moreover, some infringements could be avoided if the infringer realized that lack of a copyright or trademark registration does not evidence lack of underlying copyright or trademark rights.

Humpty Dumpty proclaimed his solipsism: “When I use a word, it means just what I choose it to mean—neither more nor less.” (Lewis Carroll, Through the Looking Glass, Chap. 6). That may have been appropriate in the Red Queen’s justice system —”Sentence first, verdict afterward” (Id. Chap 12)--but not under the U.S. Constitution. ▪