

Copyright, Patents, Trademarks

FIT 1038 Week 11 2011

Copyright, Patents, Trademarks

- Why don't we use the expression "Intellectual Property"?
- What's covered by each of Copyright, Patents, Trademarks?
- Why do we have them?
- How do you acquire them?
- Do they expire? What's the Public Domain?
- Can I use someone else's copyright, patent, trademark?

And, specifically about software and copyright,

- Who holds the copyright of a work?
- What's licensing? What are EULAs?
- What's "proprietary", "open source" and "free/libre software"?
- Two kinds of libre/open source licensing:
 - Copyleft
 - Permissive

I am not your lawyer

I am not only not **your** lawyer, I am not even **a** lawyer.

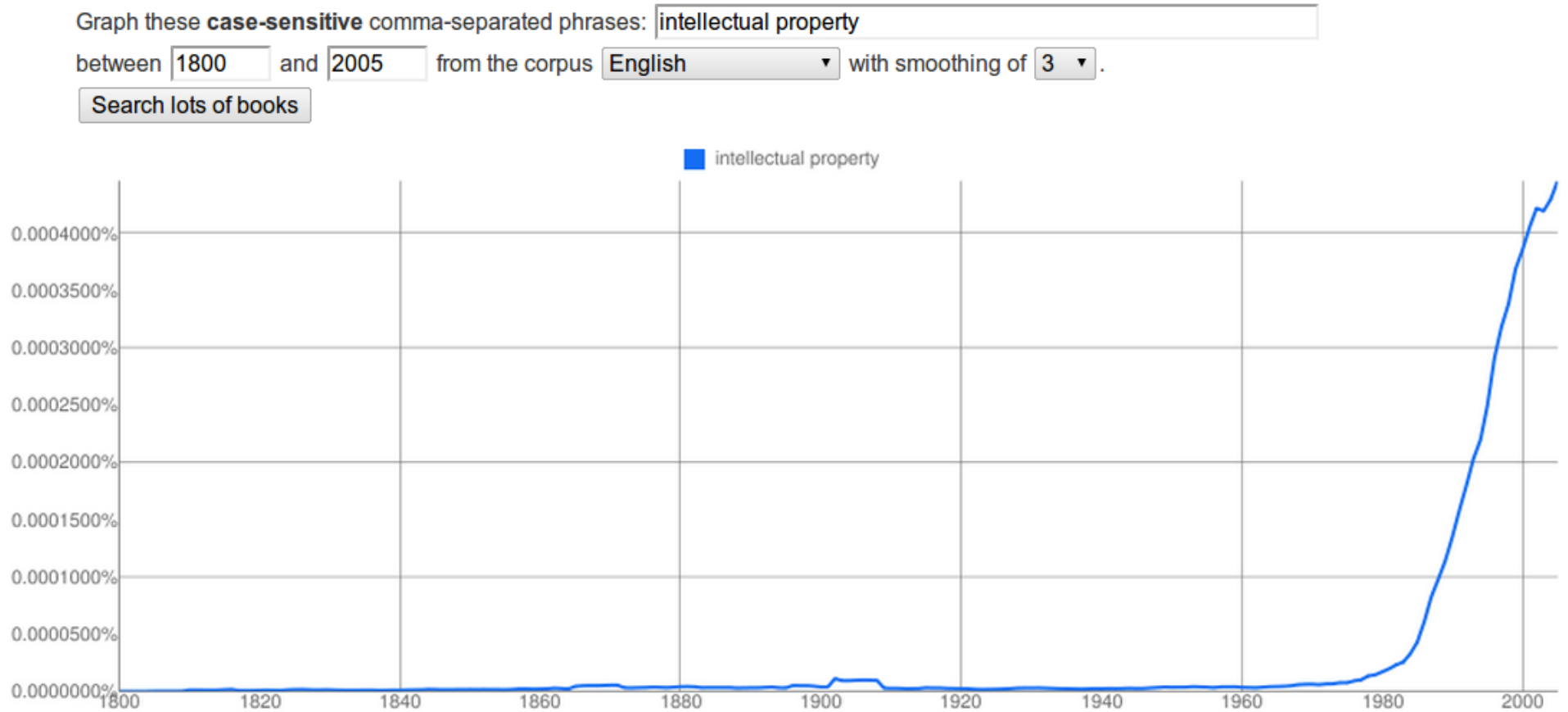
This is not legal advice. This is about copyright law as I understand it **as a practising software developer**.

Study the law by yourselves, and if you have any legal query, consult an actual lawyer!

However, you can think of this class as "guidelines on when to consult a lawyer" or "what's handy to know before I talk to a lawyer".

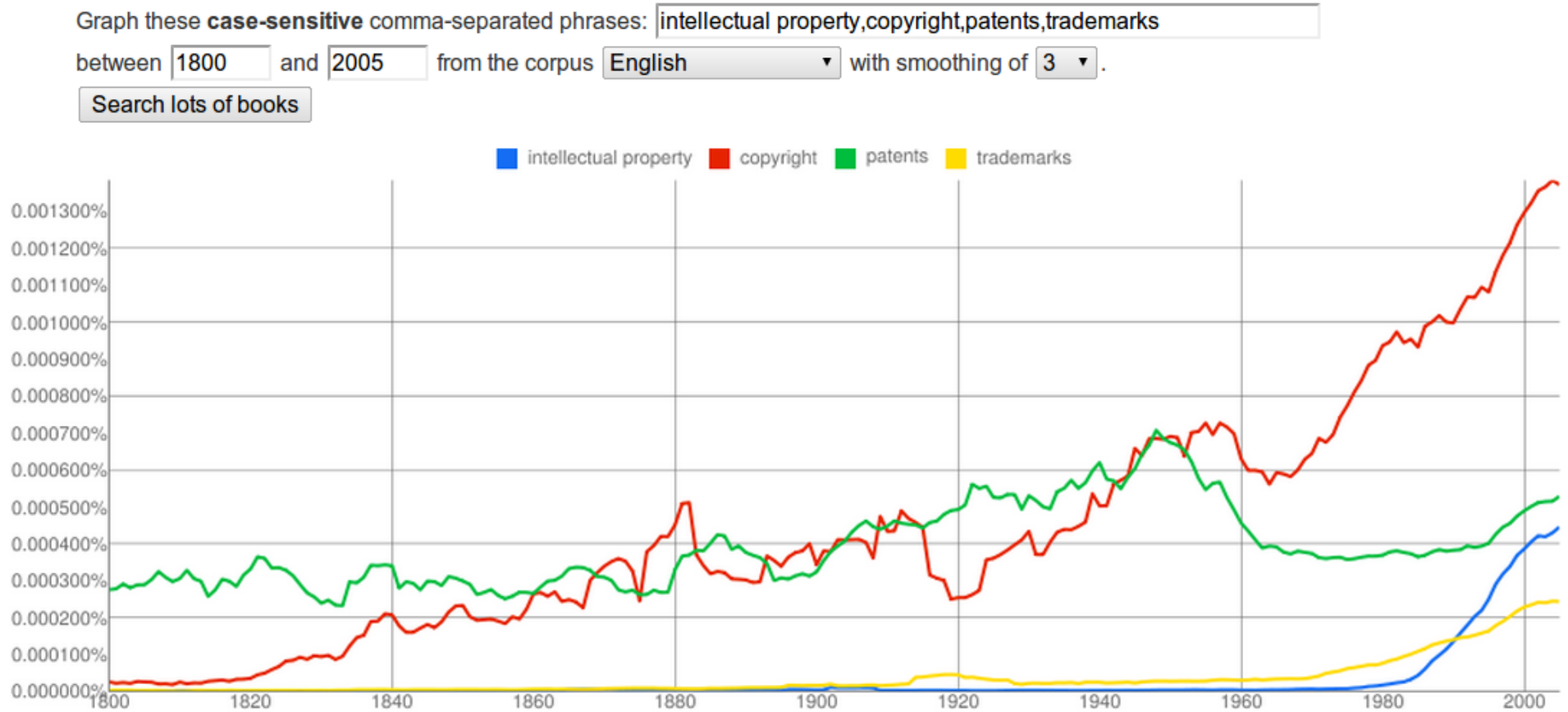
After all, the law applies to all of us. We might as well learn some.

Why don't we use "Intellectual Property"?



http://books.google.com/ngrams/graph?content=intellectual+property&year_start=1800&year_end=2005&corpus=0&smoothing=3

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Why don't we use "Intellectual Property"?

- It's a confusing term for three different types of laws covering three different types of entities:
 - copyright
 - patents
 - trademarks
- It encourages to think only about what those three categories have in common, not what is special to each one of them.
- For added confusion, the term doesn't have the same meaning in all countries.
 - For example, in Spain "propiedad intelectual" means "copyright", while patents and trademarks are part of "propiedad industrial" or "industrial property".

Copyright, Patents, Trademarks

They do have something in common. All three of them create an exclusive privilege, a government-enforced monopoly.

If you hold a copyright, a patent, or a trademark, you can exclude others from doing certain actions.

For each one of them, we'll see

- what matter they cover and what actions are excluded
- the rationale for granting them, the "social contract"
- how they are acquired
- how long they last
- what are their limits or exceptions

Copyright, Patents, Trademarks: why do they exist?

- In Common Law countries (Australia, the UK, the US) copyright is thought of as a bargain between the creator and the public. Exclusiveness is granted as incentive to creation. In European right (France, Spain, Germany), Author's Rights are thought of as innate rights, just as Human Rights are.
- Patents are an explicit bargain between the inventor and the public. Exclusiveness is granted in exchange for disclosure, because it's thought that disclosure is better for the public than industrial secrets.
- Trademarks are a form of customer protection. They are a guarantee of the source of your goods and services.

Copyright, Patents, Trademarks: why do they exist? For the public good.

For the public good.

Not for private benefit.

The "IP" idea is also wrong because it puts the cart before the horse, giving more importance to private benefit (privilege) than to the public good the policy is meant to foster.

Copyright, Patents, Trademarks: their subject matter

- Copyright deals with creative works. Dramatic works, musical works, artistic works, literary works. For the purpose of copyright, computer programs are literary works!
- Patents deal with inventions. A new process for making computer chips is an invention. There is a lot of controversy over whether computer programs and business processes should be covered by patenting.
- Trademarks (and service marks) deal with names, images, devices and their combinations (let's call them "signs") that distinguish one provider of goods and services from another provider of goods and services.

Copyright, Patents, Trademarks: their subject matter

No, you can't "copyright a trademark" or "patent a copyright".
They are different legal entities covering different types of
subject matter.

Copyright, Patents, Trademarks: the excluded actions

- A holder of copyright can exclude others from, among other uses, reproducing, performing, adapting and broadcasting a work. There are also moral rights (not in this lecture).
- A holder of a patent can exclude others from making, using, distributing or selling the invention.
- A holder of a trademark can exclude other from using the sign in commerce in connection with their goods and services.

The holders of copyrights, patents and trademarks can (and often do) license others to do these excluded actions.

Copyright, Patents, Trademarks: are there limits to the exclusive rights?

Holders have exclusive rights to some actions, but not all exclusive rights. There are limits, among which:

- You can quote works for parody, criticism research or education without infringing on the holder's copyright. In the case of computer programs, you can modify them for interoperability, and reproduce them in the normal use of a program, again without infringing.
- Don't quote me on this, but I am pretty sure I can teach on patented inventions without the patenter's permission.
- You can use trademarks to refer to the holder's products.

Copyright, Patents, Trademarks: how do you acquire them?

- Following the Berne Treaty, copyright is acquired automatically the moment a work is fixed on a physical medium. Your shopping list is copyrighted. This lecture isn't until the moment it is recorded, then it is.
- Patents are acquired through an examination process. Applicants file a description of their invention, and a technical examination determines the merits of the application.
- Trademarks are acquired either through registration or use. This means you can have a registered trademark (the (R) symbol), but also trademarks determined only by usage (the TM symbol). This varies among countries.

Copyright, Patents, Trademarks: how long do they last?

Note: durations given are according to Australian law. They vary internationally.

- Copyright on a work lasts between 50 and 70 years, depending on when the works were created (the law changed to extend the period, so 70 for new works). These are counted from publication (for works by companies) or from death of author (for works by persons).
- Patents last 20 years, though there is a class of "innovation patents" with lower requirements and a 8 year validity.
- Trademarks last 10 years, but can be renewed indefinitely.

Copyright, Patents, Trademarks: what happens after they expire?

Things not copyrighted or patented, and signs not protected as trademarks are said to be "in the public domain".

- Works covered by copyright lapse into the public domain after the period of validity of copyright. This is why anybody can perform Mozart or reprint Alice in Wonderland.
- Same thing happens with patents. After their validity period, anyone can use a patented technology. In fact, that's the point of patents.
- Trademarks can be renewed and re-renewed indefinitely. Prescription is only a management mechanism.

Copyright, Patents, Trademarks: can you lose them?

Apart from prescription, you may lose your exclusive right.

- I don't know that you can lose a copyright. I will have to research this for next year's lecture.
- A patent can be contested in the courts, and invalidated through review.
- Trademarks can be lost through non-use, or lost to genericity. The words "escalator", "zipper", "kerosene" or "yo-yo" started off as trademarks, but are now generic words.

Copyright, Patents, Trademarks: different enough!

- Copyright covers creative works, including computer programs. Patents cover inventions. Trademarks cover names used in commerce.
- Patents last the shorter period. Copyright an in-between time. Trademarks can potentially be immortal.
- Copyright is automatic. Patents require examination. Trademarks can be acquired through registration or use.
- You can't lose a copyright. Patents can be invalidated. Trademarks can be lost to genericisation.

Copyright, Patents, Trademarks: see also

Not talked about in this lecture:

- Crown Copyright: special rights by the Government of a Commonwealth realm
- Public Domain grant and US Government works
- Neighbouring rights and Moral rights
- Design patents
- Surely much more...

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Software licensing

Enough about patents and trademarks.

Now this is just about copyright as it pertains to software.

Since copyright gives the holder an exclusive right, the holder must give other parties a license (a permission in legal terms) in order for them to legally execute certain protected actions.

You can keep your copyright and license use of your work, or you can transfer your copyright.

Who owns a work of software?

Australian copyright law is clear:

- A contractor owns the copyright of the work, unless the contract says otherwise.
- A full time employee programmer does not own the copyright of their work; the employer does.

Protect yourself

Remember, this is not legal advice, as I am not a lawyer. This is just my experience from years of work.

- If working with a contractor, insist on transfer of copyright, or at least a perpetual fully paid license, maybe even the right to relicense or sublicense. Write it in the contract.
- If working as a contractor, insist on full payment before the copyright transfer or license is made. No payment, no right to use your work. Write it in the contract.
- If working as an employee, some contracts will ask for transfer of all your copyright, patents, etc. Negotiate hard. The employer already has all the rights they need by law. Do they also deserve to own the work you do on weekends?

Proprietary and Free Software

- Proprietary: non-free
- Free Software: also known as Open Source Software (often called FLOSS, Free, Libre and Open Source Software)
 1. You can use it
 2. You can study and modify it
 3. You can copy it and give copies to others
 4. You can give modified copies to others
- These are the four freedoms. Freedom 2 means you need source code. Freedoms 3 and 4 are true even if money change hands: you can sell free software, because it's free as in freedom, not free as in costless.

Free as in freedom

- Think "free speech", not "free beer"
- It's about what you can do with it (freedoms you have), not about how much it costs.
- Naturally, it's difficult to charge much money for copies of free software, since it's freely available and other people can always undercut your prices...
- ... unless you wrote the software yourself (maybe someone commissioned it from you but asked that it be under a free software license) or you are offering support and guarantees (in which case you are really charging for the support, not for the copy of the software)

Proprietary and Free Software: EULAs and Licenses

- End User License Agreements: They take away some of your rights regarding proprietary software. Some examples:
 - "You can only use it on this computer" (copyright law allows you to run a non infringing copy anywhere)
 - "You are not allowed to reverse engineer it" (copyright law contains exceptions for interoperability and security analysis that seem to allow reverse engineering).
- Free Software Licenses: they give you additional rights regarding FLOSS software.
 - Give you the right to copy, distribute, modify it...
 - Only thing FLOSS licenses say you can't do are things that copyright law wouldn't let you do in the absence of a license anyway.

Free Software Licenses

Free software licenses have two main branches: copyleft and non-copyleft or permissive.

- Copyleft: you have the four freedoms, but only if you also pass on those freedoms to others. You can only mix it with your own code to create free software under the same license.
 - The Free Software Foundation's General Public License or GPL is the best known example
- Permissive: you have the four freedoms, but you can modify and adapt the free software to create non-free software.
 - The BSD and MIT licenses, from Berkeley University and Massachusetts Institute of Technology respectively, are the best known examples.