

Methods of Documenting and Labeling Your Work

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By Chris Burke (chris@cyberabi.com)

Some people are so creative, and work in such mentally stimulating environments, that they solve a challenging problem every hour. Other people have sudden flashes of insight while washing dishes or chasing their dog. Still others work diligently and systematically to discover a formula, perfect process, or arrive at a particularly pleasing arrangement of words, sound, cloth, paint, or movement.

Ah, creativity!

It's one thing to solve a problem, and another to make money from your solution. As others find out about your solution, they'll assess (like pirates on the high seas) two things: the value of the treasure, and how well you have guarded it. The results of this assessment will determine their actions toward you. Their actions will range from unapologetic theft to offers of lucrative contracts and licensing arrangements.

Both facts and appearances matter. Both of these have their roots in proper labeling and documentation of your work.

Documentation "proves" that an idea is yours; that you thought of something before anyone else; that you were the first to invest time and money to create a product based on your idea.

Labeling puts profiteers on notice that you've established legal rights over your work: the treasure is guarded. Creative labeling can also introduce fear, uncertainty and doubt into your enemy's assessment: a mysterious defense that intimidates.

How To Prove An Idea is Yours

Ideas are intangible, and move quickly from mind to mind once communicated. Nobody can prove beyond doubt that they were the first to conceive a specific idea.

Fortunately, with a little work anyone can legally establish a date certain, on or before which they most certainly conceived the idea. When two parties fall into legal dispute over the use of that idea, the courts often favor the party establishing the earliest date of conception.

Here are three tips for establishing your idea's date of conception.

Keep a Log Book

This should be a bound book, and ruled, like a diary. Yes, a real book, nothing electronic. It must not be spiral or 3-ring bound – you want anyone who sees it to accept that no pages have been added (e.g. back-dated) or removed. Do not use blank books; ruling or grid marks help to establish that you haven't added information later "between the lines." The book should open up flat. The ruling should be light blue, rather than red or black. Write or draw in this book, only in black or dark blue ink.

Reason: If you ever need to photocopy pages from the log book, the dark ink will copy clearly, and the ruling will remain dim.

On the very first page, write a title such as "Development Log Book", your legal name, and the date that you began using the book; do not write any ideas on this page.

Each day that you have an idea, begin a new page of the book. Don't use leftover space on the previous page, and don't leave any blank pages! As you have ideas, write them in the book, describing them in some detail with words, sketches, or both. Write the date at the top of each page, and sign the bottom of each

page. Try to use the same pen for all of the writing on each page. Don't leave any blank space on the page – if you have blank space on a page at the end of the day, lightly cross-hatch the space with your pen. Don't fill space with solid color or dense crosshatch, or it will look like you're hiding something. Your goal is to create evidence that the cross-hatched area was never used, and never will be used.

It's OK to use more than one page to describe an idea, and it's OK to put more than one idea from the same day on the same page.

Since all of your great ideas are in this log book, keep it locked up. Just like you don't want your little brother reading your diary, you don't want the cleaning staff reading – or stealing – your log book.

When your log book fills up, save it. Forever. In a fire-proof safe deposit box.

Get a Witness

Even if you don't keep a log book, you should write down your really good ideas *somewhere*. If all you have is perfumed hotel stationary, use it. Write the idea down in ink, then sign and date the description.

Next, find someone who's capable of understanding the idea. Co-workers are often a good choice; competitors or people you plan to sign contracts with are often...not. Show your prospective witness the description you've written, and ask if he understands the idea. If he doesn't understand, find a different witness or rewrite the description – don't just answer questions verbally without updating the description.

Once the witness understands the idea, have her write "I understand this" and sign and date the document. You want two things to be clear: the witness admits to understanding the idea, and it is *your* idea, not the witness'.

Right-Brainer: The Two-Dollar Timestamp

You can't always find a competent and trustworthy witness for your ideas. Sometimes you can't even express them easily in handwriting or sketches.

In these cases, you might be able to use your government's postal service as a witness. Don't laugh - it worked in *Miracle On 34th Street*!

Write your idea down, either by hand on stationary, or using a computer-based word processing or drawing package. Now, get hardcopy, or burn it to a CD.

Find a suitable envelope: one that will protect the contents, that seals securely, and that cannot be opened without visibly damaging the envelope. Put your hardcopy in the envelope. Address the envelope to yourself.

Take the envelope to the post office, and send it via certified mail with a return receipt. (For those not in the U.S., this is a mail service that causes the post office to mark the package with the day it was sent, certify that the package was sent on that day, and also to inform the sender of the day on which the package was actually delivered, and who received the package). This service costs about two dollars – less than what you'd tip a Notary Public.

When the package arrives, do not open it. Ever. Save it in a fire-proof safe deposit box. The only time you will ever open this package is when you need to prove the date on which you conceived your idea, and then, only in the presence of a judge. The post office doesn't lie!

How To Prove It's Not Just An Idea

A German proverb says, "The proof of the pudding is in the eating." The proverb applies well to intellectual property: anyone can talk about pudding (an idea), but a good recipe (intellectual property) is needed to actually make a delicious pudding.

Your intellectual property rights, whether copyright, trademark, or patent, are contingent on proving to the government that you have a basis for commerce (something that can be bought and sold), that is your own creation (original, not stolen or copied verbatim from someone else). Documentation plays a crucial role in establishing these contingencies as facts.

Here are three techniques for creating the documentary evidence that proves your creation isn't just an idea.

Build It

Physical reality is pretty compelling evidence that you've taken your idea into the practical realm.

Write the story. Draw the image. Compose, arrange, and perform the music. Code and test the algorithm. Build the machine. Construct the design.

When you're done, print hard copy, take pictures, burn it onto a CD-ROM, or store your creation in a safe place. Use either a live witness or the postal service to establish the date of construction.

If you use a live witness, make sure the witness sees your invention in action and understands what your invention does. If it's a painting, the witness must view it. If it's a book, she must read it. If it's music or performance, she must witness the performance. Write up a simple document stating that on this (specified) date, in this (specified) location, the undersigned witness saw a working demonstration of this (specified) invention created by this (specified) person; have the witness sign and date the document, and store it in a safe place.

Keep A Log Book (Part II)

Your log book is not just for documenting ideas; it's also invaluable for documenting the process that transforms your idea into a working demonstration.

Make sketches in your log book. Write down approaches you tried that did and didn't work, and every improvement that you made to the idea as you developed it. When you encounter a really challenging problem, make a log entry describing the problem. Make another log entry describing the solution you find. Sign and date every page, using the same rules you used for documenting ideas.

Remember, you must never leave blank pages in your log book. If you're working on several ideas, their histories will be intertwined in the log book, showing the incremental progress on each, rather than arranged as one contiguous block of information per idea. Although this may seem disorganized, it's *exactly* what you want to happen.

Here's how you'll use this information as evidence.

1. If someone challenges your claim to have developed something, you can show the court the history of its development in addition to the original idea and the finished product. It's compelling evidence that you developed the solution through investment rather than by "a miracle."
2. If your idea is patentable, the development history in your log book will give you and your lawyers many ideas for so-called *dependant claims* – variations of the invention that, although optional or inferior to the final invention, you can protect under the same patent.

Right-Brainer: The Detailed Design

Some inventions are so grand in scale that the inventor can't muster the resources to actually build and test them.

Suppose you invent an Infinite Improbability Drive (if you don't know what that is, you *must* read *The Hitchhiker's Guide to the Galaxy* by Douglas Adams; do it - now). You're certain it will work, but can't build one because you don't have a bazillion dollars, hot tea, or access to a source of finite improbability. You can still, with a little work, "prove" that you really have invented it. Here's how.

First, draw up a detailed plan for building your invention. For music, this could be a complete musical score and arrangement. For a character, it could be a series of character study sketches. For a machine, it could be blueprints, component specifications, and operating procedures. Your goal is to describe what must be done so well, that someone of ordinary skill without a creative bone in his body could do it.

To put it another way, your goal is to teach anyone who reads your plan how to build the invention. Don't leave anything out – no secrets, no deliberately misleading information. The only things you can leave out of your detailed plan are your ideas for improvements and optional features, and explanations of steps obvious to an ordinary artist, performer, builder, engineer, etc (whatever type of workman you need).

Within this plan you should call attention to anything and everything that distinguishes the resulting work from everything that has gone before it; the element or combination of elements that identify the work as uniquely your creation.

Once this detailed plan is created, use either a live witness or the postal service to legally establish the date. Print hardcopy of the plan, or burn it to a CD, and store it in a safe place forever.

Lawyers and the U.S. Patent Office call this kind of detailed plan *constructive reduction to practice*. It's good enough to justify a patent, at which point you can find a wealthy investor to bankroll your development in return for a piece of the resulting commerce.

How To Label Finished Work

An intellectual property notice on your products lets everyone know they contain your intellectual property.

The notice is fair warning for honest businessmen (who might otherwise think the work can be copied or imitated freely). It deters dishonest businessmen (who might otherwise steal your idea without fear of legal reprisal). Both of these effects save you time and money, by reducing the number of intellectual property trespassers you have to take to court. They can also make you money, by helping to attract investors and by inducing honest businessmen to license your technology rather than designing around it or abandoning the market.

Here are the five most important kinds of labels for intellectual property, and how to use them. As with any legal issue, I encourage you to seek the advice of a competent attorney before selecting a labeling strategy.

Copyright © 2003 The Software Geniuses, Inc. All Rights Reserved

In the U.S. there is no legal requirement that you mark your works with a Copyright notice – copyright protection is automatic. The copyright applies as of the date of publication (general distribution) of the work, and lasts for decades – generally well beyond the commercial lifetime of most works. Whether or not you have registered your copyright with the government, the same form is used for the copyright notice.

Do not use (C) instead of the copyright symbol © - it doesn't always have the same legal standing. Do not abbreviate the word "Copyright". You must use either the entire word "Copyright" or the symbol © in the notice.

Put the notice on your source code, your images, your musical arrangements, your detailed plan, and all over the product: the CD, the CD jacket, the splash screen, both sides of the box, the software license, and the documentation.

If the work was created over several years, or was revised in a later year, list all of the applicable years. For example, "Copyright © 1996,2003 The Software Geniuses, Inc."

The copyright notice identifies the legal name(s) of the copyright holder(s). This may be individuals, a corporation, or a legal alias. For a business alias (doing-business-as): “Copyright © 2003 Joe Coder dba |V|orpheus”

If the work is unpublished, use “Copyright © 2003 Maggie Bard (Work in Progress)”

U.S. and Foreign Patents Pending

Use this intellectual property notice when you sell your product before any patents have issued, but use it with care: in some countries, you forfeit your rights to patents if you offer to sell the product to anyone before applying for your patents.

In the US, "Patent pending" and "patent applied for" are terms that refer to an actual pending application in the US Patent and Trademark Office. The term “patent pending” may also refer to a type of application called a provisional application that has been filed with the USPTO. Companies that misuse these terms are subject to sanctions under US law because misuse of the terms is viewed as an attempt to deceive the public by claiming an aura of IP protection that the item does not actually have.

Put this notice on the actual physical object that incorporates the invention. If the object is a software program, put the notice on the disk and on the splash screen.

Use an alternative form of the notice on packaging and within documentation, to point to the actual object incorporating the invention. For example: “The WOW! Game engine is manufactured under pending U.S. and Foreign patents.”

This notice tells the reader that they won’t be able to determine what aspects of the product you’ve patented, because patent applications (in the U.S.) are secret for 18 months after filing or until the patent issues. Maybe the patents you’ve filed for will issue, and maybe they won’t. Either way, the fear, uncertainty, and doubt created by the label “patent pending” drives most imitators within the reach of the law crazy: it’s a downside they can’t assess.

Manufactured under one or more of the following U.S. patents:

If your patents have issued, or if you have licensed patented technology for use in your product, use this notice followed by a list of applicable patent numbers.

Include design, method, and process patents. You don’t have to identify the owners of the patents, just patent numbers. You can list the patents on a single line, or in multiple columns.

Optionally, close with a variation of the “Pat Pending” notice to spread fear, uncertainty, and doubt. For example: “Other U.S. and Foreign patents pending.”

Use this notice in the same places you’d use “U.S. and Foreign Patents Pending”

TM

This notice, placed after a text or graphic, identifies a *trademark*. If the trademark has been registered with the government, use ® instead of TM. Do not use (R) instead of ® - it doesn’t carry the same legal weight.

The trademark is a specific symbol of your business and its reputation. It encourages the buyer to make assumptions about your product, based on your past performance. The trademark notice tells the world that the specific mark preceding it uniquely identifies your company and its products.

The mark is distinguished by its graphical elements, fonts, colors, arrangements, relative proportions, and spacing. The mark must be distinctive to be covered by law, and you must consistently reproduce the mark to exactly the same standards each time it is used. Never let a vendor of, for example, business cards,

produce an approximation of your trademark. Always provide vendors with your own trademark artwork to use. Make sure that the artwork is a bitmap, rather than a meta-description of the mark in XML or HTML, since different software packages can render the mark-up differently. If the mark is expressed in encapsulated PostScript®, include any fonts used.

Always use your trademark in connection with a product name, and make sure that the product name looks different from the trademark. For example, in “XYZZY™ Password Generator” the trademark is XYZZY, and the product is a password generator. This helps prevent your trademark from becoming the “generic” term for all similar products – an event that would render the trademark legally useless.

Put the trademark and notice all over your product, along with the product name. Also place it on every ad, package, label, manual, and brochure.

Follow these policies when using your own trademarks and those of others in documentation:

1. When making reference to a trademark in documentation, use the ® or ™ symbol the first time the mark is referenced; it’s not necessary to repeat the symbol on every reference.
2. On every unique piece of documentation that uses trademarks, include a footnote or other credit along the lines of:

“XYZZY and PLUGH are trademarks, and Plover is a registered trademark, of The Software Geniuses, Inc. Other product and company names mentioned herein may be trademarks of their respective owners.”

This Software Is Licensed Not Sold

Include this notice in your end-user license agreement, and also conspicuously on the packaging, to give users fair warning that you are exerting legally authorized control over their use of the software.

Once you sell something, you have no legal control over its resale. For example, you can’t prevent a user from selling your software to someone else. If you want to control this, or any other use of the software, or limit your liability related to use of the software, you must:

1. Present the user with a license agreement clearly defining the terms under which you are willing to license the software for use
2. Provide the user with the option of canceling the transaction (getting a refund and returning the product) if they are unwilling to accept the licensing terms
3. Require the user to make a conscious action (such as clicking OK) in order to accept the license terms.

In the past, so-called “shrink wrap” software licenses have been used to convey licensing terms to the user; advances in communication technology now allow the transaction to be conducted on-line. Consult with a competent attorney before implementing any software licensing agreement.