"POOR MAN'S PATENT" AND "POOR MAN'S COPYRIGHT": THE TOOTH FAIRIES OF THE IP WORLD

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There is a common misconception that an inventor or author can protect their intellectual property by mailing a copy of it to themselves. These are sometimes called a "Poor Man's Patent" or "Poor Man's Copyright". I will address each in turn (note: IP law varies greatly from country to country; I am writing only about the United States).
Poor Man's Patent:

What is a "Poor Man's Patent"? As an ehow.com article describes it, "a poor man's patent is simply, just a postcard you send through the United [States] Postal Service. Just print a copy of the product you designed on it. Address the postcard to your self [sic]. Once it comes back stamped by the postal service it is a 'Poor Man's Patent.'" The article takes it one step further, suggesting that a "better way to get a patent is to go to Lulu.com. Download a picture of your product. Then make a calendar, T-shirt, coffee mug whatever they offer. You design what [it] is you want and printed on it copyrighted by your name and date. You pay for it. Then Lulu.com sends your design on the product you chose, this is a legitimate patent plus it is copyrighted and no one else can steal it." Do not under any circumstances attempt to "patent" something this way. It doesn't work. The Chicago Tribune nailed it in a 1985 article: a "poor man's patent [is a] term most appropriate in the sense that the inventor who relies on such protection is virtually assured of remaining a poor man."
To understand why this approach is totally ineffective, we must first understand what a patent is. A patent is not the right to do anything. If I had a patent on a better way to break into bank safes, I would not then have the right to break into bank safes. Instead, a patent is the right to exclude others from practicing a patented invention, and to obtain damages in court if somebody does practice a patented invention without permission.

These rights only arise in the US once specific claims are issued by the US patent and trademark office. Before the 2011 America Invents Act, the United States awarded patents to the first person to invent, even if somebody else beat them to the patent office. Under this old regime, there was a tiny benefit to mailing an invention disclosure

to yourself — it helped established an invention date. Even this benefit is now gone, as the America Invents Act changed US patent law so that the patent is awarded to the first inventor to file for a patent, regardless of who invented first (with lots of caveats, see a lawyer for details).

In fact, even hiring a patent lawyer and filing a patent application is not a patent (a "rich man's" patent?). The only way an invention is protected under the patent system is by making it through the patent process successfully (and thanks to the America Invents Act, surviving the likely post-grant administrative challenges).
Somebody using the (ineffective) "poor man's patent" approach may also be attempting to allow themselves to continue to practice an invention even if somebody else later invents and patents it (old rules) or later files for and gets a patent (new rules). If somebody doesn't mind making their invention public and possibly preventing themselves from ever getting a patent on it, the most effective way to do this is to publish a thorough description of what they are doing in a public forum. This would then constitute "prior art" and prevent issuance of a valid patent covering that technology (patent office error could result in issuance of a patent, but it wouldn't be valid over prior art if done right). This also triggers real threats to the inventor's later attempts to get a patent ("on sale" bar for example), and should not be done lightly.

The bottom line is that there are really three patent issues the "Poor Man's Patent" raises, two of them highly related:
(1) Can I legally prevent somebody from doing what I invented?
Answer: Only by getting an issued patent. There is no shortcut — although if you keep it as a trade secret there may be some benefit, but that's really something that a lawyer needs to advise on.
(2) Can I keep doing what I'm doing?
Answer: This is a freedom to operate question, and even the best patent lawyers in the world can only get to "pretty sure" on this one in most cases. There are millions of valid patents globally, and attempting to answer the question without a strong legal team is just asking for patent litigation.

(3) Can I stop somebody else from getting a patent on what I'm doing?

Answer: If you publish your invention in a public forum, it is usually going to serve as prior art and prevent issuance of a valid patent — with some wrinkles that a patent lawyer should expand on if you're really contemplating this.

An inventor who is cash poor does have an option: There is a "poor man's patent application" — the provisional patent application. It can be filed with or without a lawyer, and costs $65, $130, OR $260 (depending on entity status – microentity, small entity, or large entity, excluding attorneys fees). This application will never mature into an issued patent without filing a proper utility patent application within a certain time frame (a year usually, although it can be shorter in some circumstances, such as when claiming priority to multiple provisionals). Note that the rules for patents other than "utility patents" differ.

There is some dispute in the patent community as to whether simply filing source code as a provisional patent application is beneficial — my opinion is that there are some cases where it may be appropriate. Let's be clear, though: Saving money on a patent application up front strongly reduces the chance of getting a valid and valuable patent at the end. This is particularly so given the changes happening in patent law. A provisional patent application protects only the content of the application, and if you leave something out, that can be a problem later.

While some materials, like the ehow article referenced above, are clearly and obviously wrong in some material ways, even well researched materials — even recent court cases — can become wrong or misleading very quickly. Any reference materials more than a few months old should be assumed invalid as to at least some points. The law is changing that rapidly (a big case came down last week from the Federal Circuit on a 6/5 vote about whether delay in enforcing rights waives patent damages). The speed of change is such that relying on anything other than a lawyer (or, if you can't afford one, at least careful reading of current USPTO materials) is likely to lead to mistakes.
One advantage of Fresno I've found as an inventor is that there is at least one excellent patent lawyer (the one I use), and I suspect there are others. Moving my patent work from two large LA law firms to her in Fresno has resulted in large cost savings (Fresno is simply a better priced legal market) and there has been no compromise on the quality of the work.

Given the pitfalls of going it alone on patents and the more than competitive rates we can get in Fresno, it is my strong opinion that using a licensed patent lawyer (or patent agent — though I don't know if we have any in Fresno) is critical to any invention-driven startup.

Side note: Ironically, what would have provided at least some benefit, compared to the

"why would people think this is effective at all" self-mailing method, would have been to sign an NDA with a witness or notary public, have them sign and witness the actual document, then seal it or not, who cares. This would have established an invention date with proof of invention, which under the old "first to invent" regime would have given the inventor priority over an earlier-filed but later-invented invention assuming the inventor timely files for a patent. Under the new first to file regime, this wouldn't work.

The bottom line is that patents are expensive. Using a lawyer local to Fresno makes them far less expensive, but patents are still not cheap to acquire. There is simply no way to get patent protection in the US without going through the patent office. Anybody who tells you otherwise is wrong. The real alternative to a patent is treating the invention as a trade secret, but that comes with its own set of risks and benefits and should not be done without the advice of counsel.

The Poor Man's Copyright:

A related myth to watch out for is people "copyrighting" things by putting them in an envelope and mailing it to themselves. It may provide proof of date, but that is easier to do by just getting a notary public, and far more likely to be legally accepted as proof. Moreover, things are copyrighted as soon as they are created in fixed and tangible form. You don't need to do anything to get a copyright in your work. The doodle you drew while talking with your friend yesterday was copyrighted as soon as you drew it. There are three levels of copyright protection in the U.S. (the first two levels differ only in terms of how the creator documents the creation date, so they differ in functional but not legal terms):

(1) You create a work, and it is automatically copyrighted with nothing further required on your part;
(2) A work you created and which you documented in a way that allows you to prove date of creation (thereby helping you to win a case if somebody copies your work and later claims that it was you who copied their work); and
(3) A registered copyright.

People don't understand the difference between copyright and a registered copyright. A registered copyright comes with the right to statutory damages and attorneys fees. Registration is cheap and easy, but is done with the US Copyright Office.

Just like with patents, writing something down and putting it in an envelope to "copyright" it is effective as a way of wasting a stamp and little more. Proof of creation date is far better established in other ways, and in any event is a poor second to actually registering the work. Unlike patents, most copyright registrations can be done equally well by a non-lawyer as by a lawyer, although for mission critical things like a novel, at least running it past a lawyer isn't a bad idea.

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