# Naming Your Open Source Software

by Lawrence Rosen

Suppose your favorite lunch spot offered you a glass of "sweetened carbonated water, caramel colored, with natural and artificial flavors and caffeine." Would you drink it? Would you want to know who made it? Would you want to know in advance that your drink will taste like the sweetened carbonated water that you enjoyed so much several days earlier?

Now, supposed your favorite lunch spot offered you a Pepsi. Would your questions about quality (good *or* bad) and product consistency suddenly go away?

What would you select if given the choice between a Coca Cola and a Melvyn's Cola? Would you be more likely to select a product simply because you are familiar with its name and reputation?

Aren't the answers to these questions obvious? We are all caught up by marketing. Television and other advertising media continually inundate us with product names that we almost automatically add to our vocabulary as if they were words in the English language. But these product names are not words in the traditional sense, nor are they intended to be so used. Terms like Windows, Apple, Java, Apache, Linux, Jabber and JBoss are marketing names -- trademarks. When carefully selected and protected, and through effective marketing, trademarks can become badges of quality, expertise and reputation.

Trademarks are potentially among the most valuable assets of companies that market free and open source software. For some projects, a trademark is much more important than the license under which the software is distributed.

Trademarks are a form of intellectual property, but they are very different from patents, which protect invention; copyrights, which protect expression; and trade secrets, which protect a company's confidential information. Trademarks are brand names of products or services. They serve to protect the reputation of a product.

More specifically, a "trademark" is a word, name, symbol or device used to identify a company's products and to distinguish those products from the competition. A "service mark" is the same as a trademark except that it is used to identify and distinguish services rather than products. A "trade name" identifies a company rather than that company's individual products or services. The same symbol might function as a trademark, a service mark and a trade name, depending on the context in which it is used. In this article, I will generally use the term "trademark" and ignore the subtle distinctions of service marks and trade names.

A company doesn't acquire trademark rights simply by choosing a trademark or even by stating its intent to use it. Trademarks (or service marks) in the United States are established by actual use in conjunction with specific goods (or services). There are advantages to registering trademarks with the US Patent and Trademark Office, but registration alone doesn't make a trademark valid or valuable. Only actual use of a trademark on goods, and a marketing campaign to breed familiarity among consumers, can create a valid and valuable trademark.

Free and open source products pose difficult marketing problems. The licenses under which such products are distributed require the distribution of source code and permit the creation and distribution of derivative works. It is difficult for a distributor of such products

to compete on price alone, because almost any knowledgeable company can undercut the price by simply copying the original software.

Trademarks can be particularly useful in this kind of environment. First, a company needs to demonstrate that its software is of high quality, reliable and efficient, feature-rich and user-friendly. It can promise continual enhancements, product support, user groups, and undertake other goodwill-creating activities. Then over time, through marketing efforts, that company's customers will begin to associate its trademarks and service marks with those products and services. New or repeat customers will pay for goods and services they perceive to be worth the price, and they preferentially will select products whose trademarks they identify.

Trademarks can also limit certain kinds of forking of free and open source code. While your software license may allow others to make derivative works of your code, the license doesn't allow (indeed, there is a legal reason why it *cannot* allow) others to apply your trademark to their derivative works.

In any industry where it is not technically difficult to create a new product, whether it be the cola beverage industry or the free and open source software industry, trademarks and service marks can provide the best protection for a company's products and services.

We see this everyday when customers order Coca Cola and Pepsi rather than Melvyn's Cola. That is why customers buy Red Hat Linux rather than El Cheapo Linux. That is why Apache servers dominate the web, rather than servers based on generic copies of the Apache code.

And that is why, if you are wise in selecting, perfecting and using your trademarks and service marks, you can protect the market for your free and open source software products from competitors who merely want to copy your work and make money off your well-earned goodwill.

In future articles, I will describe how you should select a good trademark, and explain what you need to do to use it and protect it properly.

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