iPhone Developer Legal Guide
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By Miguel Danielson, Esq.

The iPhone App Store has been a boon to many smaller software developers. With the right idea, even a minimal development effort can result in significant marketplace success. And because Apple handles all distribution and revenue collection for iPhone Apps, many developers have quickly and easily found themselves managing a small software empire, along with many of the accompanying legal issues and risks. This article will highlight some of the most common intellectual property related legal issues that are of concern to iPhone developers. By ensuring that each of these issues has been considered and, if necessary, handled in concert with skilled legal counsel, an iPhone app developer will be well on the way to avoiding the most common and costly legal mistakes.

Choosing an application name

Selecting an appropriate name for a new software product is always a challenge. While it may seem attractive to choose a name that describes some aspect of the software, such names are much less distinctive and therefore much less valuable and harder to protect as trademarks. This is true because trademark law generally does not protect words or phrases that merely describe the products they are used with -- the theory is that others in the industry should have a fair chance to use such words to describe their own products. Choosing a unique name that is not descriptive is job one in establishing your trademark rights.

Equally important as picking a distinctive and non-descriptive name is choosing a name that is not similar to any other trademarks currently in use. Just how similar or dissimilar one trademark may permissibly be in comparison to another trademark depends on numerous factors. Most important among these factors are the similarity of the marks and the similarity of the goods or services offered in connection with each mark. You should rethink your application's name if there is already a similarly named application in the App Store. Furthermore, a search for potential trademark problems should not end at the App Store. The US Patent and Trademark Office hosts a database of trademarks that are either registered or the subject of a pending application (see Resources section, below), and of course Google or another search engine can be a powerful tool for finding existing trademarks. For any application that you intend to develop as something more than a casual hobby, the best approach is to seek legal help in clearing a trademark. Experienced trademark attorneys can provide thorough searching capabilities and will be able to tell you what the results of such searching mean in terms of your legal risk profile.

Once you've decided on a good name for your app, you may consider registering your trademark with the US Patent and Trademark Office. There are certain benefits that come along with a registered trademark, but perhaps most important from a practical perspective is that you will put others on notice of your trademark use and, hopefully, avoid potential conflicts before they start. Registered trademark rights are also important tools in the event that you should have to secure a domain name from a cybersquatter or deal with a Google Adwords issue, to name but a couple of examples.

Reading and understanding the iPhone Developer terms and conditions

Anyone who wishes to develop iPhone applications must utilize the iPhone SDK and, accordingly, agree to the terms of Apple's legal agreement governing such use. In particular, Apple's terms for using the SDK as well as for participating in the App Store and all other services required to build apps, are contained in the iPhone Developer Program License Agreement (the "Agreement"), last updated January 27, 2010. Because Apple itself controls what is essentially the only legitimate distribution channel for iPhone apps, they have taken a fairly heavy handed approach in what they allow and don't allow developers to do with the SDK. It is particularly important to understand what the Agreement does and doesn't permit since every iPhone app must be reviewed and approved by Apple for compliance before appearing in the App Store. Non-compliance will mean significant delays or possibly outright denial in getting an app to market.

This guide is not intended to provide an exhaustive look at the Agreement, but a few highlights are described below for illustrative and educational purposes (please note that the 1/27/10 version of the Agreement is referenced for purposes of the issues below).

- Among the many requirements in Section 3 of the SDK Agreement, there are a number of required notices that you must provide to your users if you make use of location data, use the new real-time guidance functionality of OS 3.0, or collect data from your users. If your app employs such features, be sure that you are familiar with these requirements.

- Many iPhone apps make use of one or another Google service, the most popular of which is probably Google Maps. The Agreement obligates those who utilize Google Maps in their application to follow the applicable terms and conditions published by Google (http://code.google.com/apis/maps/terms/ iPhone.html). Among these terms, there are many additional restrictions for apps including Google Maps functionality, all of which should be carefully read and understood so as not to run afoul of them. One good piece of news for app developers employing Google Maps is that the foregoing conditions, which govern use of the Google Maps API provided in the iPhone SDK 3.0, are much clearer regarding the permissibility of using Google Maps services in paid apps, as compared to the standard Google Maps API terms that applied before 3.0 was rolled out.

- Apple has been clear since the launch of its app store that it is intended to be a G-rated affair. Accordingly, Apple proscribes in the Agreement any use of obscenity, pornography, offensive, or "objectionable" content. Bottom line: if your app has any racy content, you may be in for a struggle to get it to market or keep it there.

In addition to those requirements clearly stated in the Agreement, Apple has been known to reject apps for much more nebulous reasons. For example, Apple has on a number of well cited occasions rejected applications that duplicate the functionality of default iPhone applications. For example, Apple has rejected several web browsers on the grounds that they duplicate the functionality of the built-in Safari web browser. Critics would certainly tell you that Apple's intent here is not to avoid unnecessary duplication, but to avoid competition.

Whatever motives Apple may have, developers should certainly be aware of the more common rejections that Apple has made. Many rejections occur because of violations of Apple's Human Interface Guidelines (see link in Resources section, below), which are a set of rules that Apple created so that applications that run on Apple platforms have common characteristics geared toward ease of use. Developers should definitely read the HIGs very carefully and adhere to them as closely as possible. Mobile Orchard has done a great series of articles on the most common app rejections, links to which are provided in the Resources section below. In addition to the HIGs, developers should check out Apple's Guidelines for Using Apple Trademarks and Copyrights if their apps feature or reference any Apple trademarks or icons or other graphics (see link in Resources section).

Using third party services or materials in your app

Many of the most useful iPhone applications rely on third party sites or services, or incorporate music, images, or movies created by third parties. Anytime you choose to rely on such third party services or materials, you should be acutely aware of your obligations. In general, you cannot use any copyrighted materials without express permission from the provider or creator of such materials. While some not familiar with the law may believe that it is acceptable to take an icon or a thumbnail image for their application, copyright law is not in agreement with this position. While there may be very limited circumstances in which appropriating minimal amounts of material is lawful, these exceptions are few and far between. Unless you have experienced counsel to help you determine if you qualify for such an exception you should always labor under the impression that permission is required for you to use any size audio clip, photograph, clip art image, icon set, or the like. If you can't obtain such permission then you are best off leaving the relevant material out of your app.

Presently, there are many great third party services offered by the likes of Yahoo, Google, and Flickr, to name a few, that you can utilize in your app via web-based or Apple-provided API interfaces. Providers of these services make them available under terms and conditions with which you must comply. Some services place a maximum threshold on the number of

transactions that you can request under an assigned key or passphrase. Others restrict you from using their services in a commercial manner or in an application or service for which there is a charge. Still others may have reporting requirements, requirements that certain notices or disclaimers be published in your application or its terms and conditions, and so on. The point is this: before relying on any third party services, whether through an API interface, screen scrape, or some other mechanism, you should determine what the relevant terms of use are and be sure you've carefully read them to determine whether the use you have in mind is actually permitted and, if so, whether that are any requirements you must comply with in terms of developing your app.

A final category of content that you may be using in your app is third party software. In particular, you might wish to utilize the growing field of third party iPhone libraries and components in order to achieve functionality with some other software or system, or to save time on reinventing the wheel. In general, I would further classify such components as either commercial or free/open source software (FOSS). Both types of software will come with a set of terms and conditions that you must carefully read and follow in order to determine whether or not you're in compliance. For example, commercial agreements for software components intended to be included in other software will often restrict you from creating software that does not add significant functionality to that of the included component. In addition, commercial software components may have royalty structures that require you to pay additional fees once you pass a certain number of distributions of your software. FOSS software may or may not have requirements that prevent you from doing something you'd like to do with your app. As one example, the GNU General Public License requires that you make your software available under the GPL if your software is a derivative work of a GPL-licensed component. Often times, determining what is and isn't a derivative work can be a difficult task, so if there is a close call or you have questions, you are best served by getting expert help. Many other FOSS software comes under less restrictive licenses such as the BSD or MIT licenses, and requires only that you provide notice of the terms that govern the FOSS component when you distribute your own software.

Using push notifications or in-app purchasing

Two of the most recent features available to iPhone developers are push notification and in-app purchasing. It's clear from Apple's Agreement that they intend to allow only a specific set of uses of these features. Developers wishing to push the envelope of creativity with either of these features should carefully read the additional restrictions contained in Attachments 1 and 2 of the Agreement.

Certain restrictions are fairly obvious – you can't use the push notification service to spam users or otherwise abuse the network; other limitations are less so – you can't use the push notification service to alert your users of updates to your app. The restrictions around in-app purchase are quite exacting. You cannot use in-app purchasing to purchase stored value (gift certificates or

other types of currency), to "rent" content for a limited period of time, or to trigger any newly-downloaded updates to your app – however, you may use in-app purchasing to unlock code that is already resident in your application.

What are your terms and conditions?

Apple's current procedure on End User License Agreements (EULA) for iPhone applications is to allow developers to select either their own EULA or to have Apple's default EULA apply to their app. A link to the standard Apple-authored EULA is contained in the Resources section below. The standard EULA is a fairly good agreement for a very basic App. For those relying on any third party services, from Google or another provider, you should be sure that any notices you are required to make are contained in a customized version of the EULA that is uploaded during the App submission process. Further, you may wish to place limitations on how, where, or when your app is used, which you should be sure are reflected in your EULA.

Whether you start with Apple's EULA or wish to have something drafted from scratch, you should always be sure that your software license accurately reflects the business deal you wish to strike with the end users of your software. Do you collect any data from your users and, if so, what is your policy on user data privacy? Must you or your end users comply with any open source license terms of relevance to your software? Are there any membership or similar fees that your end users must pay in order to use your app? Any of these situations, and many more, may require you to have special clauses in your end user license.

In terms of implementing the display of your license to the end user, any lawyer will tell you that the more obvious you make such terms and the more proof you have that a user actually assented to such terms, the better off you'll be. Forcing users to acknowledge the license upon first running the app is always preferable, as is keeping a log of when and by whom such assent was made. In lieu of this, you may wish to simply include the applicable license prominently somewhere in the app, though of course this weakens the enforceability should that issue be raised down the line. It should be noted that as of this writing, Apple does not provide any automatic system for display or "click through" of any App license – developers must take care of this on their own.

Protecting your copyrights

Developers of iPhone Apps must, like any author of a creative work, concern themselves with protecting their works against misappropriation or infringement by others. In the United States, copyright ownership is automatically obtained upon the physical creation of a copyrightable work – writing a manual, saving a text file containing code, or recording a musical composition are all acts that give rise to ownership of copyright.
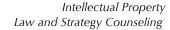
It is not widely known, however, that in order to assert your copyrights against an alleged infringer in court, you must first obtain a copyright registration. While it is possible to obtain an expedited registration in the last moment before filing a lawsuit, the process is quite expensive and certain rights are lost if you do not have a registration in hand prior to the occurrence of an alleged infringement. Accordingly, it is highly recommended that any software author obtain a copyright registration for her work. Further, any significant updates to the software should be the subject of new registrations.

Obtaining a copyright registration for a software work is fairly straight forward. Recently, the U.S. Copyright Office has implemented an electronic filing system that greatly increases the speed and efficiency of preparing an application. Complete instructions for registering a copyright for a software program are contained in the Copyright Office's publication entitled "Copyright Registrations for Computer Programs" (http://www.copyright.gov/circs/circ61.pdf). Even with these instructions, completing the registration process can sometimes be complicated – for example, if you are attempting to register an application that is based on a previous work, or if you're registering an application that is already several versions deep, questions can arise. It is often advisable to have your first copyright registration application completed with the assistance of an expert IP attorney, after which you will likely have enough information to complete any future registrations on your own, if you wish.

Patents for apps?

Many software developers wonder if they should be protecting their software by applying for patents. Certainly for larger software companies, patent protection is something to which a significant amount of effort and expense has been devoted. Many smaller developers, however, may not have a good sense of what is novel and non-obvious enough to warrant patent protection in the United States or elsewhere. If a developer believes that some feature or function of their software is indeed different enough from anything else in the field (i.e., the "prior art"), then patent protection may well be worth looking into.

If patent protection is something you might be interested, there are a couple of things you can do try and minimize the work that a patent attorney would have to do (and charge you for) in order to start an application. In particular, inventors can see whether something similar to their invention has already been covered in an existing patent or patent application. The US Patent and Trademark Office has a publicly accessible database containing several decades worth of patent documents that you can search for free and Google also has recently gotten into the patent search game (see Resources section for links to both). Searching for prior art in your field of interest should give you a basic sense of just how novel your invention is and, accordingly, whether you'd like to bear the costs of further searching and/or having a patent application drafted.

The second tip for trying to reduce the costs and frustration of preparing a patent application is to put some serious thought and effort into what exactly your invention is. The more detailed description, including any relevant drawings, that you can give your patent attorney, the less time she'll have to spend figuring out what the invention is when trying to describe it as part of a patent application.

Summary

The Apple iTunes platform and app store present a great opportunity for mobile developers. But getting your app into the App store and smoothly transitioning to a large user base requires that you make sure you are playing by all the rules. Making sure that all your intellectual property legal issues are in order is particularly important if you expect to sell your application and keep it selling without the complication and expense of legal battles. If you have all of the bases above covered, then you're off to a great start.

About the author

Miguel Danielson is a Boston-area attorney at Danielson Legal LLC, a national intellectual property and technology law practice. He has advised dozens of software, Internet, and other technology companies, including top iPhone developers, on a range of issues including licensing, copyright, trademark, Internet law, and open source issues. Mr. Danielson welcomes inquiries from iPhone developers and other software and technology companies and maintains a blog on issues of concern to such parties. Contact details for Mr. Danielson are below:

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Blog: http://www.danielsonlegal.com/blog
Twitter: @danielsonlegal

Resources

Trademark

U.S. Trademark Searching
http://tess2.uspto.gov/bin/gate.exe?f=tess&state=4008:vobc40.1.1

Basic trademark information from the US Patent and Trademark Office
http://uspto.gov/web/trademarks/workflow/start.htm

Copyright

Apply for a copyright online
http://www.copyright.gov/eco/

Copyright Office circular on registering computer program copyrights
http://www.copyright.gov/circs/circ61.pdf

Terms and Conditions

Apple Standard iPhone/iPod App EULA
http://www.apple.com/legal/itunes/appstore/dev/stdeula/

App Rejections

Apple Human Interface Guidelines
http://developer.apple.com/mac/library/DOCUMENTATION/UserExperience/Conceptual/AppleHIGuidelines/XHIGIntro/XHIGIntro.html

Mobile Orchard: Avoid iPhone App Rejection From Apple
Part I: http://www.mobileorchard.com/avoiding-iphone-app-rejection-from-apple/
Part II: http://www.mobileorchard.com/avoiding-iphone-app-rejection-part-2/

AppRejections.com – app rejection blog
http://apprejections.com/

Guidelines for Using Apple Trademarks and Copyrights
http://www.apple.com/legal/trademark/guidelinesfor3rdparties.html

Patents

USPTO Patent Search Engine
http://patft.uspto.gov/

Google Patent Search
http://www.google.com/patents