# 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 traction and/or revenue.  And because Apple handles all distribution and revenue collection for iPhone Apps, many developers have quickly 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 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 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 as well.  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 (http://tess2.uspto.gov/bin/gate.exe?f=login&p_lang=english&p_d=trmk), and of course Google 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 means 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 SDK terms and conditions**

Anyone who wishes to develop iPhone applications must utilize the iPhone SDK and, accordingly, agree to the terms of Apple's SDK Agreement.  Because Apple itself controls what is essentially the only 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 SDK 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 SDK Agreement, but a few highlights are described below for illustrative and educational purposes (please note that the iPhone SDK 3.0 agreement is used for all references).

- 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 SDK 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 SDK 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.

**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, GNU General Public License requires that you to 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 component when you distribute your own software.

**What are your terms and conditions?**

One of the most astounding things I've noticed about iPhone development is that Apple provides developers with no pre-made tools or mechanisms for creating or displaying your own terms and conditions to end users before, during, or immediately after the purchase process. This is surprising for several reasons, not the least of which is that Apple's own SDK terms and conditions require developers to put notices in their terms and conditions under certain circumstances, for example if you use certain route guidance tools. Further, just about any software these days comes with an end user agreement that users are forced to look at either when installing or first using a program. Meanwhile, the vast majority of apps presently in the app store do not have any mention of an end user license or other terms and conditions that apply to use of an app.

Apple's apparent answer to this dilemma is simply that you must come up with your own solution for including the terms and conditions of your app within your app's interface. Many larger publishers of software that have ported or created apps for the iPhone have been savvy enough to do this, but the vast majority of smaller and medium sized publishers have not. Just for the record, any time you distribute software to end users, it is imperative that you establish what your customers can and cannot do by way of an end user license. Further still, if you are using any third party services (including through Apple-provided APIs for Google services or real-time routing), then you are likely to have obligations to provide notices to your users of certain restrictions or terms that they must abide by, a task most appropriately handled in an end user license. Failure to include such notices means that you are in violation of your obligations and, therefore, not lawfully permitted to use the relevant service.

With regard to drafting a suitable end user license for your software, you can always start with a standard software license that you or your attorney may have access to. However, you should carefully consider whether your app is going to operate in a way that will require special consideration in drafting in your license. Do you collect any data from your users and, if so, what is your policy on user privacy? Must 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.

## 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 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 with a national intellectual property and technology law practice. He has advised dozens of software, Internet, and other technology companies, including 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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