



A Practical Legal Guide to iPhone Application Development

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By examining the iPhone SDK Agreement, Apple's End User License Agreement, and federal copyright and trademark registration, this guide provides an introductory overview of the common legal issues surrounding iPhone Application development, and the measures developers can adopt to minimize liability and maximize protection of their intellectual property rights.

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Apple's iPhone SDK Agreement imposes several significant legal requirements, the most notable of which include:

- **Privacy Laws**: Developers are required to comply with all state, federal, and international privacy laws regarding user data collection, and picture or voice capture. Accordingly, personal information collected from a user may not be disseminated without the user's consent; the unauthorized use of a user's name or likeness for gain is prohibited; and a user's voice may not be recorded absent a conspicuously displayed noticed indicating that a recording is taking place.
- **Copyrights in Music and Content**: Any music incorporated into your Application must be wholly owned by you or licensed to you on a fully "paid-up" basis. (Such a license should provide that the one-time, lump-sum payment is final, and that you are released from any and all further payment obligations to the Licensor, no matter how successful the Application becomes.) Further, any and all content in your Application must be owned by you, or be used by you with the owner's permission. If you are using content other than music by virtue of a license, the license should state the royalty terms, if any, resulting from any and all sales of your Application.
- **Objectionable Content and Materials**: Applications may not contain any obscene, pornographic, offensive, or defamatory content, or other content that Apple deems objectionable. What is "objectionable" is a matter of Apple's reasonable discretion; legal challenges to a rejection of your Application on this basis will prove difficult.

■ PRACTICE POINT

To avoid inadvertently “infecting” your proprietary software with the “viral” effect of the GPL license, your product should “dynamically link” to the open source components when it is running so that your proprietary code and the open source code are not considered as a single work subject to the GPL license, which would be the legal result if the open source components were “statically linked”.

- **Free and Open Source Software:** Applications that include Free and Open Source Software (FOSS) must comply with all applicable FOSS licensing terms. The SDK Agreement also requires (perhaps superfluously) that your use of FOSS may not in any way infect the SDK itself.

NOTE: Due to its “viral” nature, using open source code subject to restrictive open source licenses needs to be carefully undertaken if it is to be safely incorporated into your proprietary software. For instance, the terms of the GNU General Public License (GPL) require that any derivative work that incorporates GPL code must itself be subject to the GPL, thereby rendering the resulting software “open” and the source code publicly available. Not only will any trade secrets contained in any code carrying a GPL license be forcibly disclosed, others may freely copy and distribute your source code, give it away for free, or even create a competing product using your own code. The viral nature of restrictive open source licenses can have a devastating impact on your company’s intellectual property assets.

End User License Agreement

Applications made available through the App Store are subject to Apple’s Licensed Application End User License Agreement (“EULA”), unless the end user enters into a valid EULA with the developer.

The following provisions of Apple’s EULA are of special note, and should be adopted should you use your own EULA:

- **Disclaimer of Warranty:** This provision states that the Application is being provided “as is”; without any express or implied warranties regarding the Application’s quality, performance, effectiveness or reliability. In those jurisdictions where disclaimers of warranty are enforceable, such a provision protects the Licensor from potential legal claims arising from the use of the Application, as the Licensor makes no promises of any kind.
- **Limitation of Liability:** This provision protects the Licensor from liability for personal injury, loss of profits, loss of data, or other direct and indirect damages arising from the use of, or the inability to use, the Application. This provision additionally places an upper dollar limit on the total damages for which the Licensor may be liable, excluding damages for personal injury in those states where such a limitation would be unenforceable.

Copyright and Trademark Protections

Both copyright and trademark registration are relatively affordable means to protect your investment in your software.

Copyright Registration

As a matter of law, copyright protection subsists in original works of authorship fixed in any tangible means of expression. The exclusive rights of reproduction, adaptation, and distribution are conferred automatically upon the owner of a copyright as soon as his or her work is written.

Although registering an Application is not a prerequisite for copyright protection, registration does afford several distinct advantages:

- Registration is required to bring an infringement suit.
- Registration within five years of publication creates a presumption of validity of the copyright and the facts contained in the registration certificate. Presumptive validity can be of critical importance when seeking a preliminary injunction or temporary restraining order requiring the copyright infringer to cease and desist.
- Registration prior to infringement allows for the recovery of attorney fees and statutory damages. (Because actual damages are often difficult to prove, the owner of a copyright may elect to recover instead an award of statutory damages in an amount between \$750 - \$30,000, as the court deems just. The Court may increase this amount to \$150,000 for willful infringements.)

Where a computer program containing trade secret materials is being registered, the Copyright Office allows you to deposit source code with the trade secret information redacted, or to deposit a combination of source code and object code, with up to 49% of the source code blacked out. Where an applicant is unwilling to deposit source code (even with portions blacked out), he or she may deposit object code only, but must state in writing that the work as deposited in object code contains copyrightable authorship.

NOTE: Because of the difficulty in reading object code, depositing your program in this form will generally protect any trade secrets contained in your code. However, because the Copyright Office cannot read the object code to determine if your program constitutes an original work of authorship, your program will be registered under the Copyright Office's "rule of doubt", and you will accordingly lose one of the primary benefits of registration; *i.e.*, the presumption that your copyright is valid.

■ PRACTICE POINT

Who owns the copyright for works created by an employee or independent contractor? Under the "work-for-hire" doctrine, there is a rebuttable presumption that the copyright in a work created by an employee acting within the scope of his or her employment vests in the employer, absent an agreement to the contrary. However, an independent contractor generally maintains the rights to his or her creation, unless the parties agree in writing that the work is considered one for hire. Best practice: get it in writing!

■ PRACTICE POINT

In selecting a name to be trademarked, it is important to adopt a “strong” (*i.e.*, distinctive) mark, as the level of protection against infringement of a trademark varies according to the “strength” of a mark. Generally, “arbitrary” and “fanciful” marks enjoy the greatest protection; whereas “generic” marks are not registrable, and can therefore never achieve federal protection. *Apple* in referring to computers is an example of a strong (here, “arbitrary”) mark because the word “apple” bears no relationship to the product or service the mark represents. On the other hand, the term “computer” in the software industry is irretrievably generic and would never be afforded trademark protection.

Trademark Registration

A “trademark” is any word, name, symbol or device, or any combination thereof, that identifies to consumers the source of a product, and allows trademark owner to distinguish their products from the products manufactured or sold by others.

Federal registration of your trademark confers several important advantages:

- Exclusive use of the mark for particular goods and services on a nationwide basis. (*Note: Without federal registration, an owner's right to use a trademark is limited to the actual geographic area of actual use of the mark.*)
- Access to the federal courts to enforce your rights, including double or treble damages in the event of willful infringement (which is presumed if the infringed mark was on the federal principal trademark register).
- Constructive notice of trademark protection, and *prima facie* evidence of the registrant's ownership and exclusive right to use the mark.

Together with copyright registration, trademark registration should be considered as an additional step to protect your intellectual property rights in any Application you develop.

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