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Protecting Your Mobile App IP

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the missing manual[®]



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Richard Stim

Protecting Your Mobile App IP: The Mini Missing Manual

by Richard Stim

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Introduction

This Mini Missing Manual explains four cost-effective ways to protect applications you develop for mobile devices. The info provided here won't stop people from doing nasty stuff like misappropriating your secrets, stealing your name, and copying your code. But, if any of those things happen, it'll give you the legal ammunition you need to recover your losses and, in some cases, get money to pay attorney fees. In short, if someone takes your work and then tries to bully you because they can afford an expensive lawyer, the methods explained here will help you even the playing field. Equally important, taking these steps will reinforce your legal rights in the event that another company wants to acquire your apps. There's one chapter for each of the four methods:

- **Trade secret protection.** This kind of protection is helpful when you haven't made your app available to the public and you want to show it to others—investors, beta testers, or contractors, for example. Chapter 1 explains what trade secrets are and how you can protect them. It also includes two standard nondisclosure agreements and explains of how to fill them out.
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- **Copyright protection.** Copyright is an effective means of protecting your whole app as well as individual parts of it such as the underlying code, appearance, and in some cases, the collection of data within your app. Chapter 2 covers basic copyright principles and shows you how to file a copyright application for your app.
- **Trademark protection.** Trademark law protects your app's name, slogan, or logo. Chapter 3 explains trademarks and shows you how to file an application for trademark registration with the U.S. Patent and Trademark Office.
- **Permissions.** Most apps consist of some material from another source, like photos, data, video, or audio clips. Chapter 4 tells you how and when to get permission to reuse material, explains fair use and the public domain, and includes sample release forms (with info on how to fill them out).

Note: You'll see the term "intellectual property" pop up throughout this Mini Missing Manual. It refers to laws related to copyrights, trademarks, patents, and trade secrets—in short, all the laws that protect the intangible ideas that spring from your mind that you express in creative and (hopefully) moneymaking ways.

Why not hire a lawyer?

If you can afford to hire a lawyer to take the steps suggested here, great. Unfortunately, most developers don't earn enough to pay a lawyer's hefty legal fees. (The typical hourly rate for an intellectual property attorney is about *30 times* the cost of this manual.) Happily, most of the tasks described here aren't that tough. For example, you should be able to prepare a nondisclosure agreement and register a copyright without having to visit a law firm.

Even if you do delegate tasks to a lawyer, you're better off understanding the basic principles of intellectual property law so you're not completely at the mercy of your lawyer—an unfortunate fate that has felled many a software startup. Success and longevity in

the mobile app business are based on a lot of variables, one of which is knowing your legal rights. If you don't understand the basic rules of protecting your apps, then you might end up scrambling to retrieve rights that you've inadvertently signed over to others.

Note: The information provided here is to help you cope with basic legal needs. You should consult with an attorney if you want professional assurance that this information is appropriate to your particular needs.

FREQUENTLY ASKED QUESTION

What About Patents?

I've heard that patents are the best way to protect ideas. How come you don't cover them in this guide?

Patent protection isn't covered here for a few reasons. Patent law—meaning utility patents, the most common form of patent protection—only protects new inventions that aren't obvious to others in the field. Although many patents have been granted for software and methods of doing business, the tide seems to be turning away from software protection. In other words, it's becoming more difficult to acquire patent protection for software, *and* harder to defend those patents. Patent protection also isn't discussed here because:

- Most apps probably aren't patentable.
- Getting a patent takes approximately 2 years and you can't go after infringers until after you've obtained the patent.
- Obtaining a patent is expensive: It generally entails about \$5,000 to \$10,000 in attorney fees.

That said, if you believe that you've created a novel way of accomplishing a process using a mobile or handheld device, you should consult a patent attorney or patent agent. Keep in mind that you have 1 year from the first time you publicly sell or publish info about your app (whichever comes first) to file for your patent.

Tip: Your humble author started www.dearrichblog.com, a blog that addresses common questions asked by developers, artists, and other content producers. There, you can look for answers to questions or ask your own. For example, the site includes several entries on copyrighting apps.

Trade Secrets and Nondisclosure Agreements

The lucky developers who tested prototype iPads before they were released to the public also had to perform one not-so-fun chore: reading through Apple's hefty *nondisclosure agreement* (often called an NDA). Among other things, the agreement required developers to keep the device isolated in a room with blacked-out windows, tethered to a fixed object, and under lock and key (and of course, no tweeting about it). Apple's secrecy requirements might seem a bit draconian, but the company's covert strategy is an important part of its marketing plan; it's the reason there's so much excitement whenever Apple unveils a new product.

The whole point of NDAs is to protect *trade secrets*, which you'll learn about in a sec. You probably won't need Apple's level of secrecy when developing a mobile app, but you should require *some* confidentiality to protect your business secrets. This chapter explains what you need to know about trade secrets and includes sample NDAs you can use when working with outside folks.

Trade Secrets: An Overview

Trade secrets include any confidential information that gives you an advantage over other developers, such as an idea for an Android app, a unique method of converting a PDF to html, or a collection of data about bankruptcy laws for use in a legal app.

Your trade secrets will likely include unpublished computer code, design specifications, business plans, and pricing and marketing strategies. In order for your info to qualify as a trade secret, it has to satisfy these three criteria:

- **It can't be generally known or ascertainable through legal methods.** Once something is general knowledge or can be learned by others in the business, it can't be protected by a nondisclosure agreement (with a few exceptions, explained below). The legal term for this is "readily ascertainable," meaning that the info can be obtained legally—for example, you can find it through an online database or at a library. (On the other hand, if someone obtains your secrets *illegally*—for example, they hack their way through your company's firewall—then you can go after them in court, even without an NDA.)
- **It has to provide a competitive advantage or have economic value.** For most trade secrets, this requirement is easy to fulfill. If you can show that folks can derive benefits from using the info, that you invested time and money in developing the info, or that you've received business or licensing offers for using it, you've got yourself a trade secret.
- **It needs to be the subject of reasonable efforts to maintain secrecy.** These efforts usually include logical security procedures—like locking offices, monitoring visitors, and labeling confidential information—and NDAs, which you'll learn all about later in this chapter. If you don't make any effort to keep the info secret, then it can't be considered a trade secret.

For example, there was a case involving a blood bank that claimed its list of donors was a trade secret, but since the bank posted the list online where competitors could find it, a court ruled that this info wasn't a trade secret (see <http://tinyurl.com/22joz5s> if you want the gory details).

FREQUENTLY ASKED QUESTION

Publicly Known Info and Databases as Trade Secrets

Can information that's publicly known ever be considered a trade secret? What about databases?

Yes, info that's public knowledge can be a trade secret *if* you've compiled or assembled it in a unique way. For example, in one case, a court ruled that a combination of generic, public-domain computer programs linked together in a unique way not generally known outside the banking industry constituted a trade secret (see <http://tinyurl.com/2frc37x>).

Databases—organized collections of information, usually in digital format—are often protected as trade secrets. For example, in the 1994 case *One Stop Deli, Inc. v. Franco's, Inc.*, a court ruled that a database used for inventorying and determining cost economies on wholesale sandwich production for fast-food restaurants was a protectable trade secret. But if you have a collection of data that's readily ascertainable—for example, a list of dead celebrities or valuable baseball cards—a court isn't going to grant you trade secret protection.

Databases may also be protected under copyright law if the method of compiling or arranging the data is sufficiently creative. It's often hard to tell whether a database meets the *modicum of creativity* standard (see <http://tinyurl.com/28y8ta8>) required by the U.S. Supreme Court. Collections of raw data such as parts lists usually don't constitute sufficient creativity, and neither do street directories or genealogies. In short, the fact that it took a lot of hard work to compile the info doesn't guarantee you copyright protection.

Protecting Your Secrets

Trade secret protection is based on the simple notion that keeping information close to the chest can provide a competitive advantage in the marketplace. But simply *saying* that data or know-how is a trade secret doesn't make it so; you have to actively do things that show your desire to keep the info secret.

Some companies go to extreme lengths to keep their trade secrets...well, secret. For instance, only two Coca-Cola employees ever know the trade secret Coke formula at the same time. Their identities are never disclosed to the public, and they aren't allowed to fly on the same airplane.

Fortunately, such extraordinary secrecy measures are seldom necessary. You don't have to turn your office into an armed camp to protect your secrets, but you *do* need to take reasonable precautions to keep them hidden from prying eyes. Here's a list of the minimum safeguards a small mobile app business (like a start-up) should enact to protect its trade secrets. Follow these guidelines and, if you ever need to file a lawsuit to prevent someone from using or disclosing information in violation of an NDA, a judge would likely conclude that you took reasonable precautions to prevent the public or competitors from learning about your secrets:

- **Use nondisclosure agreements.** If you're giving someone confidential info, have them sign a nondisclosure agreement. This is the single most important thing you can do to protect your trade secrets because it gives you a legal document to fall back on and shows that you take secrecy seriously. For example, in 1984, two computer consultants were sued for reverse-engineering the interface of a system for storing hospital data (Technicon Data Systems Corp. v. Curtis 1000, Inc.). As you'll learn in the next section, reverse-engineering itself isn't illegal.