

Policing Apache® Project Brand Use By Third Parties

Shane Curcuru @shanecurcuru
Vice President, Brand Management
The Apache Software Foundation

V 1.0

Introduction



- Shane Curcuru
 - Vice President, Brand Management
 - The Apache Software Foundation (ASF)
- Volunteer, appointed by Apache Board of Directors
- Define and implement trademark & brand policy for all 180+ Apache project communities
- Involved at Apache since 1999
- Not actually a lawyer
- Questions? <trademarks@apache.org>

Topics



- Trademark concepts brief overview
 - Adjectives, nominative use, consumer confusion, and registration
- How to manage Apache® project brands
- What PMCs need to do themselves
- What PMCs should do together with trademarks@
- What you must let trademarks@ do for your PMC

- Resources

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Trademark Concepts In 30 Seconds

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What are Trademarks?

- A trademark is the **legal instantiation** of your brand
- Trademarks are about **preventing consumer confusion** as to the **source of goods** within a **specific field of commerce**
- The specific name and logo an informed consumer (user of your software) associates with a **specific downloadable software program** or service
- Trademarks **protect consumers** by ensuring expectations of quality, functionality, etc. available from a specific vendor
- A brand includes many elements – names, logos, look and feel – parts of which are specific trademarks that signify a software **product** or service
- Your **project** name is not necessarily a trademark, although it may be a service mark

Trademarks are adjectives



- Trademarks are legally used to describe the actual goods
- I buy Kleenex® brand tissues
- We run Apache Lucene™ software and Apache Hadoop® software
- ... but in common usage we just write: we're running Python

- Use as an adjective is important on homepage & download page
- ... much less so in other places

Nominative use is OK



- Nominative use for trademarks ~ = fair use for copyright
- People must be able to use a trademark to describe the goods
- Nominative use even allows people to post bad reviews of your software product
- Personal blogs, newspaper articles, technical mailing list discussions are almost always nominative use
- Infringement is when a third party uses your marks in a way that may **mislead consumers** as to the true source of goods

Registered Trademarks



- In most jurisdictions, common law rights accrue from actual use of a mark to identify goods – without any registration
- Trademarks may also be registered with the USPTO, the EU, and other individual country governments – improves your rights
- The additional protections of registration vary by country:
- Typically, easier standard proof of infringement, and higher potential damages if ever brought to court

- Most Apache product names are not registered – CHANGING!

But it's open source!



Apache License

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PMC Branding Responsibilities

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PMCs: Be responsible



- PMCs are responsible for their own brand
<http://www.apache.org/foundation/marks/responsibility>
- Have a consistent brand and use it
- Understand how your brand is used in the marketplace
- Don't assume third party uses are approved
- Treat the Apache brand and the feather appropriately

PMCs: Be consistent



- Your use of your brand is the reference implementation
- Be consistent – especially in first and most prominent uses
- Attribute your own trademarks with TM or ® to make their status clear to others – both words and logos
- Ensure consistency in your website
 - In your documentation
 - On your download page
 - In publicly visible parts of your product UI
- Trademark law is not a compiler: the general consumer perception is what counts

PMCs: Be aware



- Be aware of major third party uses of your brand
- Third party uses that may confuse consumers as to the source of goods are important to review and respond to
- Other uses probably don't need to be addressed formally
- Personal blogs, press articles, software reviews, benchmark reports, forum discussions, emails on dev@... are all places that are unlikely to be infringing uses
- Fairness to all users is critical – both with outsiders and with companies who are contributing to your project

PMCs: Be respectful



- Ensure you treat other organization's trademarks respectfully
- Charitable or community-based projects have no business infringing on other's trademarks
- Be liberal in attribution and giving credit to other communities or companies
- Respond calmly and professionally if a third party asks/demands for changes; always cc: trademarks@

PMCs: Be independent



- Apache projects are independent
<http://community.apache.org/projectIndependence>
- Present an independent face to the project
- Governance is by your independent PMC
- Software product is branded Apache Foo
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- Independence from undue commercial influence is a requirement for Apache projects
- Independence means Apache Foo performs useful functions, without additional software

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PMC & Trademarks@ Responsibilities

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- Always contact third parties privately
- Assume ignorance rather than malice
- Private, direct contact allows all parties to save face
- Public confrontations often escalate, potentially damaging everyone's reputation
- But don't panic if the first email was on dev@

Be professional and polite



- Whenever contacting anyone about improper brand use:
 - Be professional – make them understand we are serious and understand the issue
 - Be polite – many cases are resolved through simple discussion and negotiations
 - Be firm – state the ASF's clear ownership of the marks
 - Be specific – quote specific uses that we request to be changed
- Most potential infringements cases are resolved through discussion between private@, trademarks@, and the party
- Legal threats are **never** the first step

Coordinate legal advice



- The ASF has pro bono corporate counsel from DLA Piper
- Send any legal questions, especially any from outside the ASF, to:
 - trademarks@ for anything brand-related (private archive)
 - legal-internal@ for any specific legal question the PMC has on behalf of the project (private archive)
 - legal-discuss@ for any general legal questions that can be discussed publicly (public archive)
- **Never** grant legal permissions or exceptions to brand policy without explicit trademarks@ approval
- **Never** give legal advice (unless you actually are an ASF counsel)
- **Never** respond to an outside lawyer without asking ASF counsel

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Trademarks@ Responsibilities

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Trademarks@ sets policy



- The ASF owns Apache trademarks on behalf of our projects
- PMCs are required to comply with core use policy
- PMCs otherwise define and promote their own brand
- Project brand design, like technical direction, is completely up to PMCs to define for themselves
- trademarks@, like press@, infra@, etc. are here to serve the needs of all Apache projects

Deal with difficult users



- Any time a third party responds negatively, or when a lawyer is involved – ask trademarks@ to craft a reply for the project
- Any difficult negotiations should be done by VP, Brand Management, with appropriate legal counsel
- Most corporations respond to official titles
- Patience is required: trademark issues are rarely time critical
- Legal threats are never the second step

Legal action



- A Cease & Desist (C&D) is never the right place to start
- Consider the public image of “attacking” a third party
- Trademark litigation is expensive and risky
- Most issues can be resolved with polite, firm, and private discussion with the right parties
- A very few serious issues end up being resolved with other actions: making a public case; restricting PMC or commit access; or the board unilaterally restructuring a project

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Thank You



- Thanks to all Apache Members
- Thanks to all Apache committers and PMCs
- Thanks to members of Apache Trademarks Committee, with special thanks to David Nalley
- Thanks to DLA Piper counsel: Mark Radcliffe, Dash McLean, Nikkya Williams, Carol Anne Bashir
- Thank you to companies who respect Apache brands

Apache Trademark Resources



- Formal policy for third party use
<http://www.apache.org/foundation/marks/>
- Policy for PMC websites
<http://www.apache.org/foundation/marks/pmcs>
- Project Independence is **required** for PMCs
<http://community.apache.org/projectIndependence>
- Questions? `<trademarks@apache.org>` and relevant `<private@project.apache.org>`

Questions?



Please feel free to find Shane with your questions this week

Look for the Ask Me! Buttons, and just ask!



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First, thank you all for attending.

Separately, I currently serve on the board, however detailed policy is set by relevant corporate officers. The board has had a consistent policy of delegating specific sets of authority to specific officers.

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So, to really understand how to respect the Apache brand, we need to know what it is. And critically, it's important to understand what Apache – that is, the Apache Software Foundation – is as a whole and as a federation of many projects.

We'll cover some of the basics of what people can/can't do with our Apache brands.

Very briefly, we will need to discuss the elephant in the room, and talk about brand enforcement. One of the most important parts of my job is ensuring that we can defend both the Apache brand and our many project brands, and enforcement is a key part of that.

I'd like to be sure to leave time for questions – but I'm also here all this week, so please feel free to find myself or another director with your questions.



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This is the slide that we should never have to deal with, because we should be reasonable people, and talk about potential infringements or policy violations in private first, and work out differences politely.

But since there are clearly some organizations who aren't as enlightened, we do have the tools to defend our use of Apache brands. DLA Piper in particular is a leading global IP firm with a solid pro bono agreement with the ASF for both policy, enforcement, and legal agreements assistance.

Similarly, outside companies that can't respect our brands clearly aren't interested in furthering the goals of our projects, and thus, we can and will prevent them from working within the project governance.

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Also: Community over Code. It's important, as is giving the thanks to the community members who have built everything the ASF and it's projects are about.

Members have built the Foundation.

Committers/PMC members have built our projects.

Members and the trademarks committee have assisted in forming and documenting our policies, as well as assisting our various projects in applying them and defending their brands.

Our pro bono law firms have helped with review and strategy. In the past we have also used other firms, including SFLC, however DLA Piper is our primary brand-related pro bono firm.

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To do add basic links to our policies and rationale pages.

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