



JULY 16–20, 2012 **PORTLAND, OR**

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Managing Community Open Source Brands

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<http://communityovercode.com/2012/07/oscon-presentation/>

v 1.0

Introduction

- Shane Curcuru
Vice President, Brand Management
The Apache Software Foundation (ASF)
- Volunteer position, appointed by the ASF Board of Directors
- Define and implement core branding policy for all 150+ Apache projects & podlings
<http://www.apache.org/foundation/marks/>
- Questions? <trademarks@apache.org>
- I am not a lawyer ..
.. but now can play one on the Internet

Topics

- Trademark concepts in 30 seconds
Adjectives, nominative use, consumer confusion, and registration
- 10 Steps to community brand management success
Governance, policies, maintenance, enforcement
- How your \$BigCo can collaborate respectfully with the community
Give credit to the community, grow your **own** brand
- Resources



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Trademark Concepts In 30 Seconds

Trademarks? I thought you said brands...

- A trademark is the legal instantiation of your brand
- Your brand includes many elements – names, logos, look and feel – that also includes specific trademarks that signify your **software product or service**
- Trademarks are about **preventing consumer confusion** as to the **source of goods**
For software, it's typically specific name/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.
- Your **project name** is not necessarily a trademark, although it may be a service mark

Trademarks: Nominative use and Infringement

- Nominative use for trademarks =? fair use for copyright
- People must be able to use your trademark to describe your goods
- Nominative use even allows people to post bad reviews of your software product
- Infringement is when a third party uses your marks in a way that may mislead consumers as to the **true source of goods**

Trademarks: used as adjectives

- Trademarks are best 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

Trademarks: registered or common law

- In most jurisdictions, common law rights accrue from **actual use** of a mark to identify goods
- Trademarks may also be registered with the USPTO, the EU, and other individual country governments – this is not required, but improves your rights
- The additional protections of registration vary significantly by country:
Typically, easier standard proof for infringement, and higher potential damages in court
- < \$500 to register online with USPTO
- Should you register? “It depends”

But it's an open source licence!

- Go read your open source license again
- Most of them explicitly exclude any rights to trademarks



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10 Steps to Community Brand Management Success!

How To: Manage your community's brand

- Establish clear project **Governance**

- Define your brand

- Use your brand consistently

- Publish and enforce a policy

How do you want others to use your brand?

- Have a single point of contact

- Be professional, polite, and firm

- Discuss potential infringements privately

- Avoid legal entanglements...

- ... But ask a lawyer if you need to

Governance

- Having clear project governance and ownership is critical: Brands are not code
- Who decides what your specific brand actually is?
Human judgement is required to define your bikeshed's image and how it should be used
- Who owns your brand?
Specific ownership improves your ability to defend your brand

What **is** your brand?

- The specific name of your software product?
- The specific name of your software project?
- Do you have common abbreviations or other names?
- Logos?

For the product? For the community? For partners?

- You don't need a full style guide and logo use requirements
- You should have a consistent definition of your primary brand

Use your brand consistently

- 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
 - Ensure consistency in your website
 - ... in your documentation
 - ... on your download page
 - ... in publicly visible parts of your product UI
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- Trademark law is not a compiler: the general consumer perception is what counts

Create a brand use policy

- Describe clearly up front how you wish your brand to be treated by others
- Most people (who read it) will follow it
- Helps show your seriousness if legal issues do arise
- Don't try to define every use case: just general ones
- Include examples of appropriate and inappropriate uses
- Allows many questions to be answered by a link to the policy

Respect other brands

- 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

Policing your brand's use

- Legal expectation that you will defend your brand – or you may lose it
- Provide a simple and documented method for your community – and third parties – to report potential infringements to you directly
- Third party uses that may confuse consumers as to the source of goods are important to review and respond to
- Personal blogs, press articles, software reviews, benchmark reports, forum discussions, emails on dev@... are all places that are unlikely to be infringing uses
- Your brand use policy may choose to allow greater third party use than traditional trademark law might suggest

Have a single point of contact

- Include a single point of contact in your brand use policy
- Do **not** encourage community members to independently approach potential infringers
- Have a single person handle contact with each potential infringer
- Ensure consistency in your communication

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

Be professional, polite, firm, and specific

- Be professional – make them understand you are serious and understand the issue
 - Be polite – many cases are resolved through simple discussion and negotiations
 - Be firm – state your clear ownership of the marks
 - Be specific – quote specific uses that you request to be changed
-
- Most potential infringements cases are resolved through discussion
 - Using official titles often helps your cause

We'd like to avoid any legal entanglements

- Trademark litigation is expensive
- A Cease & Desist (C&D) is never the right place to start
Consider the public image of “attacking” a third party
- Most issues can be resolved with polite, firm, and private discussion
- Some issues end up being resolved by making a public case

Never play a lawyer yourself

- Don't be afraid to seek legal advice
 - Do ask counsel if you receive a specific legal threat
 - Do consult with counsel before considering sending a Cease & Desist or any legal action
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- Pro bono counsel is out there for non-profits



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How Your Company Can Help The Community

Respect the community

- It's the **community's** brand – not yours

- When in doubt, ask first!

Give plenty of lead time for volunteer or community-governed projects to respond.

- Ensure your marketing department is aware of your strategic goals

Short-term “wins” of implying ownership in community brands leads to long-term backlash

Create your own brand

- It's the **community's** brand – not yours

- Develop your **own, separate** brand

BigCo SuperThing, Powered By Apache Foo is probably OK

BigCo FooThing is not

BigCo's Apache Foo is not

The Best Foo is not

- Different communities may have partner, affiliate, or similar programs that allow a stronger coupling of brands – but on the community's terms

Give credit to the community

- Celebrate the project community
- Be liberal with praise and attributions
- Focus on competing higher up the value chain
- The community is not your competitor: those other BigCos are
- The most important asset to any community project are it's individual contributors

Volunteer other resources for the community

- Sponsor website designers, editors, logo contests for the community
But: it's the community's decision to define the brand – not yours
- Assist with organizational tasks, like finding pro bono legal counsel



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Thank You
& Resources

Thank You!

- Many thanks to many Apache Members and committers who have worked on our brands
- Thanks to the Software Freedom Law Center & DLA Piper, pro bono counsel for the ASF
- Thank you to all those contributing to Apache projects and other open source projects

- Questions?

Join me for Office Hours next @ 5pm on the Expo floor!

Resources

- **Resources – Trademark Law Basics**

<https://www.softwarefreedom.org/resources/2008/foss-primer.html>

<http://www.ifosslr.org/ifosslr/article/view/11/38>

- **Resources – Pro Bono Counsel**

<https://www.softwarefreedom.org/services/>

- **Resources – Open Source Brand Use Policies**

The Apache Trademark Policy covers all 150+ Apache projects:

<http://www.apache.org/foundation/marks/>

Mozilla explains the reasons for their policy in very approachable terms:

<https://www.mozilla.org/foundation/trademarks/policy.html>

These slides: <http://communityovercode.com/2012/07/oscon-presentation/>



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