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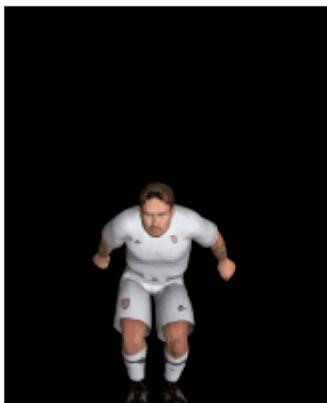
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Don't Steal My Avatar! Dealing with Smart Phone App Patents

Posted by **Mark Nowotarski** on 6/23/11 • Categorized as **All Posts, Industry**

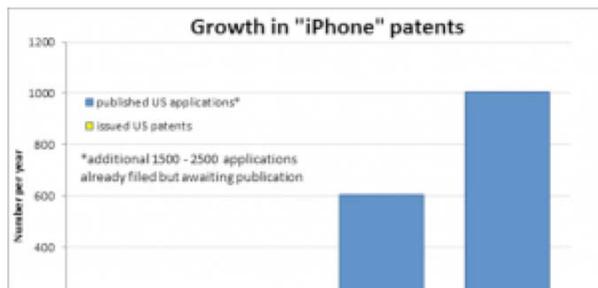
*This is a guest post from Mark Nowotarski, President of **Markets, Patents & Alliances LLC***



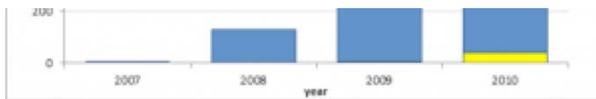
What do you think of my jumping buddy over there? Pretty cool, huh? Let's call him "George". Don't steal him, though. He's patent pending. **(US 2008/0309677)**

What! You can't patent an avatar. It's obvious! It's already been done! You will never be able to enforce it!

Ah, but George isn't just any avatar. He's an evolved avatar. What makes him special, and potentially patentable is not what he is, but how he's made. Users create a George by first selecting avatar grandparents out of a catalog. The grandparents then produce parents. The parents then produce kids, like George. George's inventors, and their patent attorney, are confident that that process they've developed is new, useful and not obvious. If the US patent examiner agrees, then they will get a patent.



A total of about 2000 smartphone patent applications have been published but only about 85 have issued. Patent applications, however, are published a year and a half after an application is filed. So there is anywhere between 1500



applications (0% per year growth rate) and 2500 applications (1.5X per year growth) that have been filed but have not been published.

Patents haven't been a problem for smart phone app developers yet because the iPhone has only been around since 2007. Patents take four to six years to get through the patent office. The ones filed in 2007 are just emerging now. So now is the time to get ready for them. With a backlog of 2000 to 4000 applications already filed, and a growth rate of at least 50% a year in new applications, they could have a major impact in the not too distant future.

So here are a few tips for app developers to bear in mind to help stay out of trouble with patents and even consider the possibility that they might want to get one themselves.

1. **Don't copy what's patent pending.** If you see something is patented or patent pending, don't copy it. Instead, consult a patent attorney and if the patent looks strong, consider approaching the patent owner to see they will license it. Most patent owners are more than happy to license for a reasonable fee, unless you are a direct competitor.
2. **Understand the realistic levels of risk.** It costs about \$1 - \$3k million or more to sue someone for patent infringement. If you are generating those kind of profits then you need to pay attention to patents. Other factors that increase your exposure to a patent lawsuit include an anticipated multiyear life for your product; you have a well-funded rival who wants to make a point, and you are deliberately copying someone else's successful product. If you can tick off more than two of these risk factors, it would be worth getting a legal opinion to help you stay out of trouble. That's how you stay smart in the patent game.
3. **Get a few patents yourself.** Patents are excellent defensive weapons. The best way to reduce your risk of getting sued is to be able to strike back. This is why Red Hat gets patents. More importantly, once you get a patent or two, you become familiar with the process and are better able to realistically assess the risks of your competitor's patent activities. This is excellent payback on the \$10k – \$20k it takes to get a patent.

Patents are coming. As many as 4000 are already on file with a growth rate of 50% per year. The first of these pending applications are just now emerging as issued patents. Those who are striving to become major players in the mobile app space would do well heed the risks and

consider getting their own patents to be fully prepared.

Disclaimer: Nothing in this posting is to be considered legal advice. Readers are urged to consult proper patent legal counsel before embarking on any patent program.

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Mark Nowotarski

Mark Nowotarski is the president of Markets, Patents & Alliances LLC, a patent and licensing firm. He is a registered US patent agent and an inventor on 17 issued US and international patents. His web site is

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Lodsys update:

As many of you know, Lodsys has sued a number of small developers for violating it's app patents for smart phones. This apparently was done to intimidate the app community as a whole into paying license fees. None of the app developers sued by themselves are big enough to warrant the expense of a full patent infringement lawsuit.

Fortunately a counter lawsuit has been filed to have the Lodsys patents declared invalid. This is a classic case where collective defense is the best defense.

Time will tell how it all works out.

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