

# Video Game Release Highlights TM Pitfalls Of App Store

By **Parmida Enkeshafi and Simon Pulman** (September 18, 2024)

As Balatro — a poker "roguelike," or role-playing game[1] — gears up for its mobile release on Sept. 28, a new challenge looms, not in the game's mechanics, but in the iOS App Store search results.

Created by developer LocalThunk, Balatro has, since its initial release in February, sold over 2 million copies across platforms like PlayStation, Xbox and Nintendo Switch.

Balatro is now up for presale on the iOS App Store. Securing a spot on the platform represents access to a critical market and opens the door to substantial revenue potential.

Yet, being on the App Store can be a double-edged sword. Search results for Balatro also return unrelated pokerlike games such as Pokero: Card Adventure, which could tap into Balatro's fanbase and market. These results raise critical questions about protecting Balatro's intellectual property.

This article explores how trademark law shapes this digital battleground. But the law does not exist in a vacuum — Apple's policies play a crucial role in shaping how this legal battle unfolds.

## Navigating the Legal Landscape and Apple's App Store Policies

Apple's policies dictate that search results are ranked by relevance and user behavior while keyword choices remain hidden.[2] This creates a tension between transparency and privacy.

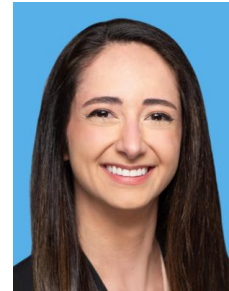
On one hand, developers need to prevent misuse of their trademarks, but the lack of visibility into competitors' keyword strategies complicates enforcement. The private nature of keyword data helps protect developers from having their strategies copied but makes it difficult to monitor if a trademarked name is being misused.

However, mere misuse is insufficient: To determine trademark infringement under the Lanham Act, the focus must ultimately be on the consumer.

The Lanham Act is not merely a statute to protect words on paper — it is a bulwark against confusion in the marketplace. Section 1114 of the act is clear: Trademark infringement occurs when the use of a mark is likely to cause confusion, mistake or deception regarding the source of goods.[3]

When it comes to keyword advertising, it matters not that a trademark is unseen by the public eye.

The act of using a competitor's mark, even in the background of a search engine, is "use in commerce" if it misleads consumers. Take *Rescuecom Corp. v. Google Inc.* in the U.S. Court of Appeals for the Second Circuit in 2009, where Google's sale of Rescuecom's trademark



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for keyword advertising was deemed actionable under the Lanham Act.[4]

Similarly, in *Hearts on Fire Co. LLC v. Blue Nile Inc.* in the U.S. District Court for the District of Massachusetts in 2009, we find that misusing a competitor's trademark in keyword advertising can lead to just the confusion the Lanham Act forbids.[5]

The heart of the matter is confusion, which need not rest on a trademark's visible display but on whether consumers are tricked into thinking they are purchasing from the rightful owner. The idea that some hidden keyword use does not violate the law is rejected outright.

But legal precedent aside, there are practical challenges. Even the clearest legal provisions cannot always surmount the difficulties of proving actual confusion in the marketplace.

### **Challenges to a Potential Trademark Infringement Claim**

Despite the intricate legal principles at play, a trademark infringement claim by Balatro against rival game developers whose apps populate in search results faces a high bar. The linchpin of trademark infringement is consumer confusion, and here, Balatro may have a hard time proving it.

Consumers in the iOS App Store are presented with not only an app's name but also its icon and detailed descriptions. These visual cues, together with clear distinctions between products, make it implausible that users would be misled — even if Balatro's trademark was used as a keyword. The iOS App Store's transparent setup renders this case quite different from the murkier situations where hidden keywords might dupe consumers. Here, the marketplace allows for informed decisions, reducing any risk of confusion.

The names "Balatro" and "Pokero: Card Adventure" are distinct enough to avoid the type of consumer confusion the Lanham Act addresses. Additionally, the app icons further differentiate the two.

The icon for Balatro features two cards: an ace of hearts and a joker in a blue and orange outfit, against a red, black, and blue gradient background. The icon for Pokero: Card Adventure depicts four cards: an ace, king, queen, and jack, each in a different suit, against a blue, pink, and purple galactic background.

Any claim by Balatro that consumers were misguided solely based on keyword use would thus be a steep uphill battle, given the clarity of the app identification process.

Nevertheless, developers are not left without recourse, and there are steps they must take to shield their brands from potential exploitation.

### **Recommendations for Developers**

#### ***Proactive Monitoring***

Keep an eye on how your game's name appears in search results. Ignorance is no defense when your brand is being misused.

#### ***Take Action***

If competitors encroach on your trademark, do not hesitate — send cease-and-desist notices and assert your rights under the Lanham Act.

Enforcement, however, is not just about aggression, it is about strategy. Knowing when and how to enforce your rights is key to safeguarding your brand without unnecessary escalation.

### ***Collaborate With Platforms***

Collaborate strategically with app store platforms — secure your rights while avoiding needless escalation.

### ***Strategic Protection***

Know when to fight and when to negotiate.

Protect your IP while maintaining essential industry relationships. In short, it is not just about fighting: It is about fighting smart, knowing precisely when to defend and how to wield the law effectively.

### ***Conclusion***

The release of Balatro highlights the interplay between keyword advertising and trademark protection — particularly for indie developers who, unlike corporate behemoths, lack vast resources yet seek to maximize the reach of their game.

Navigating this terrain may seem overwhelming, but there are clear, actionable steps: registering trademarks, monitoring for infringement and leveraging the tools at hand to defend your IP.

The law, while complex, is a shield, and with proper guidance, developers can focus on their true craft — creating the innovative games they were meant to build.

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[1] A roguelike game is a subgenre of role-playing games (RPGs) featuring procedurally generated levels, permadeath, and turn-based, grid-based movement, inspired by the 1980 game Rogue. Each playthrough offers a unique experience due to random level design, and death means starting over entirely, often requiring strategic planning to progress and survive. The games emphasize complexity and challenge, with no two playthroughs being the same.

[2] Apple Inc., Search Optimization, Apple Developer, <https://developer.apple.com/app-store/search/> (last visited Sept. 12, 2024) (providing guidelines for optimizing app visibility on the App Store, covering keyword selection, app descriptions, and the use of Apple Search

Ads to improve search ranking); Apple Inc., Keywords Best Practices, Apple Search Ads, <https://searchads.apple.com/best-practices/keywords> (last visited Sept. 12, 2024) (providing best practices for choosing and using keywords in Apple Search Ads to improve app visibility, emphasizing relevance, match types, and keyword performance monitoring).

[3] 15 U.S.C. § 1114.

[4] *Rescuecom v. Google*, 562 F.3d 123 (2d Cir. 2009).

[5] *Hearts on Fire v. Blue Nile*, 603 F. Supp. 2d 274 (D. Mass. 2009).