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# Intellectual Property Issues for Startups Participating in Entrepreneurship Support Programs in Wisconsin

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# INNOVATION IN WISCONSIN: KICK-STARTING INNOVATION ARTICLES

## INTELLECTUAL PROPERTY ISSUES FOR STARTUPS PARTICIPATING IN ENTREPRENEURSHIP SUPPORT PROGRAMS IN WISCONSIN

NATHANIEL S. HAMMONS\*

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## INTRODUCTION

Wisconsin is not known as a bastion of startup activity.<sup>1</sup> Yet the startup scene has changed significantly since the turn of the century, and the pace of change has been accelerating. In 2001, only eight early-stage Wisconsin companies raised capital, totaling less than \$53 million.<sup>2</sup> In 2016, by way of comparison, 137 early-stage Wisconsin companies raised more than \$276 million in investment capital.<sup>3</sup> As someone familiar with the state might surmise, more than half of the deals closed in 2016 were in the Madison area,<sup>4</sup>

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1. Wisconsin has achieved notoriety of sorts by ranking last in business startup activity the past three years, according to the Ewing Marion Kauffman Foundation. Rick Rommell, *For Third Straight Year, Wisconsin Ranks Last in Business Startup Activity*, JOURNAL SENTINEL (May 18, 2017 7:00 AM), <http://www.jsonline.com/story/money/2017/05/18/third-straight-year-wisconsin-ranks-last-business-startup-activity/328803001/?cookies=&from=global> [https://perma.cc/9R6W-ZKY5]; *2017 Kauffman Index of Startup Activity*, EWING MARION KAUFFMAN FOUNDATION (2017), <http://www.kauffman.org/kauffmanindex/reporting/~media/b27f0b8eb4a8414295f23870538e5372.ashx> [https://perma.cc/2U8T-QDK4]. Other studies place Wisconsin's startup activity in a more positive light. See Tom Still, *How Can Wisconsin Get More Startups?*, THE CHIPPEWA HERALD (May 24, 2017), [http://chippewa.com/news/opinion/columns/tom-still-how-can-wisconsin-get-more-startups/article\\_06ca8e39-89fa-50ba-8ca2-e8eabd790e47.html](http://chippewa.com/news/opinion/columns/tom-still-how-can-wisconsin-get-more-startups/article_06ca8e39-89fa-50ba-8ca2-e8eabd790e47.html) [https://perma.cc/VW6R-KU66].

2. Tom Still, *Technology Helps Drive "Holy Trinity" of Wisconsin Economy*, JOURNAL SENTINEL (March 4, 2017), <http://www.jsonline.com/story/money/2017/03/04/tom-still-technology-helps-drive-holy-trinity-wisconsin-economy/98704132/> [https://perma.cc/WA4T-CFQ2]; *Wisconsin 2016 Deal Flow Snapshot Year-End*, WISCONSIN ECONOMIC DEVELOPMENT CORPORATION (2016) (on file with the Marquette Intellectual Property Law Review).

3. *2017 Wisconsin Portfolio*, WISCONSIN TECHNOLOGY COUNCIL, at 4 (2017), <http://wisconsintechcouncil.com/wp-content/uploads/2015/09/2017-WI-Portfolio.pdf> [https://perma.cc/C9T9-B75G].

4. *Id.* at 19.

home to the University of Wisconsin-Madison and large employers in information technology, healthcare, and life sciences, among other sectors.<sup>5</sup> Despite ranking 82nd in the United States by population,<sup>6</sup> Madison has garnered national attention for its startup activity, with one recent study ranking the city sixteenth in a list of “Next in Tech” cities.<sup>7</sup>

Startup activity is not confined to the Madison area, with early-stage investor networks and funds active in Milwaukee, the Chippewa Valley, La Crosse, the Fox River Valley, and elsewhere in the state.<sup>8</sup> Milwaukee, the largest city in the state, is known to have less startup activity than Madison. Yet a 2017 article in *Inc. Magazine* designated Milwaukee as one of three cities in the country to which startups should consider moving, in part due to the city’s affordable rent and proximity to large companies such as Rockwell Automation, GE Healthcare, and Johnson Controls.<sup>9</sup>

Startups are not created, and do not grow, in a vacuum. Indeed, a strong startup ecosystem—i.e., a region’s entrepreneurs, investors, mentors, service providers, support organizations, etc., and the connections between the various players—encourages and facilitates the growth of new ventures.<sup>10</sup> Wisconsin’s

5. *Top Employers*, MADISON REGION ECONOMIC PARTNERSHIP, <http://madisonregion.org/about-the-region/major-companies/top-employers/> [<https://perma.cc/S95F-RYFY>]. One of the most prominent and successful employers is Epic Systems Corporation, a privately held software company employing more than 8,000 in the Madison area. Jeff Glaze, *Epic Systems Draws on Literature Greats for Its Next Expansion*, MADISON.COM (Jan. 6, 2015), [http://host.madison.com/news/local/govt-and-politics/epic-systems-draws-on-literature-greats-for-its-next-expansion/article\\_4d1cf67c-2abf-5cfd-8ce1-2da60ed84194.html](http://host.madison.com/news/local/govt-and-politics/epic-systems-draws-on-literature-greats-for-its-next-expansion/article_4d1cf67c-2abf-5cfd-8ce1-2da60ed84194.html) [<https://perma.cc/9TQN-XUV9>]. More than half of all patients in the United States have their electronic health records in an Epic system. *Id.* Venture capitalists and others view Epic Systems and the University of Wisconsin-Madison as strong assets to the entrepreneurial community in Madison. Laurel White, *Venture Capitalists Nod to Epic Systems, UW-Madison for Madison’s Burgeoning Startup Scene*, THE CAP TIME (Nov. 5, 2015), [http://host.madison.com/ct/business/technology/venture-capitalists-nod-to-epic-systems-uw-madison-for-madison/article\\_7a407cee-cc3b-5b3d-a2e8-92b6184f646b.html](http://host.madison.com/ct/business/technology/venture-capitalists-nod-to-epic-systems-uw-madison-for-madison/article_7a407cee-cc3b-5b3d-a2e8-92b6184f646b.html) [<https://perma.cc/255L-933F>].

6. *List of United States Cities by Population*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_United\\_States\\_cities\\_by\\_population](https://en.wikipedia.org/wiki/List_of_United_States_cities_by_population) [<https://perma.cc/64E2-99F9>].

7. Conor Cawlyer, *The Top 25 “Next in Tech” Cities Fostering Startup Growth*, TECH.CO (Mar. 30, 2017), <https://tech.co/top-25-cities-fostering-startup-growth-2017-03> [<https://perma.cc/4Q9W-J4SZ>]. A “next in tech” city is one fostering startup growth outside the country’s main technology hubs. *Id.*

8. *2017 Wisconsin Portfolio*, *supra* note 3, at 12.

9. Andrew Medal, *Forget Silicon Valley. Move Your Startup Any of These 3 Places*, INC.COM (Feb. 6, 2017), <https://www.inc.com/andrew-medal/3-unexpected-places-that-are-actually-amazing-for-startups.html> [<https://perma.cc/L4F5-Q3W2>].

10. *Examining the Connections within the Startup Ecosystem: A Case Study of St. Louis*, EWING MARION KAUFFMAN FOUNDATION, at 2–3 (Sept. 2014), <http://www.kauffman.org/what-we-do/research/a-research-compendium-entrepreneurship-ecosystems/examining-the-connections-within-the-startup-ecosystem-a-case-study-of-st-louis> [<https://perma.cc/LUJ7-AHQT>]. Daniel Isenberg, *Introducing the Entrepreneurship Ecosystem: Four Defining Characteristics*, FORBES (May

ecosystem has strengthened and deepened, particularly with respect to the creation and expansion of programs that support entrepreneurship and startups.<sup>11</sup> Wisconsin is now home to accelerators, incubators, hackathons, business contests, co-working spaces, startup social groups, and startup service organizations<sup>12</sup>—many of which came into existence within the last ten years. Among other things, these programs help entrepreneurs test and hone business ideas; meet potential co-founders and business partners; receive cash awards, seed investments, and in-kind support (e.g., legal and accounting services); connect with advisors and investors; and receive third-party validation, which can enhance a startup’s reputation.<sup>13</sup> Consequently, acceptance into a support program, especially one that is selective, is often a significant moment in the life of a startup.<sup>14</sup>

Participation in entrepreneurship support programs, however, is not without risk. This Article examines the risks that participation may create with respect to a startup’s intellectual property, something of critical importance to the long-term success of any modern business venture.<sup>15</sup> If issues exist regarding a startup’s intellectual property, the company exposes itself to significant liability by doing business in the marketplace. Such issues can also threaten a startup’s ability to obtain venture capital financing, as intellectual property is a core component of the investment due diligence process.<sup>16</sup>

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25, 2011 5:55 AM), <https://www.forbes.com/sites/danisenberg/2011/05/25/introducing-the-entrepreneurship-ecosystem-four-defining-characteristics/#490451d05fe8> [https://perma.cc/MBA9-GQUK].

11. This Article uses the phrases “entrepreneurship support program” and “startup support program” interchangeably and in the broad sense to encompass any activity, event, or organization that supports startup business ventures. This Article does not apply those terms to organizations that primarily invest it, or provide financial support to, startups (e.g., a venture capital firm).

12. The types of support organizations and programs will be defined and discussed *infra* in Section I.

13. Brad Bernthal, *Investment Accelerators*, 21 STAN. J.L. BUS. & FIN. 139, at 153 and n. 67 (2016).

14. Support programs are not necessary for all startups, particularly those that are well funded or run by so-called serial entrepreneurs with prior experience creating and running a successful business venture. Additionally, support programs have varying track records of success, and startups are advised to perform due diligence on a support program before accepting an offer to participate in it.

15. Dana Thompson, *Accelerating the Growth of the Next Generation of Innovators*, 8 OHIO ST. ENTREPRENEURIAL BUS. L.J. 379, at 382 (2013); Ron Corbett, *Strategies for Start-Up Ecommerce Companies in the Post-Dot-Bomb Era*, 8 TEX. WESLEYAN L. REV. 643, 644 (2002).

16. Edwin Miller, Jr., LIFECYCLE OF A TECHNOLOGY COMPANY: STEP-BY-STEP LEGAL BACKGROUND AND PRACTICAL GUIDE FROM START-UP TO SALE 63 (2008); *Sample Due Diligence Request List*, Cooley LLP, <https://www.cooleygo.com/documents/sample-vc-due-diligence-request-list/> [https://perma.cc/7TZJ-RM2Y]. Part of the due diligence process involves looking for so-called lost founders, i.e., people involved in the earliest stages of the startup who might later assert claims regarding the company’s intellectual property. *Lockdown Lost-Founder IP*, STARTUP LAWYER (Jan.

Support programs are an important focal point because they involve the insertion of third parties—i.e., mentors, service providers, customers, business partners, and potential co-founders—into the growth and development of a startup. In the author’s experience, startups in Wisconsin often engage with those third parties informally, i.e., there are no written agreements in place. Informal relationships can lead to significant problems for startups, especially when intellectual property is created, used, or disclosed in the relationship. For example, a developer might write software code for a startup during a hackathon or other entrepreneurship program. Under basic rules of copyright law, the startup will not hold any rights to that code until it is properly assigned or licensed to the company, such as through a written agreement.<sup>17</sup> Another example is where a startup discloses trade secrets or an invention to a mentor. As is common practice in Wisconsin and elsewhere, many mentors have not signed—and, in some cases, will not sign—a non-disclosure agreement.<sup>18</sup> Consequently, disclosure of trade secrets or inventions to a mentor may result in loss of trade secret rights or patent rights, respectively.<sup>19</sup>

Attorneys can, and often do, counsel startups to formalize relationships through signing of written agreements addressing intellectual property. But such advice is broad-stroked, and it does not account for why informality is now so commonplace. Entrepreneurship support programs embrace informal relationships because, among other reasons, they (1) are attractive to resource-poor startups; (2) have low transaction costs; (3) are believed to lead to natural, as opposed to forced, matches; (4) are viewed as community-oriented; and (5) are attractive to, and sometimes required by, volunteers who support these programs.<sup>20</sup> Furthermore, the reliance on informal relationships is, in the author’s opinion, an outgrowth of “lean startup,” a popular methodology for developing early-stage businesses.<sup>21</sup> Lean startup embraces that, for most industries, constant feedback from customers and other third parties is more important than secrecy because feedback allows a business to rapidly develop and iterate its products or services.<sup>22</sup> Lean startup stands in contrast to “stealth-mode,” a methodology

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26, 2010), <http://startuplawyer.com/incorporation/lockdown-lost-founder-ip> [<https://perma.cc/G2UT-MBBT>].

17. See 17 U.S.C. §§ 201(a), (d)(1) (2012).

18. Bernthal, *supra* note 13, at 164–65.

19. The risks regarding disclosure of trade secrets and inventions to mentors are discussed in Section II.C and II.D of this paper, respectively.

20. Bernthal, *supra* note 13, at 167–69.

21. See generally Eric Ries, *THE LEAN STARTUP: HOW TODAY’S ENTREPRENEURS USE CONTINUOUS INNOVATION TO CREATE RADICALLY SUCCESSFUL BUSINESSES* (2011); Steve Blank, *Why the Lean Startup Changes Everything*, *HARVARD BUSINESS REVIEW* (May 2013), <https://hbr.org/2013/05/why-the-lean-start-up-changes-everything> [<https://perma.cc/QE28-2L2P>].

22. Bernthal, *supra* note 13.

popular at the turn of the century that involved disclosure of little information outside a startup prior to product launch.<sup>23</sup> Until lean startup loses influence and the other preceding factors are addressed or proven untrue, entrepreneurship support programs are unlikely to halt their use of, and reliance on, informal relationships.

This article examines the intellectual property issues startups face by participating in support programs in Wisconsin, factoring in how and why the programs operate as they do. Section I of this article provides an overview of the entrepreneurship support programs. It includes a discussion of the informal relationships that commonly arise during the programs. Section II provides an overview of the main types of intellectual property startups encounter, namely, copyright, trademarks, trade secrets, and patents. The section discusses problems that startups commonly encounter for each type of intellectual property, and tools and practices for addressing those problems. Section III explores how entrepreneurship support organizations in Wisconsin can—and, in some cases, do—foster intellectual property ownership in early-stage startups.

## I. ENTREPRENEURSHIP SUPPORT PROGRAM IN WISCONSIN

Entrepreneurship support programs in Wisconsin, as elsewhere in the United States, take many forms. The main types are accelerators, incubators, co-working spaces, hackathons, business contests, startup social groups, and startup service organizations. An overview of the various types of programs follows.

### *A. Accelerators*

Accelerators are competitive, cohort-based programs designed to accelerate the life cycle of early-stage startups.<sup>24</sup> They operate for a fixed term, typically lasting three to six months, and culminate in an event where participants “demo” or “pitch” their startups.<sup>25</sup> Some accelerators provide capital to participants in the form of grants, loans, or equity investments.<sup>26</sup> Other accelerators do not provide any capital, focusing instead on the educational and networking aspects of the program. Some accelerators have an industry focus,

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23. *Id.* Stealth mode involves limiting exposure of products or services outside the company prior to launch, to avoid alerting competitors to a market opportunity. *Id.*

24. Ian Hathaway, *What Startup Accelerators Really Do*, HARVARD BUS. REV. (Mar. 1, 2016), <https://hbr.org/2016/03/what-startup-accelerators-really-do> [<https://perma.cc/6FX8-4BC7>].

25. *Id.*

26. Bernthal, *supra* note 13; *Seed Accelerator*, WISCONSIN ECONOMIC DEVELOPMENT CORPORATION, <https://wedc.org/programs-and-resources/seed-accelerator/> [<https://perma.cc/F9WC-X6Z5>].

while others accept startups from many business sectors. Programs include education and training, and accelerators often introduce participants to mentors, investors, and potential business partners for purposes of “accelerating” the ventures.<sup>27</sup> The mentors generally consist of volunteer experts, organized by the accelerators.<sup>28</sup>

The most prominent accelerator in Wisconsin is gener8tor, an investment accelerator ranked in the top sixteen in the country according to the Seed Accelerator Rankings Project.<sup>29</sup> Founded in 2012, gener8tor has, as of summer 2017, graduated fifty-four companies that have raised more than \$110 million in financing and created employment for more than 1500 people.<sup>30</sup> Companies accepted into gener8tor’s twelve-week program receive a \$20,000 investment upon entry and \$140,000 following successful completion.<sup>31</sup> One notable aspect of gener8tor is its “mentor swarm,” a two to three week period at the beginning of each program where startups meet with dozens of mentors.<sup>32</sup> A startup and mentor who match well may, upon mutual agreement, work with one another for the remainder of the accelerator program or beyond. As is common with other investment accelerators,<sup>33</sup> gener8tor does not ask volunteers participating in its mentor program to sign non-disclosure agreements.<sup>34</sup>

Wisconsin is home to other accelerators of note. In 2013, The Water Council, a trade group based in Milwaukee, launched Business Research Entrepreneurship in Wisconsin (“BREW”), an accelerator focused on growing water technology startups.<sup>35</sup> In 2014, two attorneys and an entrepreneur in

27. Hathaway, *supra* note 24; Bernthal, *supra* note 13, at 153.

28. Bernthal, *supra* note 13, at 158–59; *see, e.g., BREW Program Details*, THE WATER COUNCIL, <https://thewatercouncil.com/programs/brew-accelerator/program-details/> [<https://perma.cc/7L5Q-LXK4>]; *WERC Bench Labs: An Immersive Program for Technology Innovators*, WERC BENCH LABS, <http://wercbenchlabs.com/> [<https://perma.cc/A8YN-38RR>].

29. Andrew Weiland, *Gener8tor Again Named One of Nation’s Top Accelerator Programs*, BIZTIMES (Jun. 6, 2017 11:37 AM), <https://www.biztimes.com/2017/ideas/entrepreneurship/gener8tor-again-named-one-of-nations-top-accelerator-programs/> [<https://perma.cc/M9B5-Y6V2>].

30. *Id.*

31. Kathleen Gallagher, *Gener8tor Raises \$1.5 Million Fund, Names New Class of Start-Ups*, JOURNAL SENTINEL (Feb. 12, 2016), <http://archive.jsonline.com/business/gener8tor-raises-15-million-fund-names-new-class-of-start-ups-b99669253z1-368629531.html> [<https://perma.cc/F2NR-5Z38>]; *About gener8tor*, GENER8TOR, <https://www.gener8tor.com/gener8tor/> [<https://perma.cc/9FNN-7UK4>].

32. Jack Koziol, *A Morning at The Gener8tor Mentor Swarm*, SKILLSET (Dec. 2, 2015), <http://blog.skillset.com/resources/morning-gener8tor-mentor-swarm/> [<https://perma.cc/CK2V-3XSH>].

33. Bernthal, *supra* note 13, at 162–63.

34. The author has participated in multiple of gener8tor’s mentor swarms.

35. Kathleen Gallagher, *Water Council’s BREW Program Promises to Launch 75 Start-Ups*, JOURNAL SENTINEL (Mar. 22, 2016), <http://archive.jsonline.com/business/water-councils-brew->



Madison launched the Madworks Seed Accelerator, which assists Wisconsin startups in the very early stages of development, e.g., still honing business models.<sup>36</sup> In 2015, the Midwest Energy Resource Consortium,<sup>37</sup> a cluster of industry stakeholders based in Milwaukee, launched WERC Bench Labs, an accelerator focused on early-stage startups in the energy, power, and controls sectors.<sup>38</sup> BREW, the Madworks Seed Accelerator, and WERC Bench Labs each offer seed investments, loans, or grants in participating startups, lean startup training, and access to mentors and industry experts, among other things.<sup>39</sup> As with gener8tor, many of the mentors volunteer their services.<sup>40</sup>

Wisconsin also has accelerators for student-led startups. The University of Wisconsin–Whitewater’s Launch Pad, which started in 2011, is one of the oldest and most established student accelerators in the state.<sup>41</sup> Student participants in Launch Pad receive a small stipend; training and mentorship from professors and community volunteers; referrals to outside resources, such as accountants and law firms; office space at a business incubator; and an option to apply for independent study credit.<sup>42</sup>

Another student accelerator is The Commons, an initiative launched in

program-promises-to-launch-75-start-ups-b99692354z1-373093141.html/ [https://perma.cc/YA9P-TYUQ]; *BREW Accelerator*, THE WATER COUNCIL, <https://thewatercouncil.com/programs/brew-accelerator/> [https://perma.cc/A64W-5LBK].

36. Kathleen Gallagher, *Madworks Seed Accelerator Accepts Applications for Start-Up Training Class in Madison*, JOURNAL SENTINEL (Jan. 13, 2016), <http://archive.jsonline.com/business/madworks-seed-accelerator-accepts-applications-for-start-up-training-class-in-madison-b99651043z1-365154131.html/> [https://perma.cc/NSH7-7MTY]; *Our Program, MADWORKS SEED ACCELERATOR*, <http://www.madworksaccelerator.org/program-information/> [https://perma.cc/C2N2-U376].

37. The Midwest Energy Resource Consortium, or M-WERC, is an organization representing a large cluster of energy, power, and control companies; educational and research institutions; and other industry stakeholders. *EPC Industry*, MIDWEST ENERGY RESEARCH CONSORTIUM, <https://www.m-werc.org/> [https://perma.cc/3KUK-CHPM].

38. Kathleen Gallagher, *Startups Chosen for WERCbench Labs Training Program*, JOURNAL SENTINEL (Jun. 11, 2015), <http://archive.jsonline.com/business/start-ups-chosen-for-wercbench-labs-training-program-b99517983z1-307060401.html/> [https://perma.cc/J8A3-Z6P3]; WERC BENCH LABS, *supra* note 27.

39. See *BREW Accelerator*, *supra* note 34; WERC BENCH LABS, *supra* note 27; MADWORKS SEED ACCELERATOR, *supra* note 35.

40. See WERC BENCH LABS, *supra* note 27; *BREW Accelerator*, *supra* note 34; MADWORKS SEED ACCELERATOR, *supra* note 35.

41. Andrea Anderson, *UW-Whitewater Students Take the Risk and Start Own Businesses*, THE JANESVILLE GAZETTE (Wisconsin), Oct. 16, 2015, available at [http://www.gazettextra.com/archives/uw-whitewater-students-take-the-risk-and-start-own-businesses/article\\_441b8f01-67e8-5b30-b55f-631a4c166324.html](http://www.gazettextra.com/archives/uw-whitewater-students-take-the-risk-and-start-own-businesses/article_441b8f01-67e8-5b30-b55f-631a4c166324.html) [https://perma.cc/2G8C-YCER]; *Launch Pad*, UNIVERSITY OF WISCONSIN-WHITEWATER, <http://uwlaunchpad.squarespace.com/> [https://perma.cc/7HW8-UDBV].

42. *Id.*

2014 by the Greater Milwaukee Committee and Startup Milwaukee.<sup>43</sup> The program, which lasts ten weeks, is free and open to any students enrolled in the two-dozen colleges and universities in southeastern Wisconsin.<sup>44</sup> Unlike with other accelerators, The Commons creates cross-functional teams of students, and each team works on either launching a startup venture or on a challenge from a large Wisconsin corporation, such as Briggs & Stratton or Kohl's Corporation.<sup>45</sup> In the author's experience,<sup>46</sup> The Commons relies heavily on its volunteer mentors, who guide and work closely with the student teams.

### *B. Incubators and Co-Working Spaces*

Business incubators are sometimes mistaken for accelerators, but incubators differ in notable ways. The core business model of incubators is to provide space to companies, oftentimes on terms that are more affordable and flexible than with standard commercial leases.<sup>47</sup> Business incubators are not competitive—i.e., if a company can afford the rent and space is available, they will be admitted to the incubator.<sup>48</sup> While accelerators work with startups at the pre-seed and seed stages, many incubators accept companies at later stages of development.<sup>49</sup> Similar to accelerators, incubators aim to accelerate a business's growth through providing business assistance, referrals, networking opportunities, technical support, and shared equipment, among other things.<sup>50</sup> However, support services vary significantly among incubators, and incubators do not provide intense programming over a fixed term.<sup>51</sup>

Co-working spaces are also rent-based, but are open-plan, where members

43. Matt Cordio, *The Commons Seeks Students to Apply for Fall 2015 Entrepreneurial Skills Accelerator Program*, JOURNAL SENTINEL (Aug. 12, 2015), <http://archive.jsonline.com/blogs/business/the-commons-seeks-students-to-apply-for-fall-2015-entrepreneurial-skills-accelerator-program-7146153-321661761.html> [<https://perma.cc/3KB5-XLQC>].

44. Cordio, *supra* note 43; *What Is the Commons?* THE COMMONS, <http://www.thecommons.wi.com/mission/> [<https://perma.cc/QRT8-5PRV>].

45. Cordio, *supra* note 43. Corporations participating in the Commons' corporate challenge do not, in the author's experience, require an assignment to the company of intellectual property developed by the students during the program. The corporations, rather, use the program primarily as an avenue for attracting and helping to develop talented students in southeastern Wisconsin.

46. The author has served as a mentor for several classes of The Commons and has provided legal counsel to several startups that participated in the program.

47. Hathaway, *supra* note 24.

48. *Id.*

49. *Id.*; C. Jennifer Auer et al, *Innovation Accelerators: Defining Characteristics Among Startup Assistance Organizations*, U.S. SMALL BUSINESS ADMINISTRATION, at 10 (Oct. 2014), <https://www.sba.gov/sites/default/files/rs425-Innovation-Accelerators-Report-FINAL.pdf> [<https://perma.cc/ZS82-JACB>].

50. *Id.*

51. See Hathaway, *supra* note 24.

work alongside or near one another.<sup>52</sup> Membership is often month-to-month and typically includes access to conference rooms, Wi-Fi, printing, copying, and other amenities.<sup>53</sup> Because of their relatively low cost and communal environment, co-working space is attractive to early-stage startups as well as to independent workers, such as freelancers.<sup>54</sup> The open environment is believed to lead to “serendipitous” meetings of business people.<sup>55</sup> However, the open space also can create privacy challenges for members.<sup>56</sup>

Wisconsin is home to an array of incubators and co-working spaces. Two of the more prominent incubators include the MGE Innovation Center, in Madison, with twenty-seven offices and thirty-four laboratory suites;<sup>57</sup> and the Technology Innovation Center at Research Park, in the Milwaukee-area, with 80,000 square-feet of lab, light manufacturing, and office space for rent by startups.<sup>58</sup> Prominent co-working spaces include 100state in Madison, Wisconsin’s largest co-working community;<sup>59</sup> and Ward4 in Milwaukee, home to gener8tor and multiple technology startups.<sup>60</sup> Because the concept of incubators and co-working spaces is relatively easy to replicate,<sup>61</sup> the

52. J.D. Harrison, *Entrepreneurship Advice: How to Decide Between Coworking Spaces, Accelerators and Incubators*, THE WASHINGTON POST (Oct. 22, 2012), [https://www.washingtonpost.com/blogs/on-small-business/post/entrepreneurship-advice-how-to-decide-between-coworking-spaces-accelerators-and-incubators/2012/10/22/e9ab1ecc-1c0a-11e2-9cd5-b55c38388962\\_blog.html](https://www.washingtonpost.com/blogs/on-small-business/post/entrepreneurship-advice-how-to-decide-between-coworking-spaces-accelerators-and-incubators/2012/10/22/e9ab1ecc-1c0a-11e2-9cd5-b55c38388962_blog.html) [<http://perma.cc/CDL3-FUDX>].

53. *Id.*; see, e.g., *Individual Options and Pricing*, WARD4, <https://www.ward4mke.com/membership> [<https://perma.cc/8WHG-467C>] (listing amenities of the co-working space).

54. Yuki Noguchi, *Co-Working Spaces Are Redefining What It Means To Go To The Office*, NATIONAL PUBLIC RADIO (Sept. 26, 2017 1:37 PM), <http://www.npr.org/2017/09/26/552379626/co-working-spaces-are-redefining-what-it-means-to-go-to-the-office> [<https://perma.cc/L4AC-XHSC>].

55. *Id.*

56. *Id.* As discussed *infra* in Section II.C, the open environment of co-working spaces creates risks for a startup’s trade secrets.

57. *MGE Innovation Center*, UNIVERSITY RESEARCH PARK, <http://universityresearchpark.org/the-property/mge-innovation-center/> [<https://perma.cc/867X-4JLC>]. The MGE Innovation Center is part of University Research Park, a technology park affiliated with the University of Wisconsin-Madison. *Id.*; *About the Park*, UNIVERSITY RESEARCH PARK, <http://universityresearchpark.org/about/> [<https://perma.cc/SR83-US4Z>].

58. *About*, TECHNOLOGY INNOVATION CENTER AT RESEARCH PARK, <https://technologyinnovationcenter.org/about/> [<https://perma.cc/8U9N-KSEY>].

59. Erik Lorenzsonn, *100state is Moving to a New Downtown Location*, THE CAPITAL TIMES (Sept. 22, 2016), [http://host.madison.com/ct/news/local/state-is-moving-to-a-new-downtown-location/article\\_4ad15f4a-80e5-11e6-bcea-97f52bd3fdd1.html](http://host.madison.com/ct/news/local/state-is-moving-to-a-new-downtown-location/article_4ad15f4a-80e5-11e6-bcea-97f52bd3fdd1.html) [<https://perma.cc/F4TD-EZJ9>]; 100STATE, <https://100state.com/> [<https://perma.cc/BG2L-3MPT>].

60. Kathleen Gallagher, *Gener8tor, Ward4 Attract Subscription Wine Retailer to Wisconsin*, JOURNAL SENTINEL (May 9, 2015), <http://archive.jsonline.com/business/gener8tor-ward4-attract-subscription-wine-retailer-to-wisconsin-b99496168z1-303175031.html/> [<https://perma.cc/MWQ3-GH5Q>]; *Our Members*, WARD4, <https://www.ward4mke.com/ourmembers/> [<https://perma.cc/93XW-AMDL>].

61. Noguchi, *supra* note 54.

marketplace in Wisconsin for such organizations is competitive and fluid.

### C. Hackathons

A hackathon—a portmanteau of “hack” and “marathon”—is an event where teams of people work intensely over a period, such as a day or weekend, to create and pitch a service, product, or solution to a problem.<sup>62</sup> Hackathons have traditionally been events open to the public, but an increasing number of businesses are holding internal hackathons to motivate employees and to generate solutions to problems.<sup>63</sup> Hackathons have traditionally been computer-programming competitions and have therefore attracted software developers and designers.<sup>64</sup> The concept is now being applied beyond software into fields such as hardware, engineering, and even art.<sup>65</sup> At the outset of a competition, teams are typically permitted to form organically from individuals who have signed up for the event.<sup>66</sup> Near the end of the event, the teams pitch their ideas or solutions to judges, and awards are given out.<sup>67</sup> Hackathons can attract hundreds of participants and are viewed as social events.<sup>68</sup>

As in other parts of the country, hackathons are popular events in Wisconsin. MadHacks is one of the state’s largest annual hackathons.<sup>69</sup> Launched in 2015, the event attracts college students from across the country.<sup>70</sup> Participants convene at the University of Wisconsin–Madison, where teams of

62. Steven Leckart, *The Hackathon Fast Track, From Campus to Silicon Valley*, THE N. Y. TIMES (April 6, 2015), <https://www.nytimes.com/2015/04/12/education/edlife/the-hackathon-fast-track-from-campus-to-silicon-valley.html> [<https://perma.cc/974H-SE8W>].

63. *Id.*; Alan Steele, *Who Owns Hackathon Inventions?*, HARVARD BUSINESS REVIEW (June 13, 2013), <https://hbr.org/2013/06/who-owns-hackathon-inventions> [<https://perma.cc/Q7KW-TDF3>]. Problems regarding intellectual property ownership can arise where an organization’s employees desire to participate in an external hackathon. Such problems, and the solutions to them, are beyond the scope of this article.

64. Laurel White, *Programmers, Designers Descend On UW-Madison for 24-Hour “Hackathon” Competition*, THE CAPITAL TIMES (April 18, 2015), [http://host.madison.com/ct/entertainment/programmers-designers-descend-on-uw-madison-for-hour-hackathon/article\\_dac71902-1a6f-50eb-a6b2-e66c1d6fcde1.html](http://host.madison.com/ct/entertainment/programmers-designers-descend-on-uw-madison-for-hour-hackathon/article_dac71902-1a6f-50eb-a6b2-e66c1d6fcde1.html) [<https://perma.cc/5WAQ-MT7T>].

65. *See, e.g., Build Madison*, SECTOR67, <http://www.sector67.org/blog/2016/build-madison-november-19th-20th/> [<https://perma.cc/2ZUZ-FPBY>] (announcing seventh annual 24-hour “create-a-thon” for Madison).

66. Matt Menietti, *6 Tips for Putting Together a Hackathon Team*, MEDIUM.COM (Apr. 15, 2016), <https://medium.com/globalhack/6-tips-for-putting-together-a-hackathon-team-3991f14437e8> [<https://perma.cc/3Q2E-7MZM>].

67. Leckart, *supra* note 62.

68. Nathan J. Comp, *A Happening Hackathon*, ISTHMUS (Nov. 12, 2015), <https://isthmus.com/news/news/madhacks-focuses-on-drawing-novices/> [<https://perma.cc/85H6-BQVL>].

69. *Id.*; *see* MADHACKS, <https://www.madhacks.org/> [<https://perma.cc/HB3R-PR8K>].

70. Comp, *supra* note 68.

one to four students have twenty-four hours to build a mobile application, website, software, or hardware “hack.”<sup>71</sup> A student holds the rights to any intellectual property he or she creates during the program.<sup>72</sup> As a condition of participation, however, a student must represent and warrant that their work is their own and that it does not infringe the intellectual property rights of third parties.<sup>73</sup>

Another example is Hack & Tell, a one-day hackathon in Milwaukee run by a software development firm and sponsored by gener8tor, Ward4, and other organizations.<sup>74</sup> The event is open to professionals, non-professionals, and students, and participants may work on their own projects or those brought or proposed by others.<sup>75</sup> According to the program’s terms, “[p]articipants retain 100% of the ownership of their ideas.”<sup>76</sup>

#### D. Business Contests

Each year, a variety of organizations throughout Wisconsin hold contests for startups. Many of the contests involve the submission by entrants of a business plan, pitches to a panel of judges, and cash prizes or other awards for winners. One of the more prominent contests is the Governor’s Business Plan Contest, an annual program produced by the Wisconsin Technology Council.<sup>77</sup> Since 2004, the contest has received more than 3300 entries in four categories—advanced manufacturing, business services, information technology, and life sciences.<sup>78</sup> According to the Wisconsin Technology Council, contest finalists have raised more than \$200 million in venture capital and other financing.<sup>79</sup> Participants who progress past initial rounds in the contest receive support from volunteer mentors through a “boot camp” and

71. White, *supra* note 64.

72. Madhacks is sanctioned by, and has a sponsorship agreement with, Major League Hacking. See MADHACKS, *supra* note 69. As such, participants in Madhacks must agree to Major League Hacking’s Contest Terms and Conditions. *Id.*; see *Major League Hacking Contest Terms and Conditions*, GITHUB (2017), <https://github.com/MLH/mlh-policies/blob/master/prize-terms-and-conditions/contest-terms.md> [<https://perma.cc/5FZ4-4NSH>].

73. *Id.*

74. *Hack & Tell*, ROKKINCAT (2017), <http://www.rokkincat.com/hack-n-tell/> [<https://perma.cc/5YLU-9BZ2>].

75. *Id.*

76. *Id.*

77. *About the Contest*, WISCONSIN GOVERNOR’S BUSINESS PLAN CONTEST (2017), <http://govsbizplancontest.com/about/> [<https://perma.cc/9AYM-UWCA>]. The Wisconsin Technology Council is a non-partisan organization created by legislative act that advises the governor and legislature on science and technology matters. See *id.*

78. *Id.*

79. *Id.*

practice pitch sessions.<sup>80</sup> The contest is valued for its prizes—of more than \$100,000 in cash and in-kind services—but also because it connects startups with community resources, mentors, and investors.<sup>81</sup>

### E. Startup Social Groups

Startup social groups range from small groups of entrepreneurs that hold “meetups”<sup>82</sup> to larger organizations that hold regularly scheduled events. Some of the groups have rules for admission, but many do not. Startup Milwaukee, founded in 2011, is an example of a larger social group.<sup>83</sup> Startup Milwaukee offers a mentorship program, an internship program, a monthly startup pitch event, and web-based resources.<sup>84</sup> Additionally, in 2016, the organization launched Milwaukee Startup Week, a weeklong event featuring programs across the city. According to Startup Milwaukee, the event was attended by more than 2700 people.<sup>85</sup>

### F. Startup Service Organizations

Wisconsin also has a variety of other organizations that serve startups in various capacities, ranging from nonprofits to for-profit entities to government agencies.<sup>86</sup> Two are notable and relevant for this Article, in part because of their focus on mentorship and how they treat confidential information. The first organization is the Madison Entrepreneur Resource, Learning and Innovation Network (“MERLIN”) Mentors, a group of business leaders who volunteer their time and expertise to mentor entrepreneurs in the Madison area.<sup>87</sup>

80. *Mentors*, WISCONSIN GOVERNOR’S BUSINESS PLAN CONTEST (2017), <http://govsbizplancontest.com/participate/mentor/> [<https://perma.cc/4ECK-76W7>].

81. See Judy Newman, *Northern Star Fire, with a Device to Help Firefighters Exit a Blaze, Wins Biz Plan Contest*, WISCONSIN STATE JOURNAL (Jun. 7, 2017), [http://host.madison.com/wsj/business/northern-star-fire-with-a-device-to-help-firefighters-exit/article\\_be8e2b05-1eb5-5010-972f-bc5f0a6fa62e.html](http://host.madison.com/wsj/business/northern-star-fire-with-a-device-to-help-firefighters-exit/article_be8e2b05-1eb5-5010-972f-bc5f0a6fa62e.html) [<https://perma.cc/6EYG-WN6P>]; GOVERNOR’S BUSINESS PLAN CONTEST, WISCONSIN TECHNOLOGY COUNCIL (2017), <http://wisconsintechnologycouncil.com/events-overview/governors-business-plan-contest> [<https://perma.cc/4UPV-PAEU>].

82. See, e.g., *Startup Business Meetups in Madison*, MEETUP.COM (2017), <https://www.meetup.com/topics/startup-businesses/us/wi/madison/> [<https://perma.cc/Q8W4-CQ7G>]. Meetup.com is a web-based platform that facilitates group meetings.

83. Kathleen Gallagher, *Wisconsin Start-Ups Create Their Own Support Networks*, JOURNAL SENTINEL (Oct. 20, 2012), <http://archive.jsonline.com/business/wisconsin-startups-create-their-own-support-networks-1578vi3-175076271.html> [<https://perma.cc/JXP6-Y5KE>].

84. STARTUP MILWAUKEE, <https://www.startupmke.org> [<https://perma.cc/W2DK-QMG6>].

85. *Id.*, <https://www.startupmke.org/about/> [<https://perma.cc/65A8-DKJR>].

86. This Article lists only a sampling of entrepreneurship support programs and organizations in Wisconsin, many with respect to which the author has personal experience. The omission of any program should not be taken to reflect negatively or positively with respect to that program.

87. *About Us*, MERLIN MENTORS, <http://merlinmentors.org/about-us/> [<https://perma.cc/WD4J-87TV>].

Founded in 2008, MERLIN matches entrepreneurs with mentors who provide guidance on issues such as business development, startup financing, human resources, and intellectual property.<sup>88</sup> Mentors in MERLIN are prohibited from having financial ties to startups they are mentoring and must follow confidentiality guidelines.<sup>89</sup>

The second organization is BizStarts, a nonprofit formed in 2008.<sup>90</sup> BizStarts works with entrepreneurs and startups in southeastern Wisconsin, providing mentorship and referral, among other assistance. As of 2016, BizStarts has assisted nearly 800 entrepreneurs since its inception, according to the organization.<sup>91</sup> As with MERLIN Mentors, BizStarts relies on volunteer mentors.<sup>92</sup> Its mentors are provided a “program guide” and must agree to maintain confidentiality over any proprietary information provided to them.<sup>93</sup> Additionally, mentors must avoid financial conflicts of interest with companies they are mentoring.<sup>94</sup>

## II. OVERVIEW OF INTELLECTUAL PROPERTY

Intellectual property is, defined simply, a category of intangible rights, or assets, of the human intellect.<sup>95</sup> The four principle types of intellectual property are copyright, trademarks, trade secrets, and patents. Most startups encounter and use several of the types, and some startups use all four.<sup>96</sup> An overview and discussion of each type of intellectual property follows. The discussion focuses on intellectual property ownership and transfer, the most common issues that

88. Judy Newman, *Tech and Biotech: MERLIN Mentors Celebrate Milestone; and University Research Park Earns National Praise*, WISCONSIN STATE JOURNAL (Nov. 16, 2013), [http://host.madison.com/wsj/business/technology/biotech/tech-and-biotech-merlin-mentors-celebrate-milestone-and-university-research/article\\_c07bfa24-5a5c-52ad-b731-0928b1211d27.html](http://host.madison.com/wsj/business/technology/biotech/tech-and-biotech-merlin-mentors-celebrate-milestone-and-university-research/article_c07bfa24-5a5c-52ad-b731-0928b1211d27.html) [<https://perma.cc/6KC4-PL5K>].

89. *Id.*; MERLIN MENTORS, *supra* note 87, <http://merlinmentors.org/meet-the-mentors/become-a-mentor/> [<https://perma.cc/29W4-D9H9>].

90. *BizStarts Milwaukee Receives Federal Grant Extension*, BIZTIMES (Oct. 12, 2012, 12:00 AM), <https://www.biztimes.com/2012/industries/banking-finance/bizstarts-milwaukee-receives-federal-grant-extension-2/> [<https://perma.cc/7R7W-QN6H>]; *All About Bizstarts*, BIZSTARTS, <http://www.bizstarts.com/about/> [<https://perma.cc/L6H5-BWR6>].

91. *Impact Report*, BIZSTARTS (2016), <http://www.bizstarts.com/wp-content/uploads/2016/11/Q3-2016-BizStarts-Impact-Report.pdf> [<https://perma.cc/83FP-W3YJ>].

92. *Mentors are Key to Startups*, JOURNAL SENTINEL (Mar. 21, 2009), <http://archive.jsonline.com/business/41607062.html> [<https://perma.cc/6AWW-YQNV>].

93. *Id.*; *BizStarts Mentor Program Rules*, BIZSTARTS, <http://www.bizstarts.com/program-rules/> [<https://perma.cc/JG2J-4GX2>]; *Mentor Program Guide*, BIZSTARTS, <http://www.bizstarts.com/wp-content/uploads/2016/10/Mentor-Program-Guide-BizStarts.pdf> [<https://perma.cc/M63D-9FVW>].

94. *Id.*

95. *Definition of Intellectual Property*, BLACK’S LAW DICTIONARY (10th ed. 2014); Miller, Jr., *supra* note 16, at 105.

96. Miller, Jr., *supra* note 16, at 105.

arise for startups participating in entrepreneurship support programs.

### *A. Copyright*

#### 1. Overview of Copyright

Copyright is a property right in a work of authorship.<sup>97</sup> Copyright is governed almost exclusively by federal law, specifically the U.S. Constitution<sup>98</sup> and the Copyright Act of 1976, as amended.<sup>99</sup> To receive protection under the Copyright Act, a work of authorship must be (1) original and (2) fixed in a tangible medium of expression.<sup>100</sup> Copyright protection generally begins at the moment of creation.<sup>101</sup>

Under the Copyright Act, works of authorship fall into eight categories: (1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.<sup>102</sup> Startups typically have need for and use works in the “literary works” category, a broad one encompassing items such as computer programs, technical documentation, databases, website text, blog posts, and ebooks, provided the requirements of the Copyright Act are met.<sup>103</sup> Startups also commonly develop or have developed for them works in the fifth category, which may encompass logos (also known as a design mark) and website graphics.<sup>104</sup>

Copyright protection does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is embodied in a work.<sup>105</sup> Consequently, an entrepreneur who

97. *Definition of Copyright*, BLACK’S LAW DICTIONARY (10th ed. 2014).

98. U.S. CONST. art. I, § 8, cl. 8 (“Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings[.]”)

99. *See* 17 U.S.C. §§ 101–1332 (2012).

100. 17 U.S.C. § 102(a). A work is “original” if it “was independently created by the author . . . and . . . it possesses at least some minimal degree of creativity.” *Feist Publ’ns, Inc. v Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (2013). A work is fixed in a tangible medium of expression when “it [is] embodi[ed] in a material objec[t] . . . from which the work can be perceived, reproduced, or otherwise communicated.” *Star Athletica, LLC v Varsity Brands Inc.*, 137 S.Ct. 1002, 1008 (2017) (internal quotations marks omitted) (citation omitted).

101. *JCW Investments Inc. v Novelty Inc.*, 482 F.3d 910, 914 (7th Cir. 2007).

102. 17 U.S.C. § 102.

103. Margo Reder, et al., *CYBERLAW: MANAGEMENT AND ENTREPRENEURSHIP*, at 162 (2015); *see* 11 Melville B. Nimmer & David Nimmer, *NIMMER ON COPYRIGHT*, § 2A.10[B] (2017) (hereinafter *NIMMER & NIMMER*).

104. *NIMMER & NIMMER*, *supra* note 103, § 913.

105. 17 U.S.C. § 102(b). It is not uncommon for entrepreneurs to seek to protect what they



has an idea for a new business product or service not yet in the marketplace cannot rely on copyright law to protect that idea.

A copyright owner has up to six exclusive rights, depending on the nature of the work: (1) to reproduce the work; (2) to prepare derivative works; (3) to distribute copies to the public; (4) to publicly perform the work; (5) to publicly display the work; and (6) for sound recordings, to publicly perform the work by means of digital audio transmission.<sup>106</sup> An author may register a work with the United States Copyright Office, but registration is not a condition of copyright protection.<sup>107</sup> Registration does, however, confer multiple benefits, including (1) establishing a public record of the copyright claim; (2) allowing suit in federal court for copyright infringement; (3) creating a legal presumption that the facts stated in the copyright registration certificate are valid; (4) allowing a potential award of statutory damages and attorney's fees, if certain conditions are met; and (5) allowing recordation of the registration with the U.S. Customs Service for protection against importation of infringing copies.<sup>108</sup> Filing fees are relatively low, ranging from thirty-five to eighty-five dollars for basic copyright registration.<sup>109</sup>

For works created on or after January 1, 1978, copyright lasts for the life of the author plus seventy years.<sup>110</sup> For a work made for hire, discussed below, copyright lasts the earlier of 120 years after creation or ninety-five years from publication.<sup>111</sup>

## 2. Copyright Ownership and Transfer

As a general rule, copyright vests initially in the author or authors of the work.<sup>112</sup> The authors of a joint work are co-owners of copyright in the work.<sup>113</sup> In the case of a "work made for hire," however, the employer or other person for whom the work was prepared is considered the author.<sup>114</sup> A work is considered made for hire in two situations. The first situation is where a work is prepared by an employee within the scope of his or her employment.<sup>115</sup> A

believe is a unique idea, not yet existing in the marketplace.

106. *Id.* § 106.

107. *Id.* § 408(a).

108. 17 U.S.C. § 411(a); 19 C.F.R. § 133.31 (2017); U.S. Copyright Office Circular 1, at 5 (2017), <https://www.copyright.gov/circs/circ01.pdf> [<https://perma.cc/Y9S9W-JEZN>].

109. U.S. COPYRIGHT OFFICE CIRCULAR 4, at 7 (2017), <https://www.copyright.gov/circs/circ04.pdf> [<https://perma.cc/V9L5-MJKL>].

110. 17 U.S.C. § 302(a).

111. *Id.* § 302(c).

112. *Id.* § 201(a).

113. *Id.*

114. *Id.* § 201(b).

115. *Id.* § 101.

written agreement is not required in this situation.

The second situation is where an independent contractor prepares a work and three conditions are met:

(1) the work is specially ordered or commissioned;

(2) the work falls into one of nine categories, i.e., it is a contribution to a collective work, part of a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, answer material for a test, or an atlas; and

(3) the parties have expressly agreed in a signed, written instrument that the work is a work made for hire.<sup>116</sup>

The nine categories of works listed in the second condition do not encompass software or many other types of works likely to be created for startups.<sup>117</sup> Consequently, this second work made for hire situation applies infrequently to startups, even if the company has a written agreement with a contractor.

If neither the first nor the second situation applies, copyright ownership may be transferred in whole or in part by any means of conveyance or by operation of law.<sup>118</sup> The most common conveyance used by companies is an assignment, which may be used for existing as well as future copyrights.<sup>119</sup> For an assignment to be effective, it must be in writing and signed by the copyright owner.<sup>120</sup>

### 3. Copyright Risks for Startups Participating in Support Programs

Startups participating in support programs face several risks with respect to copyright ownership. In some instances, the risks arise from the support programs themselves. For example, with hackathons and certain accelerators, such as The Commons,<sup>121</sup> an individual (an engineer, software developer, graphic designer, etc.) is partnered or allowed to partner with a specific startup. For such programs, it is common for the startup and individual not to discuss the nature of their relationship, in the author's experience. No money exchanges hands, there is no understanding that the individual is an employee of the startup, and the individual does not sign a written assignment. Consequently, the individual will likely be classified as an independent

116. *Id.*

117. MILLER, *supra* note 16, at 108–09.

118. 17 U.S.C. § 201.

119. David Marsh, et al., *Intellectual Property Rights: The Key Issues*, PRACTICAL LAW, Practice Note 2-500-4365 (2017); MILLER, JR., *supra* note 16, at 108.

120. 17 U.S.C. § 204(a).

121. For a discussion of The Commons, see *supra* Section I.A.

contractor, and the startup will not hold the copyright to any works created by him or her.<sup>122</sup> Even if the support program has terms of participation, such as MadHacks, those terms generally state that copyright ownership remains with the individual participant and does not transfer to the startup.<sup>123</sup>

In other instances, the risks do not arise directly from the support program itself, but rather as a result of a startup being connected with a potential co-owner or future hire through the program. It is common for cash-poor startups to hire workers as independent contractors.<sup>124</sup> It is also common, in the author's experience, for startups to offer equity and "co-founder" status to a worker in lieu of pay or a traditional employer-employee relationship. This is particularly problematic for startups that are limited-liability companies ("LLCs").<sup>125</sup> LLCs are typically structured as partnerships, and partners (i.e., co-owners) are generally not regarded as employees of the partnership under common law agency principles.<sup>126</sup> Consequently, in either situation—where the startup engages a worker as an independent contractor or a co-owner in an LLC—the startup will not own the copyright absent a written assignment signed by the contractor.

Startups should also be aware that the individual with whom they are engaging might not hold the copyright to works he or she authors or is purportedly authoring. This may result in a couple ways. First, the individual might incorporate copyrighted works of others—e.g., open source or proprietary, third-party software—into works they create for the startup.<sup>127</sup> Second, if an individual is "moonlighting"—i.e., they are participating in the hackathon or other support program outside their normal employment—the individual's employer might hold rights to works they prepare for the startup.<sup>128</sup>

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122. A full analysis of the classification of workers as either employees or independent contractors is beyond the scope of this paper.

123. See *supra* Section II.C.

124. REDER, *supra* note 103, at 376.

125. A Wisconsin limited-liability company can be formed by filling out a simple online form and paying \$130. See WISCONSIN DEPARTMENT OF FINANCIAL INSTITUTIONS, <https://www.wdfi.org/apps/CorpFormation/directions.aspx?type=12> [<https://perma.cc/76X6-QWJB>]. Due to the low cost and ease of formation, a fair amount of Wisconsin startups begin, in the author's experience, by a founder forming a Wisconsin LLC without the assistance of an attorney.

126. See *Wood v. Lesnick*, 725 F. Supp. 2d 809, 824–25 (W.D. Wis. 2010).

127. MILLER, *supra* note 16, at 140–41. Open source software is software in which the copyright holder licenses to the public certain uses of the software. For example, software made available under the General Public License of the Free Software Foundation may be freely used, modified, and redistributed by anyone. *Id.* at 140; see *GNU General Public License*, FREE SOFTWARE FOUNDATION, <https://www.gnu.org/licenses/gpl-3.0.en.html> [<https://perma.cc/XXY9-U299>].

128. See Danielle Naftulin, *Moonlighting Founders: 5 Steps to Help Protect Your Company*, COOLEY LLP, <https://www.cooleygo.com/moonlighting-founders-5-steps-to-help-protect-your-company/> [<https://perma.cc/7UHA-D58C>].

Startups should be aware of these risks and actively take steps, such as those discussed *infra* in Section II.A.4, to mitigate them.

#### 4. Startup Practices for Copyright Protection

Startups participating in support programs should engage in a few relatively straightforward practices to reduce risks with respect to copyright ownership.<sup>129</sup> First, before a startup engages a new person (in any capacity) to work for it, the startup should determine whether that person is subject to any agreements—such as an assignment agreement with a current or former employer—that might impact ownership of that person’s work product. If the person is subject to such an agreement, the startup should consider declining the engagement, requesting a waiver from that person’s employer, or waiting until the agreement is no longer in force.<sup>130</sup>

Second, as a general rule, startups should enter into written agreements with all persons—employees, contractors, and co-owners (e.g., LLC members)—that, at a minimum, (1) provide that all copyrightable work product created by the person within the scope of their employment or services is a work made for hire under the Copyright Act; and (2) assigns to the startup full ownership of all work product that is not work made for hire under the Copyright Act.<sup>131</sup> Additionally, startups should require employees to identify any of their work product, e.g., open source software, that might be subject to a license,<sup>132</sup> and should require contractors to represent and warrant that their work product is original and does not infringe the intellectual property of third parties.<sup>133</sup>

In limited circumstances, it may be reasonable for a startup to participate in an entrepreneurship support program without written agreements in place with other participants. This is most likely to occur where the transactional costs of entering into a written agreement are high in light of the nature of the program, and the likelihood of a copyrightable work being produced that the startup will use are low. For example, code written during a one or two-day software hackathon is often discarded.<sup>134</sup> A startup participating in a hackathon primarily for networking or social purposes might therefore reasonably decide

129. These best practices generally apply outside of the context of entrepreneurship support programs, too.

130. Margaret Hagen, *Legal Planning for Hackathoners*, OPEN LAW LAB (Apr. 8, 2013), <http://www.openlawlab.com/2013/04/08/legal-plan-for-hackathoners/> [https://perma.cc/P3C5-5YZB].

131. Marsh, *supra* note 118; MILLER, JR. *supra* note 16, at 49, 118.

132. See MILLER, JR., *supra* note 16, at 141.

133. See, e.g., *Independent Contractor/Consultant Agreement (Pro-Client)*, PRACTICAL LAW, Form 2-500-4638, at § 7.1(f) (2017).

134. Hagen, *supra* note 130.

to forgo a written agreement with a person assisting it in the program. In the unlikely event a copyrightable work is produced during the event, the startup may later purchase it via a copyright assignment.<sup>135</sup>

## B. Trademarks

### 1. Overview of Trademarks

Trademarks are governed by both federal and state law. Although trademarks are protected under the common law of Wisconsin,<sup>136</sup> federal law—specifically the Lanham Act of 1946, as amended—provides the primary source of trademark protection.<sup>137</sup> The Lanham Act defines a trademark as “any word, name, symbol, or device, or any combination thereof . . . [used] to identify and distinguish . . . goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods[.]”<sup>138</sup> The term “service marks” is defined similarly, except it is used in the case of services as opposed to goods.<sup>139</sup> A trademark is also commonly referred to as a brand name.<sup>140</sup>

A key word of the statutory definition is “distinguish,” as a mark must achieve a certain level of distinction to receive trademark protection. Marks are often classified in categories of increasing distinctiveness: (1) generic, (2) descriptive, (3) suggestive, (4) arbitrary, or (5) fanciful.<sup>141</sup> A generic mark is a term that simply refers to the particular product or service, for example, WATER for bottled water. Generic terms are not eligible for trademark protection.<sup>142</sup> The latter three categories of marks are deemed inherently distinctive and are entitled to protection under the Lanham Act.<sup>143</sup> Filing fees for federal registration range from \$225 to \$400 per class of goods or services.<sup>144</sup>

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135. See *supra* Section II.A.2. The startup should attempt to enter into the copyright assignment as soon as possible after the hackathon, when the value of the work is likely the lowest.

136. *First Wis. Nat. Bank of Milwaukee v. Wichman*, 270 N.W.2d 168, 171 (Wis. 1978).

137. 15 U.S.C. §§ 1051–1072 (2012).

138. *Id.* § 1127.

139. *Id.*

140. *Trademark Basics*, UNITED STATES PATENT AND TRADEMARK OFFICE, <https://www.uspto.gov/trademarks-getting-started/trademark-basics> [<https://perma.cc/3322-J6B4>].

141. *Two Pesos v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992) (citing *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976)).

142. *Park ‘N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985).

143. *Two Pesos*, 505 U.S. at 768.

144. *Trademark Application Fee Structure*, U.S. PATENT AND TRADEMARK OFFICE, <https://www.uspto.gov/trademarks-application-process/filing-online/trademark-application-fee-structure> [<https://perma.cc/G28S-9M8V>].

## 2. Trademark Risks and Solutions

Of all the types of intellectual property, trademarks give rise to the fewest issues when a startup participates in an entrepreneurship support program. Trademarks are, by definition, associated with one business. The question of who *owns* a trademark (e.g., a startup or an independent contractor) does not arise as it does with copyright. Another business might sell goods or services under a confusingly similar mark—which might give rise to a claim for trademark infringement—but that does not result in the loss of the original trademark owner’s rights, provided the elements of the Lanham Act are met.

The primary risk that does arise is actually one with copyright. It is not uncommon for cash-poor startups to use friends, family, or inexpensive contractors (e.g., graphic design students) to design their branding and business logos. Indeed, some programs, such as The Commons,<sup>145</sup> assign individuals with graphic design backgrounds to a startup. As noted, logos and business graphics may be copyrightable as pictorial or graphic works, provided the statutory elements are met.<sup>146</sup> Consequently, the startup will not own the copyright to that logo or graphic unless the individual has signed a written assignment.<sup>147</sup>

Fortunately, failure of a startup to own copyright to a logo or other graphic or pictorial work is not fatal, as the startup may negotiate a copyright assignment with the person who authored the work.<sup>148</sup> If a startup finds itself in such a situation, it should attempt to obtain the copyright assignment as soon as practicable. As the startup rises in valuation, the value of the work will rise as well. In the author’s experience, inexperienced graphic designers are often surprised to learn they still hold copyright to a logo or other design authored during or in connection with an entrepreneurship support program and are willing to sign a copyright assignment for a low fee, sometimes \$100 or less.

### *C. Trade Secrets*

#### 1. Overview

Trade secrets are governed by state law and federal law. Wisconsin, as with most states, has adopted the Uniform Trade Secrets Act (“Wisconsin UTSA”).<sup>149</sup> Trade secrets are addressed in federal law, in pertinent part, in chapter 90 of title 18 of the United States Code, entitled “Protection of Trade

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145. *See supra* Section I.A.

146. NIMMER & NIMMER, *supra* note 103, § 913.

147. *See* 17 U.S.C. § 201 (2012).

148. Marsh, *supra* note 119.

149. WIS. STAT. § 134.90 (2015–2016).

Secrets.”<sup>150</sup> That chapter encompasses two major pieces of federal legislation: the Economic Espionage Act of 1996 (“EEA”), which made trade secret theft a federal crime;<sup>151</sup> and the Defend Trade Secrets Act of 2016 (“DTSA”), a significant change in federal law granting the right for a private party to bring a federal civil action for trade secret misappropriation, provided certain conditions are met.<sup>152</sup> Federal trade secret law does not preempt state law.<sup>153</sup> A party may therefore have remedies for trade secret misappropriation under both state and federal law.<sup>154</sup>

The Wisconsin UTSA defines “trade secret” as “information, including a formula, pattern, compilation, program, device, method, technique or process to which all of the following apply:

1. The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
2. The information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.<sup>155</sup>

Federal law defines “trade secret” consistent with the Wisconsin UTSA,<sup>156</sup> simplifying the analysis of whether information is a trade secret or not.

The statutory definition of trade secret has two key components—the information itself, and the efforts to maintain secrecy. With respect to the first component, many items of import to startups may fall within the meaning of “information”: business plans and strategies, manufacturing techniques, pricing and margin information, internal manuals, results from product testing, web analytics, financial statements, customer and supplier lists, personnel information, recipes, and more.<sup>157</sup> Such items, however, are not trade secrets

150. 18 U.S.C. §§ 1831–1835 (2012).

151. *Id.* § 1832.

152. Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, § 2(c), 130 Stat. 376, 380 (2016) (to be codified at 18 U.S.C. § 1836(b)). Among other things, the trade secret at issue must relate to a product or service used, or intended to be used, in interstate or foreign commerce. *Id.*

153. *Id.* (to be codified at 18 U.S.C. § 1838).

154. Erin M. Cook et al., *Defend Trade Secrets Act of 2016: Protecting Trade Secrets*, WISCONSIN LAWYER (Nov. 1, 2016), <http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=89&Issue=10&ArticleID=25197> [https://perma.cc/V6EZ-YZW2].

155. WIS. STAT. § 134.90(1)(c) (2015–2016).

156. Defend Trade Secrets Act of 2016 (to be codified at 18 U.S.C. § 1839); *Identifying the Trade Secrets at Issue in Litigation Under the Uniform Trade Secrets Act and the Federal Trade Secrets Act*, 33 SANTA CLARA HIGH TECH. L.J. 470, 503 (2016–2017).

157. MILLER, JR., *supra* note 16, at 110; *see* Encap, LLC v. Scotts Co., LLC, 2014 WL 4273302, at \*5 (E.D. Wis. Aug. 28, 2014) (listing examples of trade secrets in other cases, including

under the Wisconsin UTSA unless the other elements of the first component are met, i.e., they must have “economic value” from not being “generally known to” or “readily ascertainable” by persons, such as competitors to a startup, who could obtain value from it.<sup>158</sup>

The second component—reasonable efforts to maintain secrecy—is often regarded as the most important element of a trade secret.<sup>159</sup> Whether efforts are “reasonable” depends on the particular enterprise and the nature of the information.<sup>160</sup> However, courts have interpreted the Wisconsin UTSA as requiring more than engaging in normal business practices, such as simply restricting access to a facility and requiring passwords.<sup>161</sup> An overview of practices for a startup participating in an entrepreneurship support program to protect trade secrets is discussed *infra* in Part II.C.2.c of this Article.

Trade secret rights, unlike with copyright and patents, can last perpetually if maintained properly.<sup>162</sup> Additionally, information that is neither patentable or copyrightable—such as an idea—may in some instances be eligible for protection under trade secret law, provided the statutory elements are met.<sup>163</sup> Although trade secrets do not incur filing or registration fees, business costs for protecting trade secrets can be high.<sup>164</sup>

## 2. Trade Secret Issues Arising with Support Programs

Startups participating in entrepreneurship support programs face three general areas of risk with respect to trade secrets: creation of work product that a startup would like to protect as a trade secret; disclosure of trade secrets to third parties; and protection of trade secrets. These risks are magnified during a startup’s participation in an entrepreneurship support program due to the many interactions, often informal, with people in varying capacities. A discussion of the three areas of risk follows.

### *a. Creation of Information for a Startup*

Startups are in the business of bringing a new good or service to market. That involves the creation of a significant amount of new information by people internal to the company and sometimes external to it as well. A startup

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an operating manual, a proprietary manufacturing process, customer lists, vendor lists, pricing and margin information, and a spreadsheet with uniquely compiled product data).

158. WIS. STAT. § 134.90(1).

159. MILLER, JR., *supra* note 16, at 110; *see Encap, LLC*, 2014 WL 4273302, at \*2.

160. MILGRIM ON TRADE SECRETS, ch. 4, tit. 18, § 18.03 (Matthew Bender ed., 2017).

161. *Maxpower Corp. v. Abraham*, 557 F. Supp. 2d 955, 961 (W.D. Wis. 2008).

162. MILLER, JR., *supra* note 16, at 111.

163. *Id.* at 110.

164. *Id.* at 112.



generally owns work product, including information, developed by its employees, even in the absence of a written agreement and even if the work is not copyrightable.<sup>165</sup> This is true whether an employee is an officer of the business or a lower-level hourly worker. A startup may therefore operate under the presumption that, if an employee creates information for it, the information is protectable as a trade secret so long as the elements of the Wisconsin UTSA are met (i.e., the information is valuable, not generally known, and subject to reasonable efforts to maintain its secrecy). However, for avoidance of doubt, startups are advised to enter into written agreements with employees addressing ownership and confidentiality of information.

Independent contractors, on the other hand, presumptively own work product they develop during a service relationship and may use that work product with other clients or customers.<sup>166</sup> For example in *Hicklin Engineering, L.C. v. Bartell*, the Seventh Circuit, applying Wisconsin law, noted that “[a] software programmer, working as an independent contractor for Client Z, who develops a novel way to organize a database may re-use the source code for another client’s project, unless he promises otherwise.”<sup>167</sup>

For an independent contractor’s work product for a startup to be protectable as a trade secret, ownership of the work product must be assigned upon its creation to the startup.<sup>168</sup> Additionally, the contractor must know, or should reasonably know under the circumstances, that the work product is a trade secret of the startup.<sup>169</sup> Startups are therefore advised to enter into written agreements addressing the preceding items, particularly where a contractor might develop valuable, confidential information for the startup.<sup>170</sup>

### *b. Disclosure of Information by a Startup*

A separate but related area of risk is where a startup has an existing, valid trade secret but shares it with a third party. For example, a food startup might desire to disclose a recipe to a manufacturing facility, or a software startup might desire to disclose a business plan and strategy to a mentor.

As a general rule, a company may disclose trade secrets to a person or another business and maintain the company’s trade secret rights so long as a confidential relationship exists between the parties.<sup>171</sup> Under Wisconsin law, a

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165. *Hicklin Engineering, L.C. v. Bartell*, 439 F.3d 346, 349 (7th Cir. 2006); 17 U.S.C. § 101 (2012); 1-5 Milgrim on Trade Secrets § 5.02; MILLER, JR., *supra* note 16, at 111.

166. *Hicklin Engineering, L.C.*, 439 F.3d at 349.

167. *Id.*

168. *See id.*

169. *Id.* at 350.

170. MILLER, JR., *supra* note 16, at 112.

171. 2-7 MILGRIM ON TRADE SECRETS § 7.01.

confidential relationship exists most clearly with officers and other key employees, who owe a fiduciary duty of loyalty that obligates them not to use or disclose confidential information to their employer's detriment.<sup>172</sup> There are no other clear categories or types of relationships where disclosure is permitted. Rather, courts examine facts on a case-by-case basis to determine if a confidential relationship may reasonably be implied.<sup>173</sup>

A startup desiring to share trade secrets with any person (employee, contractor, mentor, etc.) or business is therefore advised to take steps to ensure that a confidential relationship does, in fact, exist.<sup>174</sup> A critical step is entering into a confidentiality agreement with the recipient of the trade secret.<sup>175</sup> The confidentiality agreement should not be one of limited duration with respect to trade secrets; otherwise, when the agreement terminates, it can be argued the information disclosed is no longer a trade secret.<sup>176</sup> The startup should also take steps with respect to the information itself, such as marking it as confidential and engaging other efforts, stated *infra* in Section II.C.2.c.

Loss of trade secrets through disclosure is an area of high risks to startups participating in entrepreneurship support programs. As previously discussed, startups are introduced to, and interact with, many people through support programs—potential or actual mentors, service providers, customers, and business partners, among others. In some instances, such as with certain accelerators, startups will be encouraged to disclose information to mentors even though the mentors have not signed a confidentiality agreement.<sup>177</sup> Indeed, many angel and venture capital investors refuse to sign confidentiality agreements for fear of liability, among other reasons.<sup>178</sup> In that situation, a startup need not be resigned to not working with the mentor. Rather, it can and should interact with the mentor but not disclose information that is truly a trade secret and core to the startup's business.<sup>179</sup>

172. See *Burbank Grease Services, LLC v. Sokolowski*, 717 N.W.2d 781, 796–97 (Wis. 2005); 1-5 MILGRIM ON TRADE SECRETS § 5.02.

173. 2-7 MILGRIM ON TRADE SECRETS § 7.01.

174. MILLER, JR., *supra* note 16, at 112; *Fail Safe, LLC v. A.O. Smith Corp.*, 674 F.3d 889, 893–94 (7th Cir. 2012) (applying Wisconsin law).

175. 2-7 MILGRIM ON TRADE SECRETS § 7.01; MILLER, JR., *supra* note 16, at 112. Confidentiality agreements are commonly called non-disclosure agreements, or NDAs.

176. MILLER, JR., *supra* note 16, at 111.

177. Merlin Mentors and BizStarts are two examples of support programs in Wisconsin that do require mentors to sign confidentiality agreements. See *supra* Section II.F.

178. Bernthal, *supra* note 13, at 164, 169.

179. In the author's experience, entrepreneurs oftentimes either (i) overreach, believing most of their company-related information is a trade secret; or (ii) under reach, treating little to no company-related information as a trade secret. Startups therefore benefit from working with counsel to determine if particular information is a trade secret or not.

*c. Efforts to Maintain Secrecy*

The open, informal nature of many entrepreneurship support programs can significantly impinge a startup's efforts to maintain secrecy of confidential information. Encouragement by programs to disclose information to third parties in the absence of a non-disclosure agreement is one example. Another example is the physical location in which startups work. Popular co-working spaces such as 100state in Madison and Ward4 in Milwaukee are communal environments where entrepreneurs work alongside one another and share conference rooms, printers, and other resources.<sup>180</sup> In some cases, it will be prudent for a startup to move its operations to a more secure location. In other instances, the benefits to working in the space might outweigh the risks to the startup of losing its trade secret rights.

To protect trade secrets, startups are advised to engage in the following practices:

- Entering into confidentiality agreements with employees, independent contractors, and other parties to whom trade secrets will be disclosed;
- Entering into non-competition and non-solicitation agreements with employees;<sup>181</sup>
- Informing employees and independent contractors of the importance of keeping trade secrets confidential;
- Marking documents containing trade secrets with “Confidential” or “Top Secret”;
- Disclosing sensitive information only to individuals who “need to know” it;
- Password protecting electronic files and documents containing trade secrets;
- Controlling and limiting access to computers and networks;
- Adopting a policy limiting use of personal clouds (e.g., Google Drive, Box, and Dropbox) for company information; and
- Conducting exit interviews for departing employees to ensure they return or delete confidential information in their possession.<sup>182</sup>

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180. See *supra* Section I.B.

181. Non-compete and non-solicitation agreements help reduce the likelihood that a current or former employee will disclose trade secrets to a business competitor or customer.

182. 4-18 MILGRIM ON TRADE SECRETS § 18.03; Maxpower Corp. v. Abraham, 557 F.Supp.2d 955, 961 (W.D. Wis. 2008); Philip Favro, *Protecting Corporate Trade Secrets in the Age of Personal Clouds*, DRIVEN INC. (Aug. 10, 2016), <http://www.driven-inc.com/protecting-corporate-trade-secrets-in-the-age-of-personal-clouds/> [https://perma.cc/JJP9-KTWT] (last visited Sept. 7, 2017); MILLER, JR., *supra* note 16, at 112.

## D. Patents

### 1. Overview of Patents

As with copyright, patents are governed by federal law, specifically, the U.S. Constitution<sup>183</sup> and title 35 of the United States Code, entitled “Patents.”<sup>184</sup> A patent is a right, granted in United States by the U.S. Patent and Trademark Office, to exclude others from making, using, offering for sale, selling, or importing an invention.<sup>185</sup> The right to exclude is an important one, as it can be used to preclude others from making the same invention even though they invented it independently.<sup>186</sup> With exceptions, United States patents last for a term of twenty years, measured from the date of filing.<sup>187</sup> A United States patent generally provides patent protection within the United States.<sup>188</sup> To receive patent protection outside the United States, a company must obtain a patent in each country or region where protection is sought.<sup>189</sup>

To receive a United States patent, the invention must be novel, useful, non-obvious, and described in terms that would enable a person skilled in the relevant field to make and use the invention.<sup>190</sup> There are three types of patents under federal law: utility patents, design patents, and plant patents. Utility patents are for the invention or disclosure of a new and useful process, machine, article of manufacture, or composition of matter, or any new and useful improvement of such thing.<sup>191</sup> Design patents are for the invention a new, original, and ornamental design for an article of manufacture.<sup>192</sup> And plant patents are for the invention or discovery of certain plants.<sup>193</sup> Utility patents are by far the most commonly issued type of patent. In 2016, for example, the U.S. Patent and Trademark Office issued 304,568 utility patents; 27,830 design patents; and 1250 plant patents.<sup>194</sup>

183. U.S. CONST. art. 1, § 8, cl. 8 (“Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries[.]”)

184. 35 U.S.C. §§ 1–390 (2012).

185. *Id.* § 154(a)(1).

186. MILLER, JR., *supra* note 16 at 105.

187. 35 U.S.C. § 154(a)(2). One exception is design patents, which have a term of fifteen years from the grant date, for those filed after May 13, 2015. 35 U.S.C. § 173.

188. *Id.* § 217(a).

189. *Patent: Overview*, PRACTICAL LAW (2017), Resource ID 8-509-4160.

190. 35 U.S.C. §§ 101–103, 112.

191. *Id.* § 101.

192. *Id.* § 171.

193. *Id.* § 161.

194. *U.S. Patent and Trademark Office Performance and Accountability Report Fiscal Year 2016*, U.S. PATENT AND TRADEMARK OFFICE at 24 (2016), <https://www.uspto.gov/sites/default/files/documents/USPTOFY16PAR.pdf> [<https://perma.cc/5DCM-3HPY>].

Under the Leahy-Smith America Invents Act of 2011, which became effective in 2013, the United States moved to a first-inventor-to-file system, under which priority is generally awarded to the first inventor to file a patent application.<sup>195</sup> The new system incentivizes inventors to file patent applications expeditiously.<sup>196</sup> Additionally, patent applications will be rejected for lack of novelty if the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the patent application was filed.<sup>197</sup> The United States has a one-year grace period for disclosures by the inventor.<sup>198</sup> Foreign countries, however, generally do not have such a grace period.<sup>199</sup> A startup wishing to patent an invention should therefore avoid disclosing the invention to anyone outside the company or who has not signed a non-disclosure agreement.<sup>200</sup>

The process for obtaining a patent is expensive and time consuming as compared to trademarks and copyright. Inventors normally use, and are advised to use, a patent attorney to prosecute a patent application with the U.S. Patent and Trademark Office.<sup>201</sup> According to the U.S. Patent and Trademark Office, the average total pendency for patent applications was more than twenty-five months.<sup>202</sup> Costs for obtaining a patent are high, ranging from \$10,000 for simple inventions to \$50,000 and more for complex inventions.<sup>203</sup>

Despite the high cost and length of time required to obtain a patent, a substantial minority of startups still pursue them. According to a 2012 study by RJ Metrics, approximately one-third of funded technology companies listed on Crunchbase had applied for patents as of that year.<sup>204</sup> Startups in the

195. Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 3, 125 Stat. 284, 285–93 (2011).

196. REDER, *supra* note 103, at 225.

197. 35 U.S.C. § 102(a)(1).

198. 35 U.S.C. § 102(b).

199. REDER, *supra* note 103, at 225.

200. *Id.* Even a single non-secret use of an invention by one person might bar a patent application. Robert A. Matthews, Jr., 3 Annotated Patent Digest, § 17:137 (Oct. 2017).

201. General Information Concerning Patents, U.S. PATENT AND TRADEMARK OFFICE (Oct. 2015), <https://www.uspto.gov/patents-getting-started/general-information-concerning-patents> [<https://perma.cc/ET7L-CHKW>].

202. *U.S. Patent and Trademark Office Performance and Accountability Report Fiscal Year 2016*, *supra* note 194, at 181.

203. REDER, *supra* note 103, at 215–16; Gene Quinn, *The Cost of Obtaining a Patent in the US*, IPWATCHDOG.COM (Apr. 4, 2015), <http://www.ipwatchdog.com/2015/04/04/the-cost-of-obtaining-a-patent-in-the-us/id=56485/> [<https://perma.cc/S8GD-NHW5>]. Total costs for obtaining a patent include patent fees and attorney’s fees. Startups are often “small entities” or “micro-entities” and therefore qualify for reduced patent fees. 37 C.F.R. §§ 1.27, 1.29 (2017); *Patent Fees*, U.S. PATENT AND TRADEMARK OFFICE (2017), <https://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule> [<https://perma.cc/3KN7-4H5U>].

204. Leonid Kravets, *Do Patents Really Matter to Startups? New Data Reveals Shifting Habits*, TECHCRUNCH (June 21, 2012), <https://techcrunch.com/2012/06/21/do-patents-really-matter-to->

semiconductor industry were most likely to apply for patents, at a rate of 65.2%, and companies in ecommerce were the least likely, at a rate of only 10.5%.<sup>205</sup>

## 2. Patent Ownership and Assignment

As a general rule, rights in an invention belong to the inventor or, for inventions made jointly, the inventors.<sup>206</sup> An inventor's interest in his or her invention, however, is assignable by an instrument in writing.<sup>207</sup> If an invention is the original conception of an employee alone, an employer will not have rights in that invention absent an agreement to the contrary.<sup>208</sup> A company will similarly not have rights to an invention conceived by an independent contractor unless the company and contractor agree otherwise. It is therefore common for a company to have employees and contractors sign an agreement containing a present assignment of inventions.<sup>209</sup> If an employee conceives of an invention and no assignment agreement is in place, the employer may have "shop rights" in the invention, i.e., an implied right to use it without liability for infringement.<sup>210</sup> However, a shop right is non-exclusive, and the employee can therefore freely sell and license the invention to third parties.<sup>211</sup>

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startups-new-data-reveals-shifting-habits/ [https://perma.cc/R5TW-6VUQ]. Crunchbase is a free online database with information about technology companies, people, funding rounds, and other information. See https://www.crunchbase.com/ [https://perma.cc/346E-YXWF].

205. *Id.*

206. *Bd. of Tr. of Leland Stanford Junior Univ. v. Roche Molecular Sys.*, 563 U.S. 776, 780, 785 (2012); 35 U.S.C. §§ 101, 262 (2012).

207. *Roche Molecular Sys.*, 563 U.S. at 786; 35 U.S.C. §§ 152, 261.

208. *Roche Molecular Sys.*, 563 U.S. at 786.

209. *Intellectual Property: Employees and Independent Contractors*, PRACTICAL LAW, Resource ID W-002-9206 (2017); Bryce C. Pilz, *Student Intellectual Property Issues on the Entrepreneurial Campus*, 2 MICH. J. PRIVATE EQUITY & VENTURE CAP. L. 1, 17 (2012). To obtain a present assignment of assignment rights—and not merely a promise to assign—an assignment agreement should state that the employee or contractor "hereby assigns" all rights in inventions he or she may develop in the future. *Id.*; see *FilmTec Corp. v. Allied-Signal, Inc.*, 939 F.2d 1568, 1572–73 (Fed. Cir. 1991); but see *Roche Molecular Sys.*, 563 U.S. at 799–801 (criticizing FilmTec's "technical drafting trap for the unwary" regarding the "hereby assign[s]" language) (Breyer, J. dissenting). Multiple states have laws limiting employee assignment agreements. See *Assignment of Employee Inventions State Laws Chart: Overview*, PRACTICAL LAW, Resource ID 4-582-6485 (2017). Wisconsin does not have such a law, but employee assignment agreements are nevertheless subject to common law contract principles.

210. *McElmurry v. Arkansas Power & Light Co.*, 995 F.2d 1576, 1580 (Fed. Cir. 1993).

211. *Intellectual Property: Employees and Independent Contractors*, *supra* note 209.

### 3. Issues with Patents and Entrepreneurship Support Programs<sup>212</sup>

Two significant patent-related issues arise for startups participating in support programs. The first issue involves the public use or disclosure of an invention, such as to a mentor or other third party, or at a startup pitch or demo event. There, disclosure may result in the startup losing international patent rights permanently and starting a one-year clock ticking for filing of a United States patent. To mitigate that risk, a startup wishing to discuss an invention with a third party, such as a mentor or advisor, should first enter into non-disclosure agreement with that party.<sup>213</sup> Additionally, a startup should avoid presenting the invention at events such as a demo day until patent filings have been properly made.<sup>214</sup>

The second issue involves failing to obtain proper ownership of an invention developed, or that will be developed, by an employee or worker hired by a startup. This issue should be addressed by entering into a patent assignment agreement with the employee or contractor, as stated *supra* in Part II.D.2. The issue of patent is not unique to, nor does it depend on, entrepreneurship support programs. As stated throughout this article, however, startups routinely meet potential new hires at or through support programs.

### III. FOSTERING OF INTELLECTUAL PROPERTY OWNERSHIP BY WISCONSIN ENTREPRENEURSHIP SUPPORT PROGRAMS

As addressed in the Introduction of this Article, Wisconsin's entrepreneurship support programs assist startups in many ways, such as through providing business development assistance, financial support, mentorship, introductions to investors and potential business partners, and third-party validation. A significant opportunity exists for support programs to assist startups in another capacity—fostering startup intellectual property ownership.

Support programs should embrace this opportunity for several reasons. First, as noted in the Introduction, intellectual property is critical for startups—not only to enable them to protect their goods or services in the marketplace, but also to make them more attractive to investors. Indeed, some commentators maintain that intangible assets account for ninety percent of the value of an early-stage company.<sup>215</sup> Second, many support programs work with early-stage startups

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212. A number of additional patent issues can arise for student inventors. Professor Bryce Pilz comprehensively addresses those issues in *Student Intellectual Property Issues on the Entrepreneurial Campus*, *supra* note 209, and the author refers readers to that article.

213. MILLER, JR., *supra* note 16, at 107.

214. See James R. Barney and Anthony D. Del Monaco, *Before You Unveil That New Product at the Big Trade Show*, 29 No. 5 INTELL. PROP. & TECH. L.J. 16 (May 2017).

215. Mary Juetten, *Do Venture Capitalists Care About Intellectual Property?*, FORBES (Aug. 11, 2015 10:23 AM), <https://www.forbes.com/sites/maryjuetten/2015/08/11/do-venture-capitalists->

that have yet to lock down their intellectual property. The timing is therefore ideal for those startups to receive assistance. And third, many startups forego legal assistance early in their life due to limited financial resources, in the author's experience. Support programs—which are often resource rich as compared to startups—can help to fill the resource gap.

First and foremost, programs can foster intellectual property ownership by educating startups about intellectual property. If time is limited (e.g., a weekend hackathon), a program can, at a minimum, emphasize to startups the importance of protecting intellectual property. If time is less limited, a program can proceed a step further and provide an education about intellectual property basics. Some support programs in the state already do this, such as accelerators that incorporate into their curricula training by intellectual property attorneys.<sup>216</sup> Programs can also direct startups to print-based and online resources.<sup>217</sup>

Additionally, support programs can, as many do, refer startups to intellectual property counsel as appropriate. Some programs partner with law firms, legal clinics, or both.<sup>218</sup>

## CONCLUSION

Wisconsin's entrepreneurship ecosystem has expanded greatly since the turn of the century, with respect to startups themselves as well as the programs that support new ventures. Wisconsin is now home to accelerators, incubators, hackathons, business contests, co-working spaces, and various other programs and organizations that assist startups in varying capacities. Participation in a support program oftentimes provides a startup with needed resources, networking opportunities, and mentorship. It also, however, can place a startup's intellectual property at risk—directly through the program itself, or indirectly through relationships that develop as a result of the program.

To address and mitigate risk with respect to such programs, startups should

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care-about-intellectual-property/#72b891475b87 [https://perma.cc/SB6Q-W5EY].

216. See, e.g., *WERCBench Labs Week 4 Highlights*, M-WERC (Nov. 4, 2016 9:30 AM), [http://energywerccs.org/media/show/wercbench\\_labs\\_week\\_4\\_highlights.html](http://energywerccs.org/media/show/wercbench_labs_week_4_highlights.html) [https://perma.cc/YVW4-HR35].

217. See, e.g., Constance E. Bagley & Craig E. Dauchy, *THE ENTREPRENEUR'S GUIDE TO LAW AND STRATEGY* (5th ed. 2017); Richard Stim, *PATENT, COPYRIGHT & TRADEMARK: AN INTELLECTUAL PROPERTY DESK REFERENCE* (17th ed. 2016); *Startup Forms Library*, ORRICK, <https://www.orrick.com/Total-Access/Tool-Kit/Start-Up-Forms> [https://perma.cc/VT9N-TWKQ]; *Documents*, COOLEY, <https://www.cooleygo.com/documents/> [https://perma.cc/2FJQ-5PF8]; *Document Generator*, WILMERHALE, <https://launch.wilmerhale.com/build/document-generator/> [https://perma.cc/MT7B-QKAU].

218. The Marquette Law and Entrepreneurship Clinic holds office hours at or in connection with several entrepreneurship support programs in the Milwaukee area.



engage in several practices. First, before a startup hires or begins to work with an employee or contractor, the startup should determine whether that person is subject to any agreements, such as with a current or former employer, that might impact ownership of that person's work product. If the startup decides to move forward with the relationship, it should then, as a general rule, enter into a written agreement with that person addressing ownership of intellectual property and confidentiality of information. In most instances, the agreement should provide that all copyrightable work product is a work made for hire under the Copyright Act, and that all work product not copyrightable is assigned to the startup.

A startup should also identify its trade secrets and anticipate that new hires are likely to develop information that might be a trade secret. The startup should make reasonable efforts to maintain the secrecy of its trade secrets, such as entering into confidentiality agreements with all parties to whom the trade secrets will be disclosed; marking documents "Confidential" or "Top Secret"; and controlling and limiting access to trade secrets. Startups should be aware that disclosure to mentors who are not in a confidential relationship with the startup may result in loss of trade secret rights. Startups should also be aware that certain locations, such as co-working spaces, might create risks for loss of trade secret rights.

To preserve patent rights, startups should enter into written patent assignment agreements with all employees and contractors. Startups should also avoid disclosing an invention to third parties who are not bound by confidentiality obligations, or at events such as startup pitches or demos, unless and until proper patent paperwork has been filed with the U.S. Patent and Trademark Office.

Lastly, entrepreneurship support programs in Wisconsin can and should foster startup intellectual property, such as through educating startup and referring them to legal resources and support, as needed.