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# I Am My Brother's Keeper: How the Crossroads of Entrepreneurship, Intellectual Property and Entertainment Can Be Used to Affect Social Justice

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# 10. I am my brother's keeper: How the crossroads of entrepreneurship, intellectual property and entertainment can be used to affect social justice

**Loren E. Mulraine**

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An individual has not started living until he can rise above the narrow confines of his individualistic concerns to the broader concerns of all humanity.

Martin Luther King, Jr.

## INTRODUCTION

Growing up in the Bronx, New York, our neighborhoods served as the fulcrum for the world we knew. Like many in my neighborhood, we were immigrants. My family had come to New York from the West Indies, for higher education, to make a better life and to contribute to a growing, energetic society. In many ways, the ultimate goal was to have a transformative effect upon our family tree. Many children, my sisters and I included, grew up in homes where we welcomed our parents' siblings and their families – our aunts, uncles and cousins – to live with us for a transitional period as they adjusted to life in “the States”. My aunt and uncle in Brooklyn had done the same for us, several years earlier. This pattern served to cement the bonds of family, ease the transition to a new country, and unbeknownst to me, plant the first seeds in my mind of what it meant to be my brother's keeper. It was also a primer on what it means to be an entrepreneur and how it fuels upward mobility.

Unlike my children, who today are driven by car or ride school buses to elementary, middle and high school, virtually all school kids in New York's five boroughs<sup>1</sup> walked to their elementary

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<sup>1</sup> New York City's five boroughs are The Bronx, Brooklyn, Manhattan, Staten Island, and Queens. While almost all elementary school kids in the city walk

schools.<sup>2</sup> I attended P.S. 78 (officially named Anne Hutchinson Elementary School), which sat on Needham Avenue in the Bronx in the Eastchester District. The journey to school generally encompassed the Boston Road neighborhood flanked by Gun Hill Road to the south and Eastchester Road to the north. It was a middle class neighborhood with an assortment of multi-family homes, apartments and townhomes. Our journey would take us past a host of corner stores and family businesses including Pete's West Indian Bakery, which sat on the west side of Boston Road, just south of Eastchester, where we could satisfy our hunger with a beef patty and cocoa bread. If we had a taste for New York's most enduring staple food, we would visit Tony's or Sal's Pizzeria where the often imitated, but never duplicated New York-style Pizza would be devoured for 50 cents a slice. For that same 50 cents, we could purchase the latest record, a "45" of course, at the RecordRama, which sat on the east side of Boston Road between Fenton and Corsa Avenues. An album could be purchased for \$3.99 or \$4.99 at that same neighborhood record store. My first album purchase was the 1976 Earth, Wind & Fire album entitled "Spirit".<sup>3</sup> For a few bucks, we could get a haircut at one of several barbershops on Boston Road. If you needed clothing items, any number of stores between Gun Hill and Eastchester could fit the bill. Not to mention my Mom's friend Marilyn who essentially ran her own mobile clothing store. I'm convinced that Marilyn would have had a nationwide, or potentially global enterprise if the Internet had existed at that time.

It never occurred to me during my elementary and middle school years, but we were surrounded by entrepreneurs. All of those establishments were family businesses or sole proprietorships, created by entrepreneurs, many of whom were immigrants or first generation U.S. citizens who were pursuing the American dream. The area was quite diverse, with West Indians, Puerto Ricans, Italians, Jews, multi-generational African-Americans, and just about every other ethnic group owning a piece of the neighborhood and serving to educate us in the ultimate melting pot. It was New York, it was the 1970s, and it was the very best place to get a 360-degree view

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to school, they are more likely to take the city bus or train to their assigned middle or high schools.

<sup>2</sup> This may partially explain why from 5th grade through my high school graduation, schools were only closed due to weather on one occasion, the nasty blizzard of 1979. In contrast, the schools my children attend are often closed based on a prediction of snow as little as 1–2 inches.

<sup>3</sup> I actually still have the original shrink wrap as proof that it was on sale that first month for \$3.99.

of small business in its most fertile ground, a multicultural, middle class neighborhood.

Growing up in a neighborhood where I was surrounded by entrepreneurs, it is no surprise that business has always excited me. I had my first job at the age of 13, when I took over my friend Mark Steven Mayfield's paper route and began delivering the *New York Daily News* and *New York Times* throughout my neighborhood. It was a great training ground for developing a strong and consistent work ethic – papers had to be delivered by 6:00 a.m. daily and 7:00 a.m. on Sundays – rain, snow, or shine. I even had my first experience as “management” when I hired a friend to make deliveries on my behalf on Saturdays. I was soon loaning money to my sister and other family members whenever they were in need.

I didn't understand it when I was 13, but entrepreneurship has always been the fuel that ignites financial growth and creates generational wealth. In this chapter, I will first look at how this fuel has historically been a powerful accelerant when combined with media, intellectual property, and entertainment. I will then give examples of how artists, specifically in the African American community, have used it to ignite the fires of social justice, and close by revisiting how these tools and energies can be directed to promote communal economic empowerment, that is, how I can be my brother's keeper.

## ENTREPRENEURSHIP, SOCIAL JUSTICE AND SOCIAL ENTREPRENEURSHIP: CONTEMPORARY DEFINITIONS

The ends you serve that are selfish will take you no further than yourself but the ends you serve that are for all, in common, will take you into eternity.

Marcus Garvey

The tools of entrepreneurship can be used to effectuate social change and social justice, and to that end, thereby stimulate and achieve social entrepreneurship. Moreover, entrepreneurs are the visionaries behind the small businesses that drive economic development. In turn, this economic development has the potential to serve as my brother's keeper in at least two regards: (1) there is the aphorism that a rising tide lifts all boats.<sup>4</sup> (2)

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<sup>4</sup> Senator John F. Kennedy coined this phrase during a campaign speech in Canton, Ohio in September 1960. It has since become a common axiom utilized to describe the belief that improvements in the general economy will benefit all participants in that economy.

if entrepreneurs themselves are committed to changing their communities for the good of everyone, and stimulating opportunities for those who are traditionally excluded from economic abundance, there will be a social justice impact that changes the lives of “the least of these”.<sup>5</sup>

In a broad sense, entrepreneurship is simply “enterprise”, or the pursuit of enterprise. The classic dictionary definition of an entrepreneur is “one who organizes, manages, and assumes the risks of a business or enterprise”.<sup>6</sup> Howard University’s Entrepreneurship, Leadership, and Innovation Institute defines entrepreneurship and the entrepreneurial mindset as “the process of opportunity discovery, risk evaluation and adding value to situations, projects, activities and organizations”.<sup>7</sup> *The Economist* magazine defines entrepreneurship as the modern-day philosopher’s stone: a mysterious something that supposedly holds the secret to boosting growth and creating jobs. All of these definitions anticipate the creation of something from nothing, or at least the creation of something tangible in the form of a business, from something intangible – the germination of an idea.

“Entrepreneurship is a way of life that offers unlimited possibilities to those who truly believe in it and live by it. But at the same time, entrepreneurship is a way of life that can totally alter the course of your life if misunderstood”.<sup>8</sup> It is the unlimited possibilities that we must unleash by showing entrepreneurs how serving as their brother’s keepers can allow them to change their lives and the lives of others simultaneously. At the same time, it is the misunderstanding of entrepreneurship as an egocentric endeavor that we need to minimize.

Among the many descriptors of social justice are the following: using your passions and talents to meet the needs of those around you; giving a voice to the voiceless; providing access to education for everyone; making a conscious decision to live one’s life for the betterment of humanity; using what you have been given to bless others around you; seeing a need in the community and coming together to meet it.<sup>9</sup> The solutions offered

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<sup>5</sup> The King will reply, ‘Truly I tell you, whatever you did for one of the least of these brothers and sisters of mine, you did for me.’ Matthew 25:40, New International Version.

<sup>6</sup> The Merriam-Webster online dictionary, [www.merriam-webster.com](http://www.merriam-webster.com).

<sup>7</sup> W. Sherman Rogers, *The African American Entrepreneur – Then and Now* (Praeger Publishing, New York (2010), 155.

<sup>8</sup> Tito Phillips, Jr., *7 Reasons Why Most Entrepreneurs Fail In Business* (2011), accessed 15 October at <http://www.naijapreneur.com/why-entrepreneurs-fail/>. Chapter 2 of this book offers a thorough exposition on the topic of entrepreneurship.

<sup>9</sup> The website [www.whatissocialjustice.com](http://www.whatissocialjustice.com) (accessed 15 October 2014),

at the end of this chapter are designed to be a catalysts for much many of these descriptors.

## THE USE OF ENTREPRENEURSHIP TO ACHIEVE ECONOMIC JUSTICE ECONOMIC EMPOWERMENT AND CIVIL RIGHTS

The cause of economic justice is the cause of social justice.

Dr. Martin Luther King, Jr.

There is a close relationship between social justice and economic justice. The Center for Economic and Social Justice defines the two as follows:

Social justice encompasses economic justice. Social justice is the virtue, which guides us in creating those organized human interactions we call institutions. In turn, social institutions, when justly organized, provide us with access to what is good for the person, both individually and in our associations with others. Social justice also imposes on each of us a personal responsibility to work with others to design and continually perfect our institutions as tools for personal and social development.<sup>10</sup>

Economic justice, which touches the individual person as well as the social order, encompasses the moral principles which guide us in designing our economic institutions. These institutions determine how each person earns a living, enters into contracts, exchanges goods and services with others and otherwise produces an independent material foundation for his or her economic sustenance. The ultimate purpose of economic justice is to free each person to engage creatively in the unlimited work beyond economics, that of the mind and the spirit.<sup>11</sup>

Throughout the 20th and into the 21st century, there has often been a direct relationship between entrepreneurship and economic justice. More than a century ago, the likes of W.E.B. DuBois, Booker T. Washington and Marcus Garvey were among the leaders of the Black economic empowerment movement. Martin Luther King, Jr. and Malcolm X were also among the most important voices for economic justice in the latter half of the 20th century.

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conducted an international campaign where they interviewed scores of individuals to come up with a comprehensive definition of social justice.

<sup>10</sup> Center for Economic and Social Justice, "Defining Economic Justice and Social Justice", accessed 15 October 2014 at <http://www.cesj.org/learn/definitions/defining-economic-justice-and-social-justice/>.

<sup>11</sup> Ibid.

Booker T. Washington's "self help" philosophy took root during the last two decades of the 19th century. In addition to founding Tuskegee Institute (now Tuskegee University) in 1880, Washington founded the Negro Business League with the intent of creating a Black capitalist class. Washington famously called upon league members to teach the masses to acquire property, to be more thrifty and economical, and he resolved to establish an industrial enterprise wherever the opportunity presented itself.<sup>12</sup>

Marcus Garvey was a great admirer of Booker T. Washington, even being stimulated by Washington's book "Up From Slavery", which played a foundational role in the development of Garvey's program of black economic empowerment.<sup>13</sup> Garvey was a staunch proponent of economic empowerment as a means to freedom and prosperity. His program of economic self-reliance included the Black Star Line, the Negro Factories Corporation and the Black Cross and Navigation Corporation.<sup>14</sup> Garvey's message was one of pride, self-help and the absolute necessity for black entrepreneurship and black economic empowerment.<sup>15</sup>

Even before Booker T. Washington, Marcus Garvey and W.E.B. DuBois, there was Frederick Douglass, who embraced the rhetoric of market capitalism. The rhetoric of market capitalism in the antebellum period and its association with the concept of political freedom meant one thing to the African American slave and quite another to white slaveholders.<sup>16</sup> To Douglass, the ideological linkage between capitalism and liberty quickened his resolve to escape by enabling him for the first time to envisage what it might mean to lay claim to the rights of his own labor.<sup>17</sup> While he was consistently critical of the state of capitalism, particularly its injustices for laborers, Douglass was not anti-capitalist. In fact, he was a strong proponent of capitalism, or private enterprise.<sup>18</sup> Douglass believed that in

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<sup>12</sup> Lance Selfa, "Booker T. Washington and Black capitalism", *The Socialist Worker*, accessed 14 October 2014 at <http://socialistworker.org/2012/05/11/booker-washington-and-black-capitalism>.

<sup>13</sup> Muhammad Ali Salaam, *A Black Man's Journey in America: Glimpses of Islam, Conversations and Travels* (Xlibris Corporation, Bloomington 2011), 77.

<sup>14</sup> Robert Trent Vinson, *The Americans are Coming! Dreams of African American Liberation in Segregationist South Africa* (Ohio University Press, Athens, OH 2012), 93.

<sup>15</sup> Gilbert R. Mason, *Beaches, Blood, and Ballots: A Black Doctor's Civil Rights Struggle* (University Press of Mississippi, Jackson 2000), 27.

<sup>16</sup> Robert S. Levine, *Martin Delany, Frederick Douglass and the Politics of Representative Identity* (University of North Carolina Press, Chapel Hill 1997).

<sup>17</sup> *Ibid.*, 134.

<sup>18</sup> Waldo E. Martin, *The Mind of Frederick Douglass* (University of North Carolina Press, Chapel Hill 1984), 129.

the midst of the failings of capitalism, there was much to praise as well. One of the praise-worthy characteristics was individual socioeconomic betterment and national economic progress.<sup>19</sup> In fact, Douglass believed the best way to create employment opportunities in the private sector was through small-business development.<sup>20</sup> In 1869, Douglass formulated a land reform proposal that encouraged the federal government to become a purchaser and seller of land in order to counteract the collusion schemes of southern landowners. The words and actions of Douglass epitomize what we would consider the entrepreneurial spirit. Being able to claim the rights to one's own labor is the essence of entrepreneurship. Once those rights have been realized, a myriad of possibilities are available to allow the entrepreneur to participate in socioeconomic betterment, and contribute to the growth of economic justice.

Martin Luther King, Jr., was also an advocate of the highest order for social justice and economic empowerment. He empathized with those who suffered economic exploitation. In fact, he lost his life during a visit to Memphis, Tennessee where he was advocating for economic empowerment for the Memphis sanitation workers. He was an advocate for radical economic reform at a societal level and at the level of individual behavior.<sup>21</sup> He believed in and had a tireless work ethic. King also believed that individually we should see our financial responsibility as a sacred responsibility.<sup>22</sup> Economic reform, hard work, financial and sacred responsibility are signposts at the intersection of entrepreneurship and social justice, and the formula for economic justice.

## LAW AND ECONOMICS VS. SOCIAL JUSTICE

Laws and policies intended to promote the development, use, and exploitation of intellectual property are most typically associated with theories of law and economics, and until recently, were generally not analyzed or applied from a social justice perspective. What is the law and economics model and how does it actually apply to intellectual property and entertainment law? How does this model compare with

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<sup>19</sup> Ibid.

<sup>20</sup> K. Carl Smith, *Frederick Douglass Republicans: The Movement to Reignite America's Passion for Liberty* (AuthorHouse, Bloomington 2011), 33.

<sup>21</sup> Wright L. Lassiter, Jr., *The Power of Thought: A Series of Messages Celebrating the Life of Dr. Martin Luther King, Jr.* (Trafford Publishing, Bloomington 2011), 56.

<sup>22</sup> Lassiter, note 21 above, 56.



the social justice model for intellectual property and entertainment law?

While scholarship on law and economics model for intellectual property is a relatively recent phenomenon which began in the 1970s, the economic analysis of intellectual property can be dated to classical economists such as Adam Smith,<sup>23</sup> Jeremy Bentham<sup>24</sup> and John Stuart Mill,<sup>25</sup> as well as other early 20th-century economists such as Arthur Cecil Pigou,<sup>26</sup> Frank William Taussig<sup>27</sup> and Sir Arnold Plant.<sup>28</sup> The law and economics model places an emphasis on incentives and people's responses to these incentives. The theory is that people will act, not act, or change their actions, based on the knowledge of how, under the law, these actions may affect them financially. When penalties for an action increase, people will undertake less of that action.

As Landes and Posner state in their text, *The Economic Structure of Intellectual Property Law*, the dynamic benefit of a property right is the incentive that possession of such a right imparts to invest in the creation or improvement of a resource in period 1 (for example, planting a crop), given that no one else can appropriate the resource in period 2 (harvest time). It enables people to reap where they have sown. Without that prospect, the incentive to sow is diminished.<sup>29</sup> From this perspective, a songwriter would be less likely to write songs, a sculptor less likely to create a

<sup>23</sup> Adam Smith, best known for his seminal work *The Wealth of Nations* is often referred to as the "father of modern economics" and remains one of the most influential thinkers in the field of economics.

<sup>24</sup> Jeremy Bentham was a British economist most often associated with his theory of utilitarianism and the idea that "it is the greatest happiness of the greatest number that is the measure of right and wrong".

<sup>25</sup> Mill was a prolific scholar and educator who was heavily influenced by Jeremy Bentham and his theories of utilitarianism. Mill's extensive scholarship on economic theory included the book *Mill's Principles*, one of the most widely read economic books of his era.

<sup>26</sup> Arthur Pigou was a British welfare economist who focused his economic theories on maximizing the well-being of society. Pigou was greatly concerned with how to use economic theory to promote social well-being.

<sup>27</sup> Frank William Taussig, a renowned economist and educator was perhaps best known for creating the foundations of modern trade theory. Among his many works dealing with trade and tariff issues, he also published in the area of intellectual property with *Inventors and Money Makers*, Brown University lectures (1915).

<sup>28</sup> Sir Arnold Plant published the groundbreaking articles "The Economic Theory Concerning Patents for Inventions" and "The Economic Aspects of Copyright in Books" in 1934.

<sup>29</sup> William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press, Cambridge, MA 2003).

work of art and an inventor less likely to invent if competing songwriters, sculptors and inventors can utilize their works without remuneration. At the very least, these creators would be hard pressed to commit their full-time efforts to their art.

Law and economics has been the most common way of looking at intellectual property rights, but what about IP's effects on social and cultural life? What if we could stimulate creation for reasons beyond the economic incentives? In other words, what is the social justice or global justice model and how can we apply this to IP and entertainment law?

The social justice and global justice perspective is that intellectual property does more than incentivize the production of more goods. It fundamentally affects the ability of citizens to live a good life. In her book *From Goods to A Good Life*, Madhavi Sunder says "The dominant law-and-economic theory of intellectual property law is premised on a thin theory of culture as commodities. But culture is not just a set of goods; it is a fundamental component of a good life."<sup>30</sup> Why should intellectual property be only viewed as a means to promote and protect property? Sunder argues that we must consider the possibility of intellectual property being a means to promote and circulate culture.

The comparison of the law and economics approach and the social justice approach leads to an inevitable question: why can't these two theories coexist? Perhaps the epiphanic moment occurs when we recognize that intellectual property can move beyond the traditional walls of law and economics into a world where doing well is on equal footing with doing good. Sunder invites us to look at these possibilities as she challenges us to a richer understanding of intellectual property law's effects on social and cultural life.

When elements of each theory are strategically used, these theories may not even be competitors. In fact, one need only look at the colors of the spectrum to recognize that no single hue exists in a vacuum. Likewise, the social justice approach to intellectual property has a more comprehensive function when it is considered within the law and economics framework and vice versa. Fusing these theoretical approaches allows us to utilize the best of each framework. An example of this fusion would be the creation of an artistic work (for example, a film, song or work of fine art) that generates economic value for the creator while creating social value for the intended audience (for example, educating the audience on a topic or academic area).

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<sup>30</sup> Madhavi Sunder, *From Goods to a Good Life* (Yale University Press, New Haven 2012).

## ENTERTAINMENT, IP AND MEDIA MEETS SOCIAL JUSTICE

One of the most effective paths to social and global justice is through entrepreneurship. A plethora of examples supports this assertion. Entrepreneurship is not just a means to personal wealth, but it is a means to changing your family tree and providing greater freedom to affect meaningful change in your community. One needs to look no further than the world of hip hop music, which has permeated not only music, but art, clothing, television and culture as a whole. This permeation, along with the street smarts and business acumen of its creators has served to change many a family tree. But the power of entrepreneurship in music is not limited to the hip-hop world, it is equally at home other genres of music, in filmmaking, television, and other forms of media, intellectual property and entertainment.

So, how does an entrepreneur or creator of intellectual property affect social justice? Let's take a close look at two approaches: (1) Entrepreneurs and creators can use the financial gain from their intellectual property to sow into their communities (or other communities) and thereby change the lives of the residents of those communities; or (2) they can use their art to change the narrative for their communities, that is, tell stories that have socio-political impact on their communities.

### **The Music Business**

First we review two case studies of the music industry which provide a road map for how an entrepreneur can leverage IP assets and business savvy, and create joint ventures and business partnerships to affect culture and write an unprecedented history not only for their companies, but for their communities as well.

#### **Kenny Gamble and Leon Huff: Philadelphia International Records, Mighty Three Music**

Kenny Gamble and Leon Huff started their company, Philadelphia International Records (a/k/a Philly International or PIR) in 1971. Along with their songwriting partner, Thom Bell (who often also wrote with Linda Creed), they formed Mighty Three Music to house their publishing interests. They established "The Sound of Philadelphia" with their songwriting and production for the likes of The O'Jays,<sup>31</sup> The

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<sup>31</sup> O'Jays hits included "Back Stabbers", "Love Train", "Now That We Found

Intruders,<sup>32</sup> Jerry Butler,<sup>33</sup> Harold Melvin & The Bluenotes,<sup>34</sup> Teddy Pendergrass,<sup>35</sup> The Three Degrees,<sup>36</sup> Billy Paul,<sup>37</sup> Archie Bell & The Drells,<sup>38</sup> MFSB,<sup>39</sup> Lou Rawls,<sup>40</sup> The Jacksons,<sup>41</sup> Patti LaBelle<sup>42</sup> and The Jones Girls,<sup>43</sup> among others.

Even as accomplished songwriters and producers, Gamble and Huff found it hard to collect on the money they had earned as writers and producers for other record labels. Kenny Gamble speaking on the business climate when he and Leon Huff founded Philadelphia International Records confirmed that it had been the norm for African-Americans to be cheated out of a lot of their music and their royalties. The industry had closed so many doors on them that “in order for us to make it, we had to

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Love”, “For The Love Of Money”, “I Love Music”, “Stairway to Heaven” and many others.

<sup>32</sup> Intruders hits included “Cowboys to Girls”, “We’ll Be United” and the classic “I’ll Always Love My Mama”.

<sup>33</sup> Jerry Butler’s hits included “Only The Strong Survive”.

<sup>34</sup> Along with the O’Jays, Gamble & Huff had their greatest success with Harold Melvin & The Bluenotes, whose hits included the classic “If You Don’t Know Me By Now”, as well as “I Miss You”, “The Love I Lost”, “Yesterday I Had The Blues”, “Bad Luck”, “Wake Up Everybody”, “Hope That We Can Be Together Soon” and others.

<sup>35</sup> Teddy Pendergrass, after leaving his post as lead singer of Harold Melvin & The Bluenotes had continued success with the sound of Philadelphia including his gold and platinum albums “Teddy Pendergrass”, “Life Is A Song Worth Singing”, “Teddy”, “Live! Coast to Coast” and “TP”, all of which were released between 1977 and 1980.

<sup>36</sup> The Three Degrees topped the charts with “When Will I See You Again”, and also provided the vocals on TSOP’s Soul Train Theme Song.

<sup>37</sup> Billy Paul’s “Me and Mrs. Jones” is a soul classic.

<sup>38</sup> Archie Bell & the Drells hits on PIR included “Can’t Stop Dancing” and “Could Dance All Night.”

<sup>39</sup> MFSB (Mother, Father, Sister, Brother) hit the charts on PIR with “Zach’s Fanfare (I Hear Music)”, “Love Is The Message” and “My One and Only Love”.

<sup>40</sup> Lou Rawls revitalized his career on PIR with the 1976 release “All Things in Time” which included “You’ll Never Find” and the subsequent album releases “Unmistakably Lou”, “When You Hear Lou, You’ve Heard It All”, “Let Me Be Good To You” and “Sit Down and Talk To Me”.

<sup>41</sup> The Jacksons, after leaving Motown, found success on PIR with the hits “Enjoy Yourself” and “Show You the Way to Go”.

<sup>42</sup> After splitting from her trio, LaBelle, Patti LaBelle released her early solo projects “The Spirit’s In It” and “I’m In Love Again” on PIR.

<sup>43</sup> Widely recognized as one of the most talented female vocal groups of the 1970s and 1980s, The Jones Girls had moderate chart success but were “Quiet Storm” favorites with their PIR albums “The Jones Girls”, “At Peace With Woman”, “Get As Much Love as You Can” and “Keep It Coming”.

do it on our own”.<sup>44</sup> And did they ever do it! Philly International produced music that was the soundtrack of the 1970s and early 1980s. As songwriters and producers, they had their fingers on the pulse of the culture of the black community writing songs like “If You Don’t Know Me By Now”, “The Love I Lost”, “Backstabbers”, “Don’t Leave Me This Way”, “You’ll Never Find”, “When Will I See You Again” and dozens of other huge hits.

Their music also had a cultural awareness and called for change and activism, for example, “Wake Up Everybody”, which was a call for the collective culture to actively engage in making the world a better place: “Wake up everybody, no more sleeping in bed, no more backward thinking time for thinking ahead . . . The world won’t get no better, if we just let it be, the world won’t get no better, we gotta change it yeah, just you and me.” “Love Train” became an anthem calling for unity and breaking down the walls of racism and nationalism. When discussing the lyric to “Love Train” Gamble says: “that song came around 1972--73...when the Vietnam War was still happening. It was just unbelievable, the sentiment in the country and around the world. People were just so hostile to each other. Huff and I were talking, and we were saying, “People all over this world need to be together.” “Love Train” was a way to say that without it being dogmatic or like you were beating somebody over the head with a message. But it was fun; it was light and it was happy. We were talking about people sharing and caring about each other, and that’s a good thing. That message is still out there today.”<sup>45</sup> “Message In Our Music” admonished the listener to “open your ears and listen here . . . we’re gonna talk about the situation of our nations all over the world, try and make you see, things ain’t like they’re supposed to be”.

Gamble & Huff sold their song catalog to Warner-Chappell in 1991 (for multi-millions), and they continue to reap benefits from the catalog, with licensing deals that include Coors Light (“Love Train”), The Apprentice (“For The Love of Money”), Verizon (“Ain’t No Stoppin’ Us Now,” written by McFadden and Whitehead but part of the Philly International catalog), and numerous other TV shows, films, and public performances.

It is one thing to gain economic success and to be content with a mindset of “to the victor goes the spoils”. But Gamble and Huff put their money

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<sup>44</sup> On their own did not mean without partners. Gamble and Huff started the company with the assistance of CBS Records after EMI had turned them down. This is an important point when considering the importance of taking advantage of strategic partnerships, joint ventures, and the like, in building our entrepreneurial ventures.

<sup>45</sup> Ken Sharp, “Gamble & Huff: Soul Deep”, *American Songwriter Magazine*, (Feb. 2009).

where their mouths were and leveraged their economic clout and community visibility to make meaningful changes to their beloved city of Philadelphia. Their humanitarian work includes numerous projects to clean up the inner city and help African American youth; Leukemia and Cancer research; neighborhood development, including a bookstore, restaurants, a mosque, low-income housing, several charter schools and their "Clean Up The Ghetto Project". Most of these projects have been built by locally hired labor.

One of their current projects involves branding Philadelphia as the city of R&B, which includes spearheading the development of the Rhythm & Blues Foundation. As a blueprint, they are using Nashville, which has successfully branded itself as "Music City USA."<sup>46</sup> More than 40 years after they launched their company, Gamble and Huff are still affecting the culture of their Philadelphia community and the world. Looking back at our definition of social justice: Gamble and Huff have clearly used their passions and talents to meet the needs of those around them; they have given a voice to the voiceless; provided access to education through their charter schools; and they have provided affordable housing for their community. There is no question that they have seen a need in their community and they have come together to meet that need. Although Philadelphia International has had an enormous impact on social justice and economic justice, the company from its inception was an example of classic entrepreneurship. As evidenced by their history, however, this classic entrepreneurship eventually spawned philanthropy and triggered social entrepreneurship offshoots. The business model of Philly International was built around the classic entrepreneurship model, that is, Gamble and Huff had a product and service, they recognized a gap in the marketplace, and they took affirmative steps to fill the gaps of the market's deficiencies through their products and services. The end result was a hugely successful economic engine that took its place among the leaders of commerce in urban America. Only then did they have the means to look at expanding their brand to philanthropy leading to social and economic justice. The ultimate impact on social and economic justice was overwhelming, as the entrepreneurs utilized the spoils of their success to have a massive impact on society. Gamble and Huff have eagerly taken on the responsibility to be their brother's keeper.

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<sup>46</sup> Nashville, Tennessee actually was first nicknamed the music city after the Fisk Jubilee Singers toured Great Britain and Europe in 1873. When the group performed "Steal Away to Jesus" and "Go Down, Moses" for Queen Victoria, she was so impressed by the Singers that she commented that with such beautiful voices, they had to be from the Music City of the United States. It was then that the nickname for Nashville, Tennessee – Music City USA – was born.

**Russell Simmons: Def Jam Recordings, Rush Productions**

Russell Simmons launched his entertainment and management company, Rush Productions and Rush Management with rapper Kurtis Blow as his first client. When he co-founded Def-Jam Recordings it was because the major labels did not see commercial value in the rap and hip-hop genre.<sup>47</sup> Simmons felt strongly that there would be a huge market for this genre so he and his partner Rick Rubin started Def Jam. Their early signings were T La Rock & Jazzy Jay, LL Cool J and the Beastie Boys.<sup>48</sup> The rest is history. Simmons had no doubt that this music would change the culture of young urban America. This vision has actually had a lasting effect on urban culture all over the world.

Known as the Godfather of hip-hop, Simmons was one of the first to recognize the cultural value and economic potential of this music genre to spawn not only music, but also lifestyle items such as clothing, jewelry, food and beverage, financial products, and so on. Entrepreneurs such as Sean Combs, Jay-Z, 50 Cent, and others have followed his path to multi-media success. Simmons has also been his brother's keeper – literally, as he has served as a mentor and role model for his brother Joseph “Rev Run” Simmons (of Run DMC) and Run's daughters, Angela and Vanessa, who have become successful entrepreneurs in their own rights with their very successful Pastry line of women's and girls' athletic shoes and accessories. Simmons says that while race still poses disadvantages in business, it can also be an advantage for the savvy entrepreneur. For example, there is a perception of authenticity that comes with minority entrepreneurs serving their own communities. Likewise, there is an inherent trust when minority entrepreneurs have business models that are designed to serve the needs of their communities. There is growing support for the belief that “while social group identities may impose unequal, if not discriminatory, starting positions, membership in these same social groups can provide opportunities to mobilize resources together”.<sup>49</sup> This is not an

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<sup>47</sup> It is notable that the corporate music industry has historically struggled with recognizing the commercial viability of black music forms. This was true in the 1950s when the labels released Pat Boone's sanitized versions of music by Little Richard and other black artists, the 1960s and 1970s when black artists were first relegated to “black divisions” of record labels, which carried with it lower budgets, fewer promotion dollars, and the like; the late 1970s and early 1980s when the likes of Luther Vandross were not signed to major labels because they believed that R&B and soul music by adult artists could not sell; and the 1980s when the major labels said rap and hip hop would never sell and would be a fad.

<sup>48</sup> The first two singles carrying the Def Jam logo were LL Cool J's “I Need A Beat” and the Beastie Boys “Rock Hard”, both of which were released in 1984.

<sup>49</sup> Zulema Valdez, *The New Entrepreneurs, How Race, Class and Gender*

insignificant statement and it should be digested and reflected upon by all up and coming entrepreneurs who fall within an underrepresented class.

Following his departure from Def Jam, in 1999, Russell created a fashion empire in Phat Farm and its progeny – Baby Phat (run by his then-wife Kimora Lee Simmons) – and Run Athletics (run by his brother Rev Run). Simmons' success in developing a genre of urban streetwear helped open the door for a generation of new designers including FUBU, Roc-A-Wear, Sean John, Derion, Enyce, Ecko and many others. His film and television production company with partner Stan Lathan, Simmons Lathan Media Group, created the enormously successful HBO series, "Def Comedy Jam" and "Russell Simmons Presents Def Poetry", the Hollywood box office hit "The Nutty Professor" and the Tony Award-winning stage production "Russell Simmons Presents Def Poetry Jam on Broadway", as well as the international MTV hit "Run's House," and "Running Russell Simmons".

In addition to his commercial enterprises, Simmons gives back to the community through his Rush Philanthropic Arts Foundation, as well as the Foundation for Ethnic Understanding. The Rush Philanthropic Arts Foundation (RPAF), which Simmons founded with his brothers Joseph (Rev Run) and Danny, provides New York City's inner city youth with exposure to the arts. By providing this cultural opportunity that would otherwise not be available, RPAF is allowing inner city youth to expand their cultural horizons while they bring their own culture to an area of the arts that is often bereft of urban influences. RPAF focuses primarily on education programs for children and exhibits featuring emerging artists. The foundation serves nearly 3,000 students and exhibits the work of 40–50 emerging artists each year. RPAF also operates two art galleries, one in Manhattan and the other in Brooklyn.

Simmons is also Chairman of the Board of Directors of the Foundation for Ethnic Understanding (FFEU), an organization that describes itself as being dedicated to ethnic understanding, reconciliation and peace. It promotes racial harmony and strengthens inter-group relations. FFEU has gained respect on an international level and was among the leading organizations speaking on behalf of peace following the 2013 Boston Marathon bombing and other ethnically or racially charged events.

In 2003, in a clear example of social entrepreneurship, Simmons

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*Shape American Enterprise*, (Stanford University Press, Redwood, CA 2011). Valdez notes that the long history of collective capital accumulation and mutual aid among Black entrepreneurs dates back to before the Civil War. This is one example of how these marginalized groups transform their perceived weaknesses into strengths.



co-founded Unirush Financial Services with consumer debt investor David Rosenberg. Initially built to provide access to the 60 million Americans rejected by or under-served by the consumer banking industry, it was one of the pioneers of the now rapidly growing “general purpose reloadable” (GPR) debit card business – a \$300 billion industry.

In 2008, Simmons founded GlobalGrind.com, the leading online destination for celebrity entertainment, music, culture and politics for the new, post-racial America. This company now reaches over 2.6 million monthly unique visitors. In its first year of sales operations, Global Grind generated \$1.2 million in sales and has surpassed all hip-hop sites to be in a category of its own.

Following the historic Hip-Hop Summit organized in June of 2001, Simmons co-founded the Hip-Hop Summit Action Network (HSAN) with civil rights activist Dr. Benjamin Chavis, a former head of the NAACP. HSAN’s mission is to harness the cultural relevance of hip-hop music as a catalyst for education advocacy and other societal concerns fundamental to the well-being of at-risk youth throughout the United States. Among HSAN’s major initiatives were helping to spearhead the first changes in 30 years to the repressive Rockefeller Drug Laws, which were repealed through Simmons’ activism in 2008, and a successful First Amendment challenge to the NY State lobbying regulations that sought to prevent raising public awareness about state legislative issues.

Simmons’ activism has grown out of his many years of traveling and advocating nationally and internationally on behalf of his brands. His platforms have consistently revolved around social justice, education, inclusion and financial empowerment. His passion is rooted in giving a powerful voice to emergent new creative and social movements, and integrating them into the American psyche.

Russell Simmons has clearly manifested the embodiment of meeting the needs of those around him, giving a voice to the voiceless, providing access to education through his arts foundation, and seeing a need in his community and coming forward to meet that need. Mirroring the transition made by Gamble and Huff, Simmons’ early enterprises were examples of classic entrepreneurship. The success that was realized through these ventures lead to philanthropy and eventually economic and social justice ventures, such as RPAF and FFEU, both of which are clear examples of social entrepreneurship.<sup>50</sup>

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<sup>50</sup> Much has changed in the recording industry over the past 15 years. The industry is very different from the one that existed when Gamble and Huff started PIR or when Russell Simmons launched Def Jam. On the one hand, artists have

These case studies demonstrate how intellectual property social justice can be attained by black creative artists and entrepreneurs in the music business, and how they can in turn further utilize entrepreneurial mechanisms to achieve economic enrichment and empowerment for their communities. Unfortunately, however, these success stories remain the exception and not the rule. There are still many past wrongs and ongoing inequitable practices in the industry which continue to frustrate the mandates of intellectual property social justice, and which might be redressed through application of the remedial IP social justice and the mechanisms of social entrepreneurship.

### **Case Study: Barrett Strong and the Motown Contradiction**

Motown. The name evokes a bygone era of classic songs, dynamic performers, crisp choreography, classy outfits and the elevation of black musicians, songwriters and performers into the nation's pop culture. The term "the Motown sound" is symbolic of a once marginalized genre of music – R&B was once called "race music" – taking its place at the very top of the musical food chain during the heyday of Motown Records, from the early 1960s to the mid 1970s. But amidst the glamour and glory of the Motown machine lived a less celebratory reality. The unfortunate truth is that many of the artists, musicians and songwriters who were a part of "Hitsville, USA" were exalted musically while at the same time being pillaged financially. The list of artists whose relationships with Motown eventually turned sour reads like an abridged version of the Motown roster. Florence Ballard, Martha Reeves (Martha and the Vandellas), Marvin Gaye, The Funk Brothers, The Isley Brothers, Gladys Knight & The Pips, Teena Marie, Michael Jackson and Holland-Dosier-Holland, to name a few. At best, the treatment they received from the label was unethical – at worst it was systematic piracy. Motown's questionable financial practices stood in stark contrast to what the company stood for as a recording label. On the

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become better educated about the business and have flexed their entrepreneurial muscles to start their own recording, production, and management companies. The availability of the Internet and its unlimited platform for distribution and direct marketing, along with the shift to digital music forms standing side-by-side with physical product, has empowered small business enterprises who no longer need to spend tens of thousands of dollars on manufacturing and inventory. Unfortunately, there has also been a major change in recording contracts that has been quite detrimental to the legal and business rights of recording artists. I will be exploring in great detail the phenomena of the multiple rights deal (aka, the 360 deal), the controlled composition clause, and the economic justice and potential anti-trust issues therein, in a law journal article that is nearing completion.

one hand they elevated young talented African Americans, many from the projects of Detroit, and gave them an opportunity to share their immense talents with the world. On the other hand, these same artists were given no creative control, had their production ideas marginalized, and most of all were systematically denied the true value of their contributions to this ultra-successful corporation. One of the earliest examples of this mistreatment has recently reared its ugly head as a Motown songwriting legend recently discovered a gross travesty perpetrated on him by Motown many years ago.

Barrett Strong, is one of the most successful songwriters of the Motown era. His hits include “I Heard It Through The Grapevine”, “Just My Imagination (Running Away With Me)”, “War”, “Papa Was A Rollin’ Stone”, “Smiling Faces”, “Ball of Confusion” and “I Can’t Get Next To You” just to name a few. Barrett’s first hit, “Money (That’s What I Want)”, written in 1959 was copyrighted under the names Barrett Strong, Janie Bradford and Berry Gordy and assigned to Jobete Publishing (Motown’s publishing entity). Barrett had actually come up with the musical riff and melody by himself, after which he collaborated with Janie Bradford who co-authored the lyrics with him. In 1962, unbeknownst to Barrett, Jobete Publishing sent a letter to the U.S. Copyright Office informing them that there was a mistake on the copyright registration and that Mr. Strong’s name should be removed.<sup>51</sup> Barrett did not become aware of this sleight of hand (and of contract) until 2012 during a review of his copyrighted works. There are a number of issues involved in this situation, not the least of which is why the copyright office allows substantive changes to be made to copyright registrations without the approval and signature of all interested parties.<sup>52</sup>

What can be done to help Barrett Strong? Moreover, what can be done to keep this situation from happening to other songwriters? Certainly, the most important goal is to have Mr. Strong’s name restored to the copyright registration. This would be valuable not just in regaining Barrett’s rightful place as a recipient of the royalty stream and a possible retrospective royalty settlement, but also the incalculable value of correcting the historical narrative. As an additional matter, Berry Gordy, at that time the sole owner of Jobete Music, was also simultaneously serving as Barrett Strong’s personal manager. At the very least these facts present the specter

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<sup>51</sup> Larry Rohter, “For a Classic Motown Song About Money, Credit Is What He Wants”, *New York Times*, 21 August 2013.

<sup>52</sup> This is an issue we are currently pursuing with the Copyright Office in an attempt to stimulate a change in policy.

of blatant conflict of interest and breach of fiduciary duty with Gordy's self-serving decision to remove Strong's name from the copyright without his knowledge, at the very same time that Gordy was Strong's personal manager.

The legal challenges that must be overcome from Barrett Strong's perspective, include statutes of limitations, as well the equitable defense of laches. In copyright infringement cases, the statute of limitations is three years from the date of the infringement or three years from the date that the plaintiff should have reasonably known of the infringement.<sup>53</sup> It is generally held that the statute of limitations starts from the date of the last infringement act. In other words, if an infringement begins in 1970 but is still continuing in 2014, at the very least the copyright owner would be able to receive damages for the infringement that has occurred over the last three years. It is possible that the damages could extend back to the beginning of the infringement if the copyright owner did not know and could not have reasonably known about the infringement until the last three years. The argument on behalf of Strong would first be that his knowledge of the infringement did not occur until 2012, thus the three-year statute of limitations has yet to expire. Alternatively, the infringement is still occurring, so even if he were not able to recapture lost royalties due to an unreasonable failure to be aware of the infringement, he would still be able to secure royalties prospectively since the infringement is still taking place.<sup>54</sup>

With regard to the defense of laches, the actual definition of laches is an unreasonable delay in pursuing a right or claim, in a way that prejudices an opposing party. Failure to assert one's rights in a timely manner can result in a claim being barred by laches. A key policy reason for laches is to prevent a party from sleeping on their rights and failing to mitigate damages in an effort to artificially build up the amount of damages. The argument on Strong's behalf is that he believed, and was reasonable in his belief that his name was still on the copyright registration. As such, he did not unreasonably delay in pursuing his cause of action. After all, he was on the registration when the song was originally filed with the copyright office and as an original claimant he had no reason to believe that he had been removed from the copyright registration. Moreover, Gordy's action of willful subterfuge in surreptitiously changing the names on the copyright registration negates laches.

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<sup>53</sup> 17 U.S.C. § 507(b) – No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

<sup>54</sup> *Money (That's What I Want)* continues to generate money for Jobete Publishing and is also the first song performed in the current Broadway play celebrating the music of Motown.

The equitable defense of laches took center stage – or center “ring” in a recent dispute over the screenplay, book and film “Raging Bull.” The case, *Petrella v Metro-Goldwyn-Mayer*, was recently decided by the U.S. Supreme Court. In 1991, petitioner Paula Petrella renewed the copyright to her father’s 1963 screenplay, *The Raging Bull*, which later became the basis for the critically and commercially acclaimed film *Raging Bull*. Despite intermittent correspondence between legal representatives for both parties, respondents MGM continued to market the film during the ensuing years. Believing there was no agreement without pursuing litigation, Petrella sued for copyright infringement in 2009. The three-year statute of limitations barred her from recovery for infringement that occurred prior to 2006. Although the statute did not bar recovery of damages and injunctive relief for acts of infringement that occurred in 2006 or later, the district court granted summary judgment for respondents, holding that the non-statutory defense of laches entirely barred Petrella’s suit. The Ninth Circuit affirmed, based on binding circuit precedent, and denied hearing en banc.

The federal courts of appeals were divided 3-2-1 over whether the non-statutory defense of laches can bar a civil copyright suit brought within the express three-year statute of limitations. Three circuits, the Fourth, Eleventh, and Second had held that laches cannot completely bar relief for acts of infringement that occur within the statutory period. Two circuits, the Sixth and Tenth, strongly disfavored laches and restricted it to exceptional circumstances. The Ninth Circuit liberally allowed a laches defense in copyright cases, and had also adopted a presumption in favor of applying laches to continuing copyright infringements. The issue before the Supreme Court was: Whether the non-statutory defense of laches is available without restriction to bar all remedies for civil copyright claims filed within the three-year statute of limitations prescribed by Congress, 17 U.S.C. § 507(b).

The argument against laches in the Barrett Strong case would benefit most from the state of the law in the Fourth Circuit. In *Lyons Partnership, LP v Morris Costumes, Inc.*,<sup>55</sup> the plaintiff was the sole copyright owner of the Barney character, a green and purple dinosaur used in children’s entertainment. Lyons sued to enjoin the defendants from using and renting out costumes that resembled Barney and violated Lyons’ interests in the character. Morris Costumes argued that Lyons’ claims were barred by laches because of a delay between Lyons’ initial contact with Morris and the actual filing of the lawsuit. The plaintiffs argued that they were not barred

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<sup>55</sup> 243 F.3d 789 (2001).

from asserting claims based on sales occurring within three years of filing suit. The court agreed, and determined that laches could never bar a claim that was brought within the statutorily mandated time frame.

Even if the Supreme Court were to adopt a stance based on the middle ground approach of the Sixth Circuit, Mr. Strong would still be able to pursue a copyright infringement action. The Sixth Circuit set forth its approach to laches in *Chirco v Crosswinds Communities, Inc.*<sup>56</sup> Avoiding the extremes of the Ninth and Fourth Circuits, the Sixth Circuit requires “rare circumstances” must be shown in order for laches to bar a copyright infringement case. The *Chirco* case involved a copyright owner of architectural plans who brought suit against a defendant when he learned the defendant was planning to use the designs for a condominium complex. While this suit was brought within weeks of learning of the alleged infringement, the plaintiff learned of another planned infringement but did not bring suit until 18 months later. By this time, the defendant had begun the building process and had incurred great expense in developing the property. The Sixth Circuit held that the plaintiff’s delay in the second instance constituted “rare circumstances” and laches applied. There are no analogous “rare circumstances” in Mr. Strong’s case.

Ultimate, in *Petrella*, the Supreme Court, in a 6-3 decision, ruled that laches cannot be invoked as a bar to pursuing a claim of damages brought within §507(b)’s three year window.<sup>57</sup> However, in extraordinary circumstances, laches may, at the very outset of litigation, curtail equitable relief. The 6-3 majority in *Petrella* was not along the typical ideology of the Justices, as conservative Justices Antonin Scalia, Clarence Thomas and Samuel Alito joined in the opinion by liberal Ruth Bader Ginsburg, while Chief Justice John Roberts and Anthony Kennedy joined a dissent by liberal Justice Stephen Breyer. It is important to note that Justice Ginsburg’s opinion pointed out that copyright owners must still be mindful to avoid the judicial doctrine of estoppel, which would deny all damages if it can be shown that the plaintiff engaged in deception. Moreover, laches is still a viable defense for actions in equity. The Court’s decision will put more onus on movie studios and other copyright users to be more vigilant in searching their titles and communicating with copyright holders.

Principles of intellectual property social justice support the middle ground approach. Once infringement has been established, there is no legal or policy basis to preclude actions brought within the limitations

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<sup>56</sup> 474 F.3d 227 (2007).

<sup>57</sup> *Paula Petrella v. MGM, Inc., et al.*, Docket No. 12-1315, Supreme Court of The United States. January 10, 2014.

period, unless there has been some inequitable conduct on the part of the plaintiff prejudicial to the defendant or other circumstances antagonistic to copyright social utility or justice. In the Strong case, not only is there no evidence of misconduct on plaintiff's part, but the application of laches would promote intellectual property injustice and concomitant inequitable practices and policies.

Intellectual property social justice is not restricted to remedial action. In this context, "remedial action" refers to attorneys pursuing, and judges and triers of fact providing, remedies through the court system. While this will inevitably be part of the solution, the glaring problem is that it can only occur after creators such as Barrett Strong have already experienced harm. In contrast to remedial action, a proactive measure is one that would attempt to create or control a situation by causing something to happen rather than responding to it after it has happened. Proactive measures in this instance include legislative and social justice mechanisms that can and should be put in place to minimize the need for remedial action. The Barrett Strong case, while it may have unique facts, is not unique in its overall effect. There are scores of artists, both from earlier eras, and in the current marketplace, who are taken advantage of on a daily basis. How do we prevent this from happening in the future? Education, advocacy, and of course the vigilant pursuit of justice under law . . . then more education and more advocacy.

There are also potential entrepreneurial solutions – some classic entrepreneurship and others social entrepreneurship – for providing this education and advocacy, including the following: (1) Group or online basic IP educational programs offered at low fees to community and civil rights groups and individuals; (2) IP litigation support to individuals on a structure contingency basis; (3) individual IP transactional support in exchange for an irrevocable assignment of a small percentage of royalties (for example, 5–10 per cent); and (4) for "successful" artists, tax shelter/trust and estate advice in order to structure long-term donations, trusts, and foundations to the benefit of non-profit community IP Empowerment/Social Entrepreneurship entities – here the non-profit recipient offers the tax shelter opportunities. A brief overview of each of these solutions follows:

- (1) *Basic IP education* The model for online or web-based education has been created and has developed to a highly sophisticated level. Universities and state bar organizations have embraced the technology that allows for online and web-based training. In fact, brick and mortar institutions of higher education are essentially in an arms race to develop as many online, web-based, and hybrid course offerings

as possible in order to compete with online institutions. Technology allows this type of venture to be undertaken at a minimal capital outlay. The wheel has already been invented allowing IP social justice practitioners to build platforms that serve the same purpose. Courses could be taught in a variety of styles, e.g., the Khan Academy strictly academic model that is perpetually available on a web site or server, or alternatively the webinar model or live audience model that is available for a limited time. This entity would be designed to teach important skills to intellectual property creators, which would allow the creators to sustain themselves. This would also solve an on-going educational deficiency that has not been solved by government (statutes and court holdings) or the private sector, but can be solved by a social entrepreneurship venture of this type.

- (2) *IP litigation support exchange* One of the greatest challenges faced by the individual artist battling against a well-heeled corporation is overcoming the expense of litigation. This poses a difficult hurdle to overcome. Moreover, it is made more problematic because the amount of hours that must be invested in litigation tends to discourage private attorneys from undertaking these time-intensive cases with no possibility of remuneration. One possible solution is creating a hybrid pro bono/contingency fee arrangement where the attorneys do not charge up front fees but share in the settlement either after a certain threshold, or with some sliding scale based upon the recovery. An additional feature would be the requirement that the client agree to either accept a reasonable settlement offer if made or pay reasonable fees and expenses if such settlement offer is declined. The benefit for the client is evident. Instead of neglecting to protect their legal rights, the IP creators would be able to stand up to the corporate machine with some muscle of their own.
- (3) *Individual IP transactional support exchange* Individual IP transactional support could also be offered in exchange for an irrevocable assignment of a small beneficial interest in the royalty stream (e.g., 5-10%). This would allow the client to receive the immediate benefit of high-end legal counsel, while providing a beneficial interest to the attorney. The effect of this type of transactional support would be similar to the artist having a transactional attorney as a part of their business entity, placing them on a level playing field with their corporate counterparts. Many entertainment attorneys routinely enter into fee agreements with their clients, which instead of being based on an hourly rate or flat fee/retainer are based on a percentage of the deal (e.g. the first fund for a record deal, the performance fee for an actor, the advance paid to an entertainer by the party procuring their



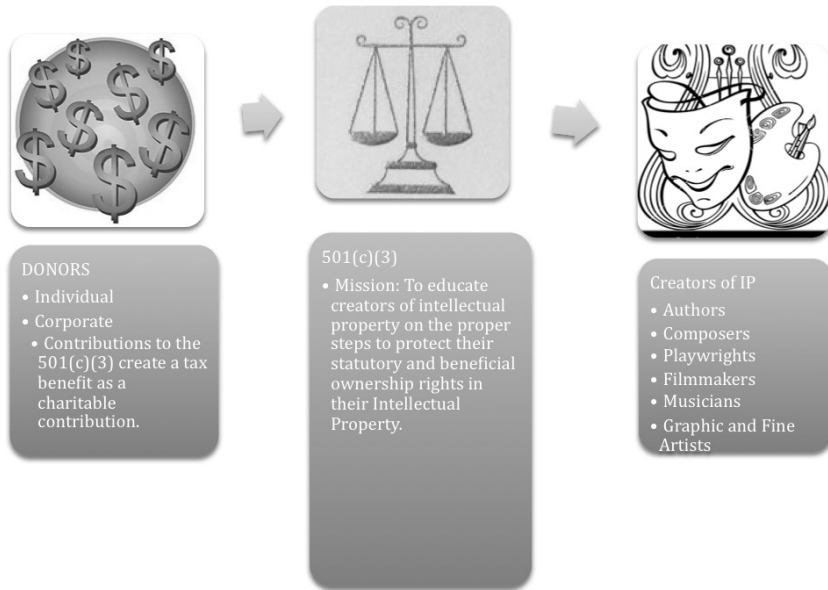


Figure 10.1 Tax shelter/trust advice model

services).<sup>58</sup> Likewise, most plaintiff's attorneys often enter into fee arrangements based upon the amount of the recovery in the litigation, i.e., contingency fee agreements.<sup>59</sup> Accordingly, there is some precedent for this type of arrangement. If managed effectively, this could certainly be a win/win for all parties.

- (4) *Tax shelter/trust advice* This model provides a clear social justice entrepreneurship model that is essentially a joint venture between the donor and the IP social justice provider. This organization would resemble the figure below:

The 501(c)(3) can schedule tours that would take the organization to key artistic hot spots in the U.S. where live seminars could be held at universities or the headquarters of arts organizations. Cities such as New

<sup>58</sup> Percentage deals for entertainment attorneys are often in the range of 5–10% of the deal, with some being higher based on the complexity of the work or other factors.

<sup>59</sup> Most contingency fee agreements for personal injury and other plaintiff's cases are paid at 33% of the total recover plus expenses, with some being as high as 40%.

York, Los Angeles, Nashville, Atlanta, San Francisco, Austin, Chicago, Washington, D.C. and Seattle would be ideal landing spots for the tour. The 501(c)(3) itself could secure the expertise of practitioners and academicians in the various regions to reduce overhead costs. And for those cities that are not designated as tour stops, the course material could be made available via podcast, online streaming, or digital download, as well as written transcript. Each tour stop would focus on a different IP topic, for example, the legal essentials of music publishing, recording contracts, screenwriting, independent film production and the like. The courses can be designed to have a level of simplicity that is accessible for the IP creators who have no business or legal backgrounds but can perhaps also have sufficient complexity to satisfy general CLE requirements for attorneys who are not experienced in these areas. There are a number of arts-centered organizations that could be used as blueprints for this organization including the Health Alliance for Austin Musicians (HAAM) based in Austin, Texas that provides healthcare for self-employed musicians in Austin; several organizations throughout the U.S. that provide music lessons for free (or close to free) for underprivileged children, such as the W.O. Smith Music School in Nashville, Tennessee; and organizations in many major cities that provide opportunities for exposing underprivileged students to the arts, such as the previously mentioned Rush Philanthropic Arts Foundation (RPAF).

## CONCLUSION

Whatever the eventual solution may be, there can be no argument that an answer is desperately needed. What the world needs is more songwriters like Barrett Strong who can enrich the lives of millions through their talents. What the world doesn't need is more stories of the despair experienced by these creators.

One of the leading theories behind the justification of copyright law is the theory of Natural Law or the Labor Model. "Natural rights" or "inherent entitlement" is based on the rights of authors to reap the fruits of their creations.<sup>60</sup> John Locke based the Labor Model on the belief that in owning their bodies, people also own the labor of their bodies and, by extension, the fruits of their labor.<sup>61</sup> Under the Utilitarian or Economic

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<sup>60</sup> Robert Brauneis and Roger Schechter, *Copyright Law, A Contemporary Approach* (West Publishing, Eagan, MN 2011).

<sup>61</sup> John Locke, *Second Treatise on Civil Government* (1690).

Rational for copyright law, authors are granted limited monopoly through copyright law, a private property right over the author's creation, with the market ultimately determining its value.<sup>62</sup>

The United States Constitution, Article 1, Section 8, Clause 8, grants Congress the right "To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors, the exclusive right of their respective Writings and Discoveries."<sup>63</sup>

Writers like Barrett Strong who devote their lives to creativity are classic examples of authors being failed by the very system that has been put in place to protect them – not because of a flaw in the statute, but because of a lack of understanding of their rights. Today's entertainment and IP lawyers have a rich opportunity to be at the forefront of providing a solution to these economic justice and social justice issues.

By using intellectual property and entrepreneurship to break down the walls of social injustice, I can indeed be my brother's keeper.

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<sup>62</sup> Brauneis and Schechter, note 59 above.

<sup>63</sup> The United States Constitution, Article 1, Section 8, Clause 8.