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## IP and Entrepreneurship in an Evolving Economy: A Case Study

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# IP AND ENTREPRENEURSHIP IN AN EVOLVING ECONOMY: A CASE STUDY<sup>+</sup>

*Michael Risch*<sup>\*</sup>

## INTRODUCTION

That intellectual assets—whether protected or not—are of growing importance in evolving economies is practically unassailable.<sup>1</sup> Unfortunately, getting that message across to members of those economies might prove difficult. This chapter takes a ground-level look at one law school’s attempt to aid an evolving economy through entrepreneurial legal assistance. The West Virginia University Entrepreneurship Law Clinic (hereinafter “ELC”) was formed to help entrepreneurs and small businesses throughout the state start and run businesses. The goal was to help those businesses leverage their intellectual property to drive economic development in the state.

The results, however, were unexpected. To be sure, the ELC helped many entrepreneurs, but little of that aid involved intellectual property (IP), with the notable exception of trademark protection. The problem was not so much a lack of desire by

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<sup>+</sup> Forthcoming chapter, *ENTREPRENEURSHIP AND INNOVATION IN EVOLVING ECONOMIES: THE ROLE OF LAW* (Megan Carpenter, ed., forthcoming 2012)

<sup>\*</sup> ©2011 Michael Risch. Associate Professor of Law, Villanova University School of Law. The author thanks participants at the Evolving Economies Conference at Texas Wesleyan Law School for their helpful comments and the West Virginia University College of Law for permission to tell this story and share the data. Research assistance was provided by Cailyn Reilly, Gabriele Wohl, and Jenny Maxey.

<sup>1</sup> See, e.g., Megan M. Carpenter, ‘Will Work’: *The Role of Intellectual Property in Transitional Economies – from Coal to Content*, *CREATIVITY LAW AND ENTREPRENEURSHIP* 49 (Shubha Ghosh & Robin Paul Malloy, eds. 2011); Elias G. Carayannis, *et al.*, *Technological learning for entrepreneurial development (TL4ED) in the Knowledge Economy (KE): Case Studies and Lessons Learned*, 26 *TECHNOVATION* 419, (2006); Lubomira Ivanova & Anne Layne-Farrar, *The Role of Intellectual Property Rights in Transition Economies: Lessons from Bulgaria* (September 30, 2008), available at <http://ssrn.com/abstract=1275988>; Josh Lerner, *Patent Protection Over 150 Years*, NBER Working Paper No. 8977 (2002), available at [http://www.epip.eu/papers/20030424/epip/papers/cd/papers\\_speakers/Lerner\\_Paper\\_EPIP\\_210403.pdf](http://www.epip.eu/papers/20030424/epip/papers/cd/papers_speakers/Lerner_Paper_EPIP_210403.pdf); Sunil Kanwar and Robert Evenson, *Does Intellectual Property Protection Spur Technological Change?*, 55 *OXFORD ECONOMIC PAPERS* 235 (2003).

entrepreneurs, but rather a lack of business plans, ideas, and training to create and build IP-based businesses.

This experience can be generalized. While IP is the new trick that will help an evolving economy grow, one must first teach the old dogs—and their young offspring. In this sense, the ELC's best clients may be the least expected: university professors and students. They are great clients not because of the business they bring to the clinic, but because of the symbiotic relationships innovative faculty and new college graduates and lawyers might forge early in their careers that will lead to a new IP-based business culture.

#### I. WEST VIRGINIA AS AN EVOLVING ECONOMY

West Virginia is an evolving economy, even if its residents are unaware of it. Indeed, a few of my former colleagues in West Virginia expressed surprise that I was discussing West Virginia in a “evolving economy” book. West Virginia has traditionally been a mining and manufacturing state, but that is changing—at least in part. The U.S. Bureau of Economic Analysis tracks the industry transformation: the following table shows West Virginia’s GDP in three select years for a few industries.

Industry (in millions)	1997	% Total	2002	% Total	2009	% Total
Mining	\$2,848	8.94%	\$2,927	7.94%	\$5,985	11.99%
Manufacturing	\$5,908	18.55%	\$5,243	14.22%	\$5,577	11.17%
Information	\$987	3.10%	\$1,254	3.40%	\$1,415	2.84%
Finance and insurance	\$1,347	4.23%	\$1,937	5.25%	\$3,005	6.02%
Professional and technical services	\$1,170	3.67%	\$1,724	4.68%	\$2,503	5.02%
Health care and social assistance	\$3,026	9.50%	\$4,083	11.07%	\$5,950	11.92%
Private industries Total	\$31,853		\$36,874		\$49,907	

The drop in manufacturing, both in absolute terms and as a percentage of GDP is significant, and perhaps surprising to some. This shift alone shows that West Virginia's economy is evolving.<sup>2</sup> Two other industries are also worth discussion. First, the conventional wisdom is that employment in mining is decreasing as mechanization increases, but the data does not necessarily bear that out.

Mining appears to be a larger percentage of GDP now than in 1997. Employment wage data also shows that wages in mining have at least held steady in traditional mining, and have risen in oil and gas extraction. An increase in oil and gas represents a large portion of the increase in overall mining industry wages and GDP.

While these levels are perhaps lower than in the 1950s or even 1980s, this chapter is focused on the current evolution rather than the drop from the more distant past. To be sure, extraction is significantly down from historical peaks. Now, however, despite mechanization and modernization, West Virginia's evolution is not currently trending away from natural resource extraction as much as some might think. It may be that the transition in mining was mostly complete by the mid-1990s; this may be why some were surprised to hear that the economy is evolving.

The second industry worth consideration is information. While absolute GDP in information industries has grown somewhat, its percentage of total GDP has remained steady, which is a bit surprising given the technological boom of the last fifteen years. In fact, gross wages in this industry have actually decreased, possibly because of automation and outsourcing. In other words, fewer people are employed in West Virginia generating the same percentage of GDP in information industries.

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<sup>2</sup> See Carpenter, *supra* note 1, for an account of the decrease in manufacturing and historical importance of mining.

Based on these trends, it appears that the political and business leaders of West Virginia are keenly aware of the need for economic development generally and of entrepreneurship and innovation specifically. When I joined the WVU faculty in 2007, there were many economic development programs and agencies throughout the state. None of these programs, however, addressed the legal issues relating to entrepreneurship and innovation.

There is little doubt that West Virginia's need for a broad-based entrepreneurship and innovation law program. In 2007, LexisNexis (lawyers.com) listed a total of twenty-three lawyers practicing intellectual property in West Virginia, and the IP committee of the state bar was approximately the same size. While there may be more than this associated with corporations, fewer than twenty-five IP attorneys statewide is too few, even for a state the size of West Virginia. The number is certainly too few to meet the needs of a state that wants to foster entrepreneurship and innovation.

Similarly, Richard Gruner, a law professor at John Marshall School of Law, studied the number of patent attorneys in given states and locales in an effort to find a link between the number of IP attorneys and the amount of innovation. West Virginia ranks toward the bottom of per capita patent attorneys. In 2007, there were fewer than fifteen patent lawyers living in the state, and most of them worked for Mylan, a pharmaceutical company. Whether IP attorneys fuel industry or the technology industry creates demands for IP attorneys, a link between the two suggests that having more trained IP attorneys in West Virginia would be desirable.<sup>3</sup>

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<sup>3</sup> See, e.g., Anne Kelly, *Practicing in the Patent Marketplace*, 78 U. CHI. L. REV. 115, 115 (2011) (discussing growth in patent licensing).

## II. FOUNDING THE WVU ENTREPRENEURSHIP LAW CLINIC

The West Virginia University College of Law's Entrepreneurship Law Clinic was a long time coming. In the late 1990's, Joyce McConnell, WVU's associate dean of academic affairs,<sup>4</sup> envisioned an economic development center at the College of Law. By 2005, she and Dean John Fisher had convinced the provost to create a new faculty position for a professor with entrepreneurial experience to work with WVU's research commercialization group.<sup>5</sup>

Academia moves slowly, and it was not until 2007 that I joined the faculty as that professor. My charge was deceptively simple: to start a program of my choosing to advance economic development in the area.

I spent my first year doing due diligence. I met with lawyers in the area, WVU's economic development team, the director of the business school's Entrepreneurship Center, and others to learn about entrepreneurship in the area. I researched the entrepreneurship programs at other law schools<sup>6</sup> and identified all of the entrepreneur and small business support organizations I could find. Finally, I taught an Intellectual Property Practicum that accepted real assignments from law firms that were supervised by area attorneys; this provided me with information about IP needs in the state.

Toward the end of that first year, I developed a proposal for an ambitious Entrepreneurship, Innovation, and Law Program. The proposal described five subject areas: 1) Clinical Education/Public Service—the Entrepreneurship Law Clinic; 2) Outreach—informal programs for the public and lawyers, beginning with a Law Review

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<sup>4</sup> Joyce McConnell is now Dean of the College of Law.

<sup>5</sup> Many schools, especially public schools, have such research arms to separate research grant and patent exploitation from public funds. At WVU, this was called the "Research Corp."

<sup>6</sup> See Chapter \*\* (Lee) for a discussion of programs at law schools.

Symposium on digital entrepreneurship; 3) Curriculum—development of a cohesive set of classes that support and teach entrepreneurship; 4) Scholarship—support for scholarship in entrepreneurship; and 5) Internship/Externship development—connecting students with firms, companies, and agencies that could provide an educational benefit.

Most of these prongs were implemented in the ordinary course of school business. For example, we obtained grant funding for the Digital Entrepreneurship symposium, which was well attended and hosted scholars and practitioners from all over the country.<sup>7</sup> Furthermore, the law school implemented an extensive externship program with its own director, and entrepreneurial externships were incorporated into that program.

The clinic, however, ran into some hiccups. Despite work during the first year, the grant proposal was considered too uncertain, but we were not deterred. Taking the advice of the Benedum Foundation's program coordinator, we spent the summer of 2008 meeting with law firms, small business advisors, and other constituents to introduce the clinic and generate interest and, more importantly, referrals.

The meetings were time well spent. I learned much more about entrepreneurial support within the state, met many of the lawyers working in the area, made contacts with business professors, and even found my first adjunct professor.

However, one group of lawyers I *did not* meet was IP lawyers. I met a couple of lawyers working in IP, but they worked for big firms for big clients. The lack of IP lawyers in the state was quite apparent.

This shortage, I theorized, must have meant that there was a large population of burgeoning companies that would be unable to find representation. I believed that the

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<sup>7</sup> See 112 W. VA. L. REV. (2009).

ELC would fill that void, providing IP services to entrepreneurs, among the other services provided. At the end of the summer, Benedum granted us sufficient funds to launch a pilot clinic, and we were able to test that theory beginning in the Fall of 2008.

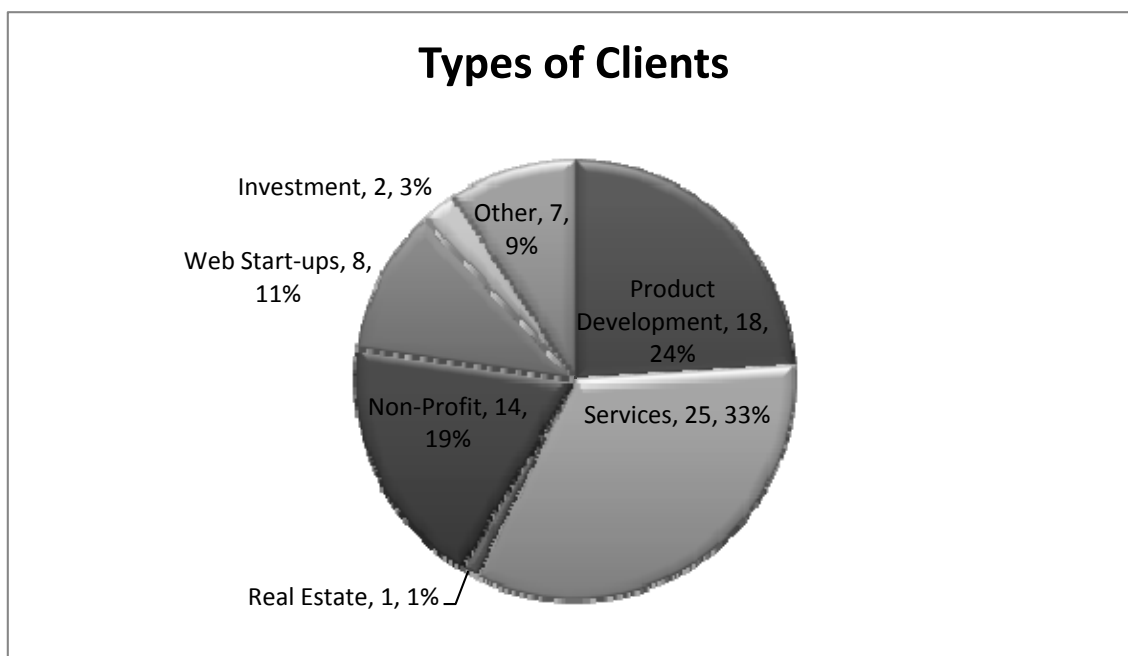
### III. CLIENTELE IN AN EVOLVING ECONOMY

As expected, there was no shortage of clients during the first two years at the clinic. The ELC served forty-six and sixty clients respectively. However, surprisingly few of the clients required intellectual property services, despite our best efforts to find IP issues among client needs. The following table lists the type and amounts of services provided by the clinic during those two years:

<b>Type of Service</b>	<b>Clients Served Year 1</b>	<b>Clients Served Year 2</b>
Amendments to Organizational Documents	2	4
Articles & Operating Agreements/Bylaws	14	17
Business Plan Counseling (competition)	10	10
Contracts Drafting/Reviewing	8	25
Copyright Counseling	3	5
Dissolution/Buy-Outs	4	2
Employee Handbooks/Policy Manuals	2	1
LLC Formation	6	12
Nonprofit Filings	7	3
Patent Searches	2	6
Website Terms of Use	N/A	5
Trademarks	10	24
Informational Memorandums	N/A	17
Cease-and-Desist Letters	N/A	3
Tax Recommendations	N/A	11
Annual Report Filings	N/A	2

While the amount of IP work grew during the second year, it was still much less than I had hoped for or expected. For example, there were only eight total patent searches, resulting in a single provisional patent application referred out to a patent attorney (located nearly three hours away in Charleston, WV). Similarly there was some copyright assistance, but this was less than 7.5% of the work, and only for two or three clients. One bright spot was trademark work; students either cleared marks, filed applications, or both, 34 times.

The lack of IP work was not due to company type. The following chart details the types of clients served by the ELC in its second year.



As the chart shows, there were plenty of clients that might have needed IP services, including more than fifty product, service, or internet companies. The question, then, is

what to make of the relatively light IP needs of ELC clients, as well as potential clients that never even visited the ELC.

#### IV. IP IN AN EVOLVING ECONOMY

ELC students were tasked to find IP needs of their clients, and they answered identified needs. This implies that the clients simply did not need such services. Each type of IP tells a different story.

*Trademarks.* Trademarks were a bright spot. Many of the clients needed trademark services. This, however, says little about the underlying entrepreneurial endeavors, nor does it speak to West Virginia's evolving economy. One would expect that any business with a name might need trademark services. Indeed, trademark filings may have been over-represented because the ELC obtained grant money that paid for filing fees. If the clients had been asked to pay the filing fees, it is probable that there would have been fewer filings. In any event, to the extent that protecting marks is important for entrepreneurs in evolving economies, the ELC succeeded.

*Copyright.* The copyright work was split between advice about the use of content created by others and protecting the clients' own creative work. The shortage of such work implies, quite simply, that there was little of either, and the entrepreneurs visiting the clinic were not involved in copyrightable creative expression.

*Patent.* Because the clinic was not supervised by registered patent attorneys, the work was limited to prior art searches that the client could then examine or deliver to a patent attorney to determine whether the expense of a patent filing was justified. The clinic did not provide such advice. The patent work was especially disconcerting for two reasons. First, the lack of clients needing searches implied limited inventive activity. Second, the

searches almost always yielded existing patents that were identical to the idea our client brought. This led to the unfortunate takeaway that the client would not only be barred from patenting, but also faced risk of lawsuit if it went forward with the business plan.

*Trade Secret.* There was almost no trade secret work, although many of the employment agreements included confidentiality provisions. This implies that the types of products and services being offered were self-revealing. If so, then protection by copyright and patent would have been more important—and the lack of such work implies that business ideas of ELC clients might have been easily duplicated if successful. This result, of course, might be better for growth in an evolving economy.<sup>8</sup>

The type of IP work performed for ELC clients is a telling piece of the puzzle. The clients surely *wanted* IP services; the problem is that they did not *need* IP services. And they did not need IP services because they were not ready for them.

Instead, the typical entrepreneur had created simple mechanical products, performed services similar to many competitors, or otherwise did not create a new or unique business model or intellectual asset. This is not to fault our clients: they had great ideas, worked hard, and delivered better results than their competitors, all without heavy use of IP.

Of course, it is possible that West Virginia is teeming with startups receiving paid IP services from lawyers both within and outside the state. Given my discussions with other

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<sup>8</sup> DORON S. BEN-ATAR, *TRADE SECRETS* (Yale University Press, New Haven 2004) 99-101 (arguing that America's early economic development was founded on the emigration of skilled labor from Europe to the United States and the ensuing knowledge transfer); Yochai Benkler, *Growth-Oriented Law for the Networked Information Economy: Emphasizing Freedom to Operate Over Power to Appropriation*, RULES FOR GROWTH: PROMOTING INNOVATION AND GROWTH THROUGH LEGAL REFORM 314 (The Kauffman Task Force on Law, Innovation, and Growth 2011) ("The benefits of crisply defined and enforced appropriation models are outweighed by the fact that in order to secure that appropriability, the law has set up a set of rules that, in protecting yesterday's actors, limits to too great an extent the freedom of new innovators to operate today.).

lawyers and referral agencies, there were a few startups with technology, but not too many. WVU ran a business incubator that had very few technology clients compared to incubators in other states.

There were, however, many people with ideas but little knowledge about business plans, little resources for development, and little training about how to best create new intellectual assets.

In short, the ELC may have been ahead of the curve with respect to IP. To be sure, the clinic was necessary and helpful with respect to many other legal needs facing West Virginia entrepreneurs, but its role in aiding IP development was trailing. With both time and help—partly from the ELC, but mostly from elsewhere—West Virginia entrepreneurs will eventually find their IP legs and start running.

## V. IMPLICATIONS

The WVU ELC experience reveals a central conceit of those who believe law can create economic development in an evolving economy. With the possible exception of legal structure allowing for enforceable transactions,<sup>9</sup> the law does not create economic development. Instead, it must follow and support that development. There can be no IP protection without IP, and there can be no IP without knowledge, investment,<sup>10</sup> and infrastructure.<sup>11</sup> One study categorizes priorities for growth:

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<sup>9</sup> See generally Michael Risch, *Virtual Rule of Law*, 112 W. VA. L. REV. 1 (2009), for a discussion of the role of law in a new economy, albeit a “virtual” one.

<sup>10</sup> See Chapter \*\* (Krumm) for discussion about state run venture capital.

<sup>11</sup> See, e.g., Ivanova & Layne-Farrar, *supra* note 1, at 20 (describing slow growth in Bulgaria despite intellectual property rights due to lack of supporting infrastructure).

The priorities of new venture formation in the knowledge economy are: [computers] and Internet access; linkages to investors and lenders; formation of lean management and advisory boards comprised of experienced individuals...; and planning and securing facilities. The priorities of e-development and sustained growth are: the ability to evaluate and react to risk well; protection of product; stimulation of existing market; and the available population of skilled knowledge workers....<sup>12</sup>

Protection of products is low on the list and comes only after successful formation.

This does not mean that IP clinics and other IP lawyers should abandon the effort.<sup>13</sup>

Rather, efforts should be retargeted to better meet the needs of entrepreneurs in the evolving economy.

*Provide generalized services – not just IP.* Even if entrepreneurs in some evolving economies are slow to develop IP, they still need other legal services.<sup>14</sup> This means that clinics should provide not only IP services, but also other entrepreneurial services such as incorporation, contract, employment, and real estate. A generalized entrepreneurship clinic—as opposed to a specialized IP clinic—would serve at least three purposes in an evolving economy. First, it would support entrepreneurs while they transition to IP-based businesses. Second, it would provide another means for encouraging entrepreneurs to develop IP while pursuing non-IP businesses. Third, it would ensure that IP services were in place when necessary.

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<sup>12</sup> Carayannis, *supra* note 1, at 435.

<sup>13</sup> Alizabeth Newman, *Bridging the Justice Gap: Building Community by Responding to Individual Need*, 17 CLINICAL L. REV. 615, 621-30 (2011) (discussing need for clinical services in underserved economies).

<sup>14</sup> Oliver R. Goodenough, *Digital Firm Formation*, RULES FOR GROWTH: PROMOTING INNOVATION AND GROWTH THROUGH LEGAL REFORM 343 (The Kauffman Task Force on Law, Innovation, and Growth 2011) (discussing importance of company formation to growth).

*Seek out university professors and students.* Law school clinics are in a good position to both encourage and serve university professors and students. Professors and students starting businesses are more likely than most to develop intellectual assets.<sup>15</sup> This is especially true where the school provides a concentration in engineering and sciences. Furthermore, some universities grant the right to exploit intellectual property back to professors. These professors and their companies can be the leading edge of technology growth in an area. Finally, academic relationships can be helpful even without startups. Most students find employment at companies, many professors consult with business, and some professors even transition out of academia. Their experience with IP and IP-based legal services provided by clinics can help encourage the development of intellectual assets long after the clinic has stopped representation.

*Partner with business schools and other strategic coaches.* Clinics should partner with students at affiliated business schools to provide joint advice to startups. The ELC students did their best to provide general business advice where necessary, with varying results based on the students' own education and experience. Such efforts would be bolstered by others who are actively pursuing degrees in business planning and management. One of the biggest hurdles facing the ELC clients was the development of a business plan that would differentiate the business from competitors both locally and nationally.<sup>16</sup> Other groups in the area provided small business assistance, but in my

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<sup>15</sup> Robert E. Litan and Robert Cook-Deegan, *Universities and Economic Growth: The Importance of Academic Entrepreneurship*, RULES FOR GROWTH: PROMOTING INNOVATION AND GROWTH THROUGH LEGAL REFORM 56-59 (The Kauffman Task Force on Law, Innovation, and Growth 2011) (discussing importance of university faculty innovation).

<sup>16</sup> Kevin Rivette and David Kline, *Discovering New Value in Intellectual Property*, Jan.-Feb. 2000

experience that assistance was more basic, even if more necessary. Community development organizations were focused on business plans for survival—how to get bank loans, how to track money, how to advertise, etc. These are critically important skills in any economy, let alone an evolving one. The goal of a joint business/law clinic is to work with other development organizations to aid entrepreneurs in taking the next step toward IP differentiation.<sup>17</sup> Furthermore, the experience would provide law students with exposure to new skills to aid their own strategic advice while in practice.<sup>18</sup>

*Provide training on the importance of IP.* Not all IP encouragement need be provided directly to legal clients. Entrepreneurial clinics should also offer generalized outreach, through websites, brochures, and live seminars. These materials and classes would teach about the different types of intellectual property, why each type is important for different kinds of businesses, and how each type can be protected. The overriding goal is the same: encouraging the development of IP while waiting for the area's entrepreneurs to catch up.<sup>19</sup>

## CONCLUSION

Intellectual property will surely be important to some, if not all, growth areas in evolving economies. The West Virginia experience indicates that the law may not drive

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HARVARD BUSINESS REV. 54, 54 (Xerox CEO: "I'm convinced that the management of IP is how value added is going to be created . . . Increasingly, companies that are good at managing IP will win.").

<sup>17</sup> Newman, *supra* note 13, at 635 (discussing importance of focus on the individual, even in economic growth clinics).

<sup>18</sup> See, Chapter \*\* (O'Connor) for further discussion about lawyers as strategic consultants.

<sup>19</sup> See, Chapter \*\* (Madison) for a case study of one region's experience with changing entrepreneurship.

IP growth as much as lawyers would like to think. Instead, IP protection will likely trail the development of intellectual assets to protect. As a result, IP lawyers should focus not only on protection, but also on development: development of IP producing founders, development of IP based business plans, and development of businesses that survive long enough for their founders to execute the business plans.

In this “chicken and egg” problem, the technical must come first. Once the effort begins, however, momentum and symbiosis should help entrepreneurs and their IP lawyers jointly increase the pace of evolution.