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## **CONTENT & OPINIONS**

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## FROM THE EDITOR

### **A Passion for Teaching Business Law & Ethics: Student Learning Through Case Studies**

Both awareness and knowledge of business law and ethics are crucial for success in business and everyday life. Application and analysis of business scenarios using this awareness and knowledge are even more important. As teachers, our passion is to facilitate student learning of all aspects of the business law and ethics disciplines.

This issue of the Journal of Business Law & Ethics Pedagogy provides a variety of useful classroom ideas to help students learn. It also offers helpful information regarding online education and teaching modalities, as well as assistance for instructors in presenting their best cases in faculty evaluations for our unique discipline.

In *The Entrepreneurs with No Garage Project*, Professor Perry Binder shares his class project in which students start a hypothetical business. The purpose is to show students the importance of law in business, especially business formation, contracts, and intellectual property. Students can benefit now, as well as when they are out in the working world because the focus is being entrepreneurial on a budget. To add greater flexibility and value, the author has separated the project into modules that can be used individually or as a whole.

Professors Craig Barkacs and Linda Barkacs have developed a classroom exercise that uses experiential learning to help students understand several areas of business law and ethics, most prominently environmental law. In *Citropolis: An Experiential Classroom Exercise in Environmental Justice*, the authors have created a fictional city in which students serve as city planners and decide which proposed project they will accept. The article offers detailed information for each project, including revenues for the city, as well as possible negative issues. The exercise then moves on to coverage of real-world environmental cases, the facts of which are similar to issues students encountered as city planners in the fictional city. This unique learning exercise offers students a hands-on approach to applying law and other topics, while also incorporating real-world examples to show the impact of their decisions.

Professor Carol Bast presents a valuable analysis of evaluations of business law faculty, especially in universities with few such faculty members. Because business law teaching and research is different than other business disciplines in many ways, faculty do not have as many mentors and successful tenure examples throughout the business school. They must educate colleagues, department chairs, and deans in how this work should be evaluated. Her article, *Toward More Effective Faculty Evaluation*, shares research and offers ideas about how to navigate the process of building a case for teaching and research in the business law discipline.

In a study comparing performance in online and face-to-face classes, Professors Jill Jasperson, Ronald Mellado Miller, and Maureen Snow Andrade share data about the performance of 1,100 students taught over a six-year period. *Speed of Light versus Speed of Sound* offers statistical analysis of data to show the differences between these types of teaching modalities. The authors found business law students in face-to-face classes outperform students in online sections. They suggest uses of technology and other resources to better address the needs and performance of online learners.

In *Teaching Business Law to Non-Lawyers*, Professor Dawn Levy presents a three-pronged engagement approach which includes: addressing students' prior beliefs about law; illustrating law

with relatable real-world examples; and demonstrating the value of business law knowledge in strategy and decision-making. While her paper focuses on reaching community college students, this excellent and useful information is universally applicable for all students and would be valuable for business law and ethics faculty to consider.

\* \* \*

This issue is my last as Editor in Chief. Starting this journal and publishing four issues has been a joy. Our business law and ethics disciplines are critical to creating well-rounded business majors and business professionals, and imparting knowledge about the same to students is our calling. This journal serves these purposes. Professors will be able to search this permanent and searchable archival tool and benefit from the fine work by truly gifted, hard-working educators (as well as from dedicated editors and reviewers). Many, many thanks to all who have helped build this valuable pedagogical resource.

Linda Christiansen  
EDITOR IN CHIEF

# The Entrepreneurs with No Garage Project: Protecting Ownership Interests and Intellectual Property Rights on a Shoestring Budget

Perry Binder\*

## ABSTRACT

*Entrepreneurs with No Garage* is a team project focusing on the most common mistakes that people make when forming a business without legal counsel. In the assignment, students assume the role of a hypothetical business partner in a start-up with only \$500 for initial legal costs. Students participate in exercises that allocate these funds; assess personal and company risk levels; draft a Shareholder Agreement entailing different roles and capital contributions; and write a Work for Hire agreement with a clause conferring intellectual property ownership. The project is broken up into short and flexible modules, with an a la carte menu for Legal Studies professors to choose from and use in a business law course.

**KEY WORDS:** ENTREPRENEURSHIP, BUSINESS LAW, INTELLECTUAL PROPERTY, SHAREHOLDER AGREEMENT, WORK FOR HIRE AGREEMENT, RISK ASSESSMENT, PEDAGOGY

## I. Introduction

A lawyer starts life giving \$500 worth of law for \$5, and ends giving \$5 worth for \$500.

—Benjamin H. Brewster

Legal Studies professors can take a lead role in augmenting university Entrepreneurship curricula.<sup>1</sup> To promote this effort, the author created a class entitled *Technology Law for Entrepreneurs* for students who major or minor in Entrepreneurship.<sup>2</sup> The course objectives include discovering how law is used strategically as a tool to manage risk in a technology-based business enterprise. Throughout the class, students learn about the vital role that attorneys play in protecting company and personal interests. Without competent counsel, the financial consequences to a business can be devastating, as it was for a Facebook co-founder portrayed in *The Social Network* movie.<sup>3</sup>

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\*Clinical Associate Professor of Legal Studies, Georgia State University

<sup>1</sup> The “intersection of law and entrepreneurship is a topic of increased interest for scholars seeking to understand the role and effect of laws on entrepreneurship practice and the decision to create or pursue a new venture.” Vlad Bursuc & Jason Gordon, *Law and Entrepreneurship Education: A Proposed Model for Curriculum Development*, 35 J. LEGAL STUD. EDUC. 123, 123 (Winter 2018).

<sup>2</sup> Syllabus on file with the author. This class is cross-listed with *Internet Law* in the Robinson College of Business at Georgia State University.

<sup>3</sup> In a tense movie scene, a Facebook co-founder, Eduardo Saverin, just learned that his shares were diluted, based on documents he signed:  
Mark Zuckerberg: You signed the papers.  
Eduardo Saverin: [almost in tears] You set me up.

With many students starting businesses while still in college,<sup>4</sup> there is an obvious need for them to obtain “\$500 worth of law for \$5.” Unfortunately, the author is unable (and unwilling) to deliver on that proposal<sup>5</sup> and instead encourages the utilization of self-help legal resources for business formation and contract needs. This approach is highlighted in the exercise profiled here—*Entrepreneurs with No Garage*—a practice-oriented team project which focuses on the most common mistakes that individuals make in the early stages of forming a company.<sup>6</sup>

First implemented in Spring 2018, this assignment walks students through the legal side of the business start-up process. It centers around four hypothetical entrepreneurs with different skill sets and levels of liquidity, and “no garage” to house their medical app venture. At the beginning of the project, students decide how to allocate \$500 for their initial legal expenses. Participants then learn about the importance of defining partner roles, equity interests, and intellectual property ownership matters. To achieve these objectives, the author created multi-part modules for team members to work collaboratively in and out of class to experience the following:

- Assessing personal and company risk levels;
- Drafting a Shareholder Agreement<sup>7</sup> (for the benefit of the company and one shareholder) entailing different roles and capital contributions; and
- Writing a Work for Hire agreement<sup>8</sup> with a clause conferring intellectual property ownership.<sup>9</sup>

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Mark Zuckerberg: You're gonna blame me because you were the business head of the company and you made a bad business deal with your own company?

Eduardo Saverin: This is gonna be like I'm not a part of Facebook!

Sean Parker: It won't be like you're not a part of Facebook. You're not a part of Facebook.

Eduardo Saverin: My name's on the masthead.

Sean Parker: You might wanna check again.

*The Social Network Quotes*, IMDB, <https://www.imdb.com/title/tt1285016/quotes> (last visited Nov. 13, 2018).

<sup>4</sup> See Jane O'Brien, *When Students Start a Business in University*, BBC NEWS (Aug. 1, 2016), <http://www.bbc.com/news/world-us-canada-36911155>, and Kaitlin Mulhere, *8 Super Successful Businesses That Were Created by College Students*, MONEY (Mar. 17, 2016), <http://time.com/money/4243766/successful-businesses-started-by-college-students/>.

<sup>5</sup> A growing number of universities with law schools are making free legal advice available to Entrepreneurship students through clinics. Legal advice is typically given by third year law students, who are supervised by attorneys. See e.g., Keela Sweeney, *BU, MIT Announce Joint Entrepreneurship Clinic Program*, THE DAILY FREE PRESS (Sept. 10, 2015, 12:52 AM), <https://dailyfreepress.com/blog/2015/09/10/bu-mit-announce-joint-entrepreneurship-clinic-program/>. For a discussion in the literature on the importance of legal clinics and teaching practice oriented skills, see generally, Sean Arthurs et al., *From Zero to 60: Building Belief, Capacity and Community in Street Law Instructors in One Weekend*, 24 INT'L J. CLINICAL EDUC. 118 (2017); Elaine Campbell, *Recognizing the Social and Economic Value of Transactional Law Clinics: A View from the United Kingdom*, 65 J. LEGAL EDUC. 580 (2016); Patience A. Crowder, *Designing A Transactional Law Clinic for Life-Long Learning*, 19 LEWIS & CLARK L. REV. 413, 414 (2015); Martha F. Davis, *Institutionalizing Legal Innovation: The (Re)Emergence of the Law Lab*, 65 J. LEGAL EDUC. 190 (2016); Jennifer S. Fan, *Institutionalizing the USPTO Law School Clinic Certification Program for Transactional Law Clinics*, 19 LEWIS & CLARK L. REV. 327 (2015); Robert C. Illig, *The Oregon Method: An Alternative Model for Teaching Transactional Law*, 59 J. LEGAL EDUC. (2010); Susan R. Jones, *Representing Returning Citizen Entrepreneurs in the Nation's Capital*, 25 J. AFFORDABLE HOUSING AND COMMUNITY DEV. L. 45 (2016); Susan R. Jones & Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 WASH. U. J.L. & POL'Y 85 (2013); Susan R. Jones, Jacqueline Lainez & Debbie Lovinsky, *Viewing Value Creation by Business Lawyers Through the Lens of Transactional Legal Clinics*, 15 U.C. DAVIS BUS. L.J. 49 (2014); Praveen Kosuri, *Impact in 3D - Maximizing Impact Through Transactional Clinics*, 18 CLINICAL L. REV. (2012); Charles R. McManis, *Answering the Call: The Intellectual Property & Business Formation Legal Clinic at Washington University*, 17 WASH. U. J.L. & POL'Y 225 (2005); David Oppenheimer, et al., *Berkeley Law's Student Initiated Legal Services Projects*, 61 J. LEGAL EDUC. 621 (2013); Lynisse E. Phillips Pantin, *The Economic Justice Imperative for Transactional Law Clinics*, 62 VILL. L. REV. 175 (2017); Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLINICAL L. REV. 215 (2013); Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57 (2009); Amanda M. Spratley, *Connecting Law and Creativity: The Role of Lawyers in Supporting Creative and Innovative Economic Development*, 8 HASTINGS BUS. L.J. 221 (2012); and Paul R. Tremblay, *Transactional Legal Services, Triage, and Access to Justice*, 48 WASH. U. J.L. & POL'Y 11, 13 (2015).

<sup>6</sup> “Entrepreneurs have been starting companies without reading instruction books since the first Phoenician trader bought his first ship over 5,000 years ago.” Anne Fisher, *Starting a Company? Don't Hire a Cheap Lawyer*, FORTUNE (May 23, 2016), <http://fortune.com/2016/05/23/starting-a-company-dont-hire-a-cheap-lawyer/>, citing David Rose, THE STARTUP CHECKLIST: 25 STEPS TO A SCALABLE, HIGH-GROWTH BUSINESS (Wiley 2016). See also Richard Harroch, *10 Big Legal Mistakes Made by Startups*, FORBES (Oct. 3, 2013, 12:47 PM), <https://www.forbes.com/sites/allbusiness/2013/10/03/big-legal-mistakes-made-by-start-ups/#7ec010b5497e>.

<sup>7</sup> For a discussion of Shareholder Agreements, see *infra* notes 45-50.

<sup>8</sup> For a discussion of Work for Hire agreements, see *infra* notes 51-66.

<sup>9</sup> For a discussion of ownership of intellectual property clauses, see *infra* notes 58-60. Intellectual property “refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.” *What is Intellectual Property?*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/about-ip/en/> (last visited Nov. 13, 2018). Intellectual property protection

The author recognizes that business law faculty often wish to use innovative assignments, but are challenged to find the class time to integrate extensive projects. Thus, the *No Garage* project is divided into short and flexible modules, presented as an a la carte menu to provide for instructor choice. For example, these options include student writing assignments or, alternatively, contract clause analysis for professors who would prefer to exclude writing components. In addition to potential use for undergraduate business law courses, these modules would also be appropriate for a Masters of Business Administration (MBA) law course.

The article is divided into the following parts: Section II discusses Learning Objectives; Section III includes details of the *Entrepreneurs with No Garage* project; and Section IV addresses Assessment and Peer Evaluation.

## II. Learning Objectives

The Association to Advance Collegiate Schools of Business International (AACSB) Business Standards emphasize that curricula should “facilitate and encourage active student engagement in learning,” and “improve skills and the application of knowledge in practice.”<sup>10</sup> As most Legal Studies faculty already know, “legal analysis is well suited to be the subject of active, collaborative, and experiential learning.”<sup>11</sup> Even though “[s]tudents love to hate group projects,”<sup>12</sup> there are established benefits of working collaboratively.<sup>13</sup>

However, one of the most challenging tasks in teaching law to business students is getting them to apply the law to real world situations.<sup>14</sup> Stated differently by an entrepreneur: “My experience in college made it clear that I wasn’t as prepared as I needed to be to start my own business . . . There are things the textbook tries to tell you about, but I needed to experience them.”<sup>15</sup> In an effort to give Entrepreneurship students a real world experience, the author developed a collaborative, interactive project on protecting a start-up founder’s ownership interest and the company’s intellectual property rights.

*Entrepreneurs with No Garage* is designed to help students think carefully when choosing suitable business partners with complementary skills; assess the risks of doing business with these associates and others; and protect business and individual interests. The project aims to de-emphasize the rote learning of legal concepts, and make contract clauses come alive with applicability to common business problems. These and other goals are aligned with the teaching mission at the author’s university.<sup>16</sup>

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involves “[t]he ownership of ideas. Unlike tangible assets to your business such as computers or your office, intellectual property is a collection of ideas and concepts.” *Intellectual Property*, ENTREPRENEUR, <https://www.entrepreneur.com/encyclopedia/intellectual-property> (last visited Nov. 13, 2018). Ownership of such creations may be secured through patent, trademark, copyright, and trade secret protection. *Id.*

<sup>10</sup> *Eligibility Procedures and Accreditation Standards for Business Accreditation*, Appendix II, AACSB, page 32 (adopted Apr. 8, 2013, revised July 1, 2018), <https://www.aacsb.edu/-/media/aacsb/docs/accreditation/business/standards-and-tables/2018-business-standards.ashx?la=en> (last visited Nov. 13, 2018). For a journal article on the importance of active learning, see Mystica M. Alexander, *The Flipped Classroom: Engaging the Student in Active Learning*, 35 J. LEGAL STUD. EDUC. 277 (2018).

<sup>11</sup> Patricia Sanchez Abril, *Reimagining the Group Project for the Business Law Classroom*, 33 J. LEGAL STUD. EDUC. 235, 236 (2016). *See also* Anne Tucker Nees et al., *Enhancing the Educational Value of Experiential Learning: The Business Court Project*, 27 J. LEGAL STUD. EDUC. 171 (2010).

<sup>12</sup> Abril, *supra* note 11, at 235.

<sup>13</sup> *Id.*

<sup>14</sup> Ryan C. Grelecki & Susan L. Willey, *Applying Legal Concepts to Business in a Legal and Ethical Environment of Business Course: The Build-a-Business Project*, 34 J. LEGAL STUD. EDUC. 89 (2017). “[W]e must bring the material to life for them by showing them – not telling them – how important an understanding of the law is to every facet of any business.” *Id.*

<sup>15</sup> L. Gregory Henley, R U THE NEXXT ENTREPRENEUR? 16 (The Nexxt Entrepreneur, LLC 2014) (quoting entrepreneur interviewed by author).

<sup>16</sup> In the business school’s B.B.A. program, the faculty seeks to accomplish the following objectives:

- Students will demonstrate effective communication skills.
- Students will effectively and efficiently use computer technology.
- Students will effectively and efficiently analyze and solve business problems.
- Students will function effectively as team members.
- Students will demonstrate a desire for lifelong learning.

The project learning objectives are as follows:

- Challenging students to create a budget for legal protection of a business;
- Helping student teams to appreciate the pros and cons of working with business partners who have different skill sets, time commitments, and levels of liquidity;
- Encouraging students to assess the legal risks of protecting a business;
- Explaining relevant contract clauses and intellectual property concepts; and
- Introducing students to the complexities of writing contracts.

If learning outcomes are achieved, students should gain foundational knowledge of the legal tools needed to protect many aspects of a business. In **Module I** (Determining Legal Start-up Costs), project participants learn the importance for a start-up to put its *legal house* in order at the outset. Specifically, they prioritize which facets of a start-up need legal protection on a limited budget. In **Module II** (Assessing an Individual/Founder's Risk), students analyze the pros and cons of working with business partners with different skill sets, time commitments, and levels of liquidity.

In **Module III** (Drafting a Shareholder Agreement), team members learn which standard clauses protect the business. Then, they draft a Shareholder Agreement, with a focus on protecting one founder's business interest. Finally, in **Module IV** (Drafting a Work for Hire Agreement), students learn about legal issues when hiring a freelancer, as well as the importance of owning the intellectual property created for the company. Then, they write a Work for Hire agreement conferring intellectual property ownership rights.

### III. Team Project Description

*Entrepreneurs with No Garage* has five activity modules:

- Module I: Determining Legal Start-up Costs;
- Module II: Assessing an Individual/Founder's Risk in Partnering with Others;
- Module III and III.A: Drafting a Shareholder Agreement to Benefit One Founder;
- Module IV and IV.A: Drafting a Work for Hire Agreement to Benefit the Company; and
- Module V: Student Presentations.

As a foundational backdrop to the project, students learn practical information on business name selection and protection, entity selection, standard contract clauses,<sup>17</sup> sample Shareholder Agreement clauses,<sup>18</sup> and select intellectual property clauses.<sup>19</sup> Working as a team, students generate realistic solutions through group discussions, problem analysis, and writing exercises.

#### **A. Module I: Determining Legal Start-up Costs<sup>20</sup>**

A common mistake that entrepreneurs make in forming a business is to assume that if a corporate name is available, then incorporation confers a legal right to use that name in business. Thus, it is important to discuss federal and state trademarks, trademark searches, and domain name searches, *prior* to incorporation.<sup>21</sup>

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Georgia State University Robinson College of Business 2018-2019 Undergraduate Catalog Bachelor-Level, 7010.22 Objectives of the B.B.A. Program, <https://catalog.gsu.edu/undergraduate20182019/j-mack-robinson-college-of-business/>.

<sup>17</sup> For a definition and examples of standard or *boilerplate* clauses, see *infra* notes 43-44.

<sup>18</sup> For examples of Shareholder Agreement clauses, see *infra* note 45.

<sup>19</sup> For examples of intellectual property clauses, see *infra* note 58.

<sup>20</sup> See Appendix C for Module I.

<sup>21</sup> For a discussion of entity selection, see Kelly Phillips Erb, *LLCs, S Corps & PCs: Choosing A Business Entity*, FORBES (Aug. 19, 2015), <https://www.forbes.com/sites/kellyphillipserb/2015/08/19/llcs-s-corps-and-pcs-choosing-a-business-entity/#57ff74086b8a>, and Thomas D.

Therefore once a business identifies a unique trade name, the author guides students in class, through a series of online searches:<sup>22</sup>

As a starting point, look up the business name on popular search engines;  
Conduct a free Secretary of State corporate search on the company name<sup>23</sup> to see if the name is available;  
Do a domain name search<sup>24</sup> to see if the .com, .net, and .org extensions are available;  
Conduct a free federal trademark search on the company name;<sup>25</sup> and  
Conduct a free state trademark search on the company name.<sup>26</sup>

In the team project, students are instructed that their start-up business can only afford to spend \$500 on legal protection and compliance. Assuming that the process of incorporating costs \$100, they must allocate the remaining \$400 based on group and class discussions. Specificity is required, with itemized actual costs of doing business in their city, county, and state. Acknowledging that there is no *right* answer, below is a sample breakdown of costs:

State incorporation<sup>27</sup> = \$100  
Two Domain names<sup>28</sup> = approximately \$20  
State trademarks: Name and logo<sup>29</sup> = \$30 (\$15 each)  
Copyright logo<sup>30</sup> = \$45 (\$65 if there are multiple filers)

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Flanigan, *Starting a Business: Entity Selection*, THE NAT'L L.J. (May 29, 2013), <https://www.natlawreview.com/article/starting-business-entity-selection>.

<sup>22</sup> These steps are identified in Perry Binder, *New Top-Level Domain Names Add .Xxxtra Company Burden – Group Scenarios to Create Effective Domain Registration Portfolios*, 14 ATLANTIC L.J. 114, 126-127 (2012).

<sup>23</sup> See *infra* notes 33-34.

<sup>24</sup> For an example of a domain name website, see REGISTER.COM, <https://www.register.com/> (last visited Nov. 13, 2018).

<sup>25</sup> UNITED STATES PATENT & TRADEMARK OFFICE, <https://www.uspto.gov/trademarks-application-process/search-trademark-database> (last visited Nov. 13, 2018).

<sup>26</sup> GEORGIA SECRETARY OF STATE, <http://sos.ga.gov/index.php/corporations> (last visited Nov. 13, 2018).

<sup>27</sup> \$100 in Georgia. *Corporations, LLCs, and Limited Partnerships*, GEORGIA SECRETARY OF STATE, <https://georgia.gov/popular-topic/corporations-llcs-and-limited-partnerships> (last visited Nov. 13, 2018).

<sup>28</sup> Ideally, the business would register several names, but that did not fit the author's budget. Domain names can cost "from just \$10 a year, to hundreds or even millions!" KeriLynn Engel, *How Much Does a Website Cost?*, WHOISHOSTINGTHIS?, <https://www.whoishostingthis.com/blog/2014/07/29/website-cost/> (last visited Nov. 13, 2018).

<sup>29</sup> \$15.00 per registration in Georgia. *Trademark and Service Mark Applications and Forms*, GEORGIA SECRETARY OF STATE, [http://sos.ga.gov/index.php/corporations/trademark\\_and\\_service\\_mark\\_applications\\_and\\_forms](http://sos.ga.gov/index.php/corporations/trademark_and_service_mark_applications_and_forms) (last visited Nov. 13, 2018). It is important for students to choose the proper class or classes for their trademarks. *Classes of Goods and Services*, GEORGIA SECRETARY OF STATE, [http://sos.ga.gov/index.php/corporations/classification\\_of\\_goods\\_and\\_services](http://sos.ga.gov/index.php/corporations/classification_of_goods_and_services) (last visited Nov. 13, 2018).

<sup>30</sup> *Schedule of Fees*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/about/2020-fees.pdf> (last visited May 13, 2020). While trademarks are the traditional protection for logos, "[a] visual art work that is used as a trademark, logo, or label may be registered [with the Copyright Office] if it satisfies 'the requisite qualifications for copyright,' *i.e.*, that it has 'some creative authorship in its delineation or form.'" COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, 3d Ed. § 913.1 (2014) (quoting 37 C.F.R. § 202.10), reprinted in 11 M. & D. NIMMER, NIMMER ON COPYRIGHT 913.1 (2017), cited in *Copyright Protection for Trademarked Material*, INTERNATIONAL TRADEMARK ASSOCIATION (Sept. 12, 2017), [https://www.inta.org/Advocacy/Pages/BR20170912\\_2.aspx](https://www.inta.org/Advocacy/Pages/BR20170912_2.aspx). If a logo is copyrighted, the owner may have an extra tool against infringers using the logo on the internet, under the *takedown* provisions of The Digital Millennium Copyright Act of 1998, 112 Stat. 2860 (1998) (DMCA). Under the DCMA's takedown procedure, "a copyright holder notifies the provider of an alleged infringement" and allows the service providers "to quickly 'find and examine' infringing material." Andre M. Bleech, *What's the Use? Good Faith Evaluations of 'Fair Use' and Digital Millennium Copyright Act 'Takedown' Notices*, 18 COMM'LAW CONSP'CTUS 241, 254 (2009). To be effective under the DCMA, the copyright holder's notice must: (1) be signed, physically or electronically, by the copyright owner or authorized agent, (2) identify the copyrighted work that is allegedly infringed upon, (3) identify the material alleged to be causing the infringement – including "information reasonably sufficient to permit the service provider to locate the material" on its network, (4) provide the contact information of the complainant, (5) include "[a] statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law," and (6) provide a statement swearing to the

Occupational license<sup>31</sup> = approximately \$140  
Fictitious name filing<sup>32</sup> = approximately \$160  
**Total ≈ \$495**

Items which fell outside of this budget include a corporate name reservation.<sup>33</sup> Such a reservation “does NOT necessarily mean that the commercial availability of the name is valid.”<sup>34</sup> In addition, it was too expensive to protect the business name and logo with federal trademarks.<sup>35</sup> Even though the mere use of a name in commerce without registration may confer common law trademark rights to the name in a particular geographic region,<sup>36</sup> the author encourages students to file for state trademark registration. State registration is economical, and the marks will appear in a database if someone conducted a comprehensive fifty states search. In this regard, it was also too costly for our project budget to hire an outside trademark search firm to conduct a federal and all states clearance search.<sup>37</sup> Finally, while students are eager to learn about legal protection for their start-up, they are made fully aware that enforcement may be difficult and expensive in the future.<sup>38</sup>

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accuracy of the information provided in the notice as well as to the authority of the complaining party’s authority to act. *Id.* For a brief description of how the DMCA provides “content owners with a process to remove their content from a site to which they didn’t provide permission,” see Lindsay LaVine, *Legal Basics: What You Need to Know About the Digital Millennium Copyright Act*, ENTREPRENEUR (Oct. 2, 2013), <https://www.entrepreneur.com/article/228590>.

<sup>31</sup> An occupational license permits a corporation to conduct business in a city. For example, in the city of Johns Creek, Georgia, the minimum cost per annum is \$138 (\$125 + \$13 for one employee). See *Business Licenses*, CITY OF JOHNS CREEK, <https://www.johnscreekga.gov/Businesses/BusinessLicenses> (last visited Nov. 13, 2018).

<sup>32</sup> It costs \$162 in Fulton County Superior Court (Georgia), to register a trade name, also known as a *DBA* (doing business as). *Tradename (DBA) Process*, FULTON COUNTY CLERK OF SUPERIOR COURT, <https://www.fultonclerk.org/237/Trade-Name-DBA-Process> (last visited Nov. 13, 2018).

<sup>33</sup> “For just **\$25**, you can get a valid name reservation number for **30 days**. During those 30 days, you can file your entity’s formation documents (using the name you’ve reserved) without the fear of someone else taking your name in the meantime.” *Reserving Your Business’s Name*, GEORGIA SECRETARY OF STATE, <https://georgia.gov/blog/2015-11-05/reserving-your-business-name> (last visited Nov. 13, 2018) (*emphasis in original*).

<sup>34</sup> *Id.* (*emphasis in original*) “The true ‘owner’ of a name remains a complicated process and SOS recommends that you seek legal counsel for your specific situation in order to understand it fully. ... Also, trade names are NOT registered with SOS. To do this, go to the clerk of the superior court in the county where the business is located.” *Id.* (*emphasis in original*)

<sup>35</sup> The cost per class ranges from \$225-\$400. *Trademark Application Fee Structure*, UNITED STATES PATENT & TRADEMARK OFFICE, <https://www.uspto.gov/trademarks-application-process/filing-online/trademark-application-fee-structure> (last visited Nov. 13, 2018).

<sup>36</sup> Common law trademark rights “are based solely on use of the mark in commerce within a particular geographic area. Common law rights may be stronger than those based on a registration, if the common law use is earlier than the use that supports the registration. *Protecting your Trademark: Enhancing Your Rights Through Federal Registration*, UNITED STATES PATENT & TRADEMARK OFFICE, page 9, <https://www.uspto.gov/sites/default/files/documents/BasicFacts.pdf> (last visited Nov. 13, 2018). Students are encouraged to put a TM (trademark) or SM (service mark) symbol by their business name and logo, whether they merely seek common law protection or file for state registration. “These designations indicate that a person or entity claims rights in a particular trademark or service mark,” though they don’t mean that you actually registered your mark. *Trademarks and Service Marks: Frequently Asked Questions*, GEORGIA SECRETARY OF STATE, [http://sos.ga.gov/index.php/corporations/trademarks\\_and\\_service\\_marks\\_frequently\\_asked\\_questions](http://sos.ga.gov/index.php/corporations/trademarks_and_service_marks_frequently_asked_questions) (last visited Nov. 13, 2008). The ® “designation indicates that a mark is federally registered. It should only be used if the United States Patent and Trademark Office has granted registration.” *Id.*

<sup>37</sup> See, e.g., *How Much Do Online Trademark Search Services Cost?*, TRADEMARKNOW, <https://www.trademarknow.com/blog/how-much-do-online-trademark-search-services-cost> (last visited Nov. 13, 2018), and *Comprehensive Trademark Search Pricing*, LEGALZOOM.COM, <https://www.legalzoom.com/business/intellectual-property/trademark-search-pricing.html> (last visited Nov. 13, 2018).

<sup>38</sup> For example, in a trademark dispute, an entrepreneur owed his attorneys approximately \$500,000 in legal fees. Michael R. Koval, *How Shorebilly Brewing Company Won the Trademark Battle, but Lost the War: A Cautionary Tale for Entrepreneurs*, 35 J. LEGAL STUD. EDUC. 45, 74 (2018). Even though he ultimately won the case, it “caused so much uncertainty and aggravation, and cost so much time, money, sleep, and anxiety, that [he] made the business decision to change the name before the lawsuit was completed and the judgment rendered.” *Id.* at 45-46.

## ***B. Module II: Assessing an Individual/Founder's Risk in Partnering with Others***<sup>39</sup>

The *Entrepreneurs with No Garage* project is built around four hypothetical business partners that are full-time students, each with a different skill set and level of liquidity. Students assess potential company risk and then draft a Shareholder Agreement for the founders,<sup>40</sup> tailored to protect one partner's ownership interest. Finally, the project concludes with an independent contractor creating the company's logo. Student groups draft a Work for Hire agreement to, in part, secure ownership of that logo's intellectual property. Participants not only need to understand contract clauses and concepts, but they also need to select appropriate clauses for legal protection (more fully explained in Sections III. C and D).

The class is divided into teams (ideally with three or four students to a team) and are provided a lengthy hypothetical.<sup>41</sup> They are instructed to look out for red flag items that may adversely affect one particular founder's short term and/or long term interest in the company. The author briefly considered having each student represent a different founder (Wilt, Kareem, Betty, and Veronica, introduced below). However, some teams might not have four students and Wilt was intentionally given more novel decision-making issues than the other three. Further, the focus of the project is not on business negotiation; rather, this portion of the exercise emphasizes the importance of protecting one's personal legal interest in a company when no one is represented by counsel.

### **Introductory Facts for Hypothetical Company Hospitals and Doctors Best Insurance App, Inc. (HADBIA)**

*Wilt, Kareem, Betty, and Veronica are college juniors with full-time jobs, but have weekends and some nights available to meet and work on the new business.*

***You are Wilt in this scenario.***

*Wilt and Kareem are best friends.*

*Kareem is married to Betty.*

*Betty's friend Veronica is a savvy technical person.*

*Wilt and Kareem do not know Veronica well, but both trust Betty's judgment.*

*Wilt and Kareem have long discussed going into business together. For many months, they talked about building an app for hospitals and medical doctors to streamline costs related to submitting claims to patients' insurance companies. The idea was conceived by Betty, who processes medical claims for an insurance company.*

The project is typically assigned in the middle of the semester, after students learn basic legal concepts, analyze relevant contract clauses, and discuss the business and legal risks of starting a business. Initially, they must answer the questions below in writing:

- 1- What are the risks to Wilt if Kareem participates in this business venture?
- 2- What are the risks to Wilt if Betty participates in this business venture?

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<sup>39</sup> See Appendix D for Module II.

<sup>40</sup> Properly setting up the initial ownership structure and relationship for founders "will protect the rights of each founder, provide incentives for hard work, and divide the rewards fairly." Constance E. Bagley & Craig E. Dauchy, *THE ENTREPRENEUR'S GUIDE TO BUSINESS LAW* 4th Ed. 77 (South-Western, Cengage Learning 2012). "[T]he process should be forward-looking and include other considerations," such as adding new founders or raising more capital. *Id.*

<sup>41</sup> See Appendix B for a complete set of facts.

3- What are the risks to Wilt if Veronica participates in this business venture?

4- Betty is creating content for the business. Assume that she insists on owning her content, and granting a license to HADBIA. Explain the risks to Wilt and the company under this arrangement.

Model responses to these questions are included in Appendix D.

### **C. Modules III & III.A: Drafting a Shareholder Agreement to Benefit One Founder<sup>42</sup>**

Over the course of the semester, students learn about *boilerplate* clauses<sup>43</sup> found in most contracts, including: Anti-Modification; Arbitration; Assignment and Delegation; Attorneys' Fees; Choice of Law; Force Majeure; Forum Selection; Indemnification; Integration or Merger; No-Waiver; Severability; Time is of the Essence; and Warranties.<sup>44</sup> In addition to these standard contract clauses, student groups discuss the applicability of select clauses to Shareholder Agreements, including: Anti-Dilution; Bad Leaver; Best Efforts; Confidentiality or Non-Disclosure agreements; Good Leaver; Gross Profit; Net Profit; Non-Compete; Non-Disparagement; Non-Solicitation; Preemptive Rights; Restrictions on Share Transfer; Vesting Clause for Shares; and Voting Bloc or Shareholder Voting agreement.<sup>45</sup> The *Entrepreneurs with No Garage* project gives real world context to many of these clauses.

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<sup>42</sup> See Appendix E for Modules III & III.A.

<sup>43</sup> Boilerplate clauses “refer to certain standard clauses that usually appear at the end of a contract.” Richard Stim, *Common Boilerplate Provisions in Contracts*, NOLO.COM, <https://www.nolo.com/legal-encyclopedia/common-boilerplate-provisions-contracts-32654.html> (last visited July 7, 2020). “Which boilerplate provisions are included and how they are drafted can have a significant impact on your rights and liabilities under the contract.” *Id.*

<sup>44</sup> Examples of boilerplate clauses include Anti-Modification (“contractual provisions that purport to prohibit enforcement” of subsequent changes to the contract), Kevin E. Davis, *The Demand for Immutable Contracts: Another Look at the Law and Economics of Contract Modifications*, 81 N.Y.U. L. REV. 487, 490 (2006); Arbitration (“a dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute”), Victor D. Quintanilla & Alexander B. Avtgis, *The Public Believes Predispute Binding Arbitration Clauses are Unjust: Ethical Implications for Dispute-System Design in the Time of Vanishing Trials*, 85 FORDHAM L. REV. 2119, 2123 (2017); Assignment and Delegation (“when one party assigns certain contractual rights or delegates certain duties to a third party”), Robert J. Aalberts, Scott Bogatz & Darren A. Prum, *Terms of Engagement: What Does All That Contract Legalese Really Mean and How Can We Better Teach it to Students*, 26 MIDWEST L.J. 75, 107 (2012); Attorneys' Fees (prevailing party in a lawsuit is entitled to recover fees paid to his or her attorney from the losing party, if a contract clause provides for such recovery), *Benchmark Builders, Inc. v. Schultz*, 294 Ga. 12, 12 (2013); Choice of Law (designates the applicable “law of the chosen jurisdiction to resolve any disputes arising out of the contract”), John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631, 633 (2017); Force Majeure (“event or effect that can be neither anticipated nor controlled,” and which excuses performance of contractual obligations. Force majeure refers to a “superior or irresistible force” and “is often used interchangeably with an ‘act of God.’”), Jennifer Sniffen, *In the Wake of the Storm: Nonperformance of Contract Obligations Resulting from a Natural Disaster*, 31 NOVA. L. REV. 551, 554-555 (2007); Forum Selection (“a contractual designation as to where any litigation that may occur in regard to the contract should take place”), David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785, 785 (1993); Indemnification (“allows one who has discharged a common obligation to recover up to the entire amount which has been paid from the party primarily responsible.” Indemnification allows for the shifting of liability “from a party who has paid damages...to another responsible party” after a specified event), Sherri L. Sweers & Thomas B. Quinn, *The Law of Indemnity in Wyoming: Unravelling the Confusion*, 31 LAND & WATER L. REV. 811, 811-812 (1996); Integration or Merger (a provision “to which the parties assent as the full statement of the terms of the agreement.” Integration or merger “assumes that a written document embraces all of the terms, conditions, and intentions of the parties who enter into the contract”), Alison M. Sulentic, *Promises, Promises: Using the Parol Evidence Rule to Manage Extrinsic Evidence in ERISA Litigation*, 3 U. PA. J. LAB. & EMP. L. 1, 27 (2000); No-Waiver (“attempts to preserve a party’s rights and remedies under a contract if that party fails” to exercise them “in response to a breach of contract”), Alexandra P. Everhart Sickler, *Recent Developments in North Dakota Contract Law*, 92 N.D. L. REV. 19, 37 (2016); Severability (the common law doctrine that “where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest”), *Marathon Entertainment, Inc. v. Blasi*, 42 Cal. 4th 974, 991 (2008); Time is of the Essence (highlights “the requirement for timely performance of contractual obligations.” In a contract, “one party may make a promise expressly conditional on the exact performance of any agreed term, including that performance shall occur on a specified day.” If contracting parties “provide that time is of the essence...they effectively agree that...timely performance is in effect an express condition precedent” to the other side’s performance), Lori D. Johnson, *Say the Magic Word: A Rhetorical Analysis of Contract Drafting Choices*, 65 SYRACUSE L. REV. 451, 469-470 (2015); and Warranties (“a seller’s affirmation[s] or promise[s] relating to goods being sold” and are “part of the basis of the bargain between the seller and the buyer”), Thomas J. Holdych & Bruce D. Mann, *The Basis of the Bargain Requirement: A Market and Economic Based Analysis of Express Warranties – Getting What You Pay For and Paying for What You Get*, 45 DEPAUL L. REV. 781, 782 (1996). While not typically a standard clause, the author also discusses Most Favored Nation (a contract provision “that allows the buyer to receive the benefit of any better payment rate, term or condition that the seller gives another provider for the same service”), *Wisconsin v. Kenosha Hosp., Civil Action No. 96-C-1459*, 1996 U.S. Dist. LEXIS 20215, 21 (E.D. Wis. Dec. 31, 1996).

<sup>45</sup> Examples of Shareholder Agreement clauses include Anti-Dilution (a contractual provision which protects a contracting party “in the event of recapitalization” of the underlying stock, “so that the recapitalization would trigger a change to the number of shares that can be acquired upon

**Module III** provides an opportunity for teams to select appropriate clauses by drafting a Shareholder Agreement. This module is the most time consuming exercise in the HADBIA project. Thus, professors teaching a *Legal Environment of Business* or other business law class may instead want to assign **Module III.A**:

**Module III.A**  
**Discussion on Preemptive Rights, Voting Bloc Agreement, and Best Efforts**  
(Alternative to Drafting a Shareholder Agreement)

*Outside of class, find on the internet and read a sample:*

- *Preemptive Rights clause;*
- *Voting Bloc agreement; and*
- *Best Efforts clause.*

*In class, be prepared to critically examine these clauses, and how each benefit Wilt in the HADBIA fact pattern.*

For the more in depth task (**Module III**), teams are given written instructions on how to proceed with the assignment:

In the Shareholder Agreement, identify the job titles and specific skills that Wilt, Kareem, Betty, and Veronica bring to the table. Provide details for each person's capital contribution, equity percentage of the company, shares allotted, and each person's expected time commitment in making this app business a success. Include all relevant clauses.<sup>46</sup>

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exercise of the option, with no change to the value of the option itself"), Miriam R. Albert, *Common Sense for Common Stock Options: Inconsistent Interpretation of Anti-Dilution Provisions in Options and Warrants*, 34 RUTGERS L.J. 321, 322 (2003); Bad Leaver (any person who is not a "good leaver." Bad leavers, upon termination of employment, "receive the lesser of the market value or the amount paid for the shares"), Daum v. Planit Solutions, Inc., 619 F. Supp. 2d 652, 655 (D. Minn. 2009); Best Efforts ("parties may agree to use specific levels of effort when satisfying their responsibilities." Best effort "clauses describe these levels of effort and can apply to a variety of obligations in an equal variety of transactions."), Zachary Miller, *Best Efforts?: Differing Judicial Interpretations of a Familiar Term*, 48 ARIZ. L. REV. 615, 615 (2006); Confidentiality or Non-Disclosure agreements (promises "not to disclose employer confidential information...to prevent unfair competition from the employer's competitors."), Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 627 (1999); Good Leaver ("persons...whose employment ends because of death, disability, or dismissal other than for reasonable cause." Good leavers are "entitled to the market value of his shares on the date of termination"), Daum, 619 F. Supp. at 655; Gross Profit ("revenue received without accounting for expenses"), Paul McDonald & Daniel J. Murphy, *Recovery of Lost Profits Damages: All Is Not Lost*, 24 MAINE B.J. 152, 153 (2009); Net Profit ("calculated by subtracting expenses from revenue"), Mark Anderson, *The Enigma of the Single Entity*, 16 U. PA. J. BUS. L. 497, 528 (2014); Non-Compete ("an agreement between the employer and the employee that prohibits the employee from competing with his employer in a business which is the same as or is similar to his employer's business." Non-compete covenants should be reasonable in "territory, activity, and time restrictions contained" in the agreement), Gary P. Kohn, *A Fresh Look: Lowering the Mortality Rate of Covenants Not to Compete Ancillary to Employment Contracts and to Sale of Business Contracts in Georgia*, 31 EMORY L.J. 635, 651-652 (1982); Non-Disparagement ("aim to prohibit or restrict the consumer's ability to write and post negative reviews or ratings of a product, service, or business, and also purport to give the business the right to sue or fine consumers who" disseminate disparaging information), James J. McGuire, Deanna K. Shullman, & Allison Kirkwood Simpson, *Seeing Stars: Courts and Congress Consider Whether to Knock Out Online Ratings Defamation Claims*, 32 COMM. LAWYER 19, 22 (2016); Non-Solicitation ("prohibit individuals from recruiting others to a competitor's business using information obtained from, and to the detriment of, their former place of employment" and seek to "prohibit employees from soliciting their co-workers for a period of specified years after the employee leaves her or her former employment"), Elizabeth E. Nicholas, *Drafting Enforceable Non-solicitation Agreements in Kentucky*, 95 KY. L.J. 505, 505 (2006/2007); Preemptive Rights ("grants each shareholder the right to purchase, in a new issuance of stock by a corporation, a number of new shares proportionate to the percentage of original stock held by the shareholder." The goal is to preserve "the original stockholder's proportionate voting strength and control"), Lori A. Dawkins, *Shareholders' Preemptive Rights in West Virginia*, 97 W. VA. L. REV. 437, 437-438 (1995); Restrictions on Share Transfer ("allow existing shareholders a measure of control over the identity of the shareholding group" and "may be utilized to maintain an existing pattern of control, or to prevent one or more shareholders from obtaining control by purchase of shares from other shareholders"), Thomas J. Andre, Jr., *Restrictions on the Transfer of Shares: A Search for Public Policy*, 53 TUL. L. REV. 776 (1979); Vesting Clause for Shares ("establish vesting schedules for the exercise of stock options and establishing a 'default' vesting schedule." Most employers allow "employees to exercise only the vested portion of their options"), Denis T. Rice, *Internet Start-ups and the Use of Stock Options*, 18 J. TAX'N INV. 141 (2001); and Voting Bloc or Shareholder Voting agreement ("an agreement among some or all of the shareholders to vote their shares in a specified manner on matters defined in the agreement. Such an agreement permits the shares to be voted as a block." The modern view is that these voting agreements "are valid as long as they comply with applicable statutory criteria and do not constitute vote-buying arrangements."), Douglas K. Moll & Robert A. Ragazzo, CLOSELY HELD CORPORATIONS § 3.02(A)(1) (2017).

<sup>46</sup> For a complete set of instructions, see Appendix B. For a backdrop on topics discussed in class to prepare for the HADBIA project, see Appendix A.

Three of the clauses that teams are expected to draft include: 1) Preemptive Rights for shareholders; 2) Voting Bloc agreement between shareholders; and 3) Best Efforts of the shareholders. A Preemptive Rights clause “grants each shareholder the right to purchase, in a new issuance of stock by a corporation, a number of new shares proportionate to the percentage of original stock held by the shareholder.”<sup>47</sup> The goal is to preserve “the original stockholder’s proportionate voting strength and control.”<sup>48</sup> A Voting Bloc agreement is a contract “among some or all of the shareholders to vote their shares in a specified manner on matters defined in the agreement.”<sup>49</sup> Finally, a Best Efforts clause is used when “parties may agree to use specific levels of effort when satisfying their responsibilities.”<sup>50</sup>

In this Module, students are told that Wilt and Kareem each contributed \$2,000 to seed HADBIA. Then, they need to assume that HADBIA initially issued 3,000 shares of stock:

Wilt	900 shares (30%)
Kareem	900 shares (30%)
Betty	900 shares (30%)
Veronica	<u>300 shares (10%)</u>
Total	3,000 shares

Teams are then asked how each of these clauses would benefit Wilt:

1. Assume that each party to the contract has voting rights up to his or her percentage interest. Explain what a Preemptive Rights clause is, and based on some of the risks you expressed above, how it may benefit Wilt. Include the clause in your agreement.
2. Explain what a Voting Bloc agreement is, and based on some of the risks you expressed above, how it may benefit Wilt to have one with Kareem. Oftentimes, this is a separate contract, but for the convenience of this assignment, include it in the Shareholder Agreement.
3. Explain what a Best Efforts clause is, and how its inclusion in a Shareholder Agreement would benefit Wilt.

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<sup>47</sup> See Shareholders’ Preemptive Rights in West Virginia, *supra* note 45.

<sup>48</sup> *Id.* The following is a sample student team Preemptive Rights clause excerpt from the HADBIA project (on file with the author):

*Preemptive Rights.*

1. If the Company proposes to offer New Securities to any Person, the Company shall, before such offer, deliver to the Shareholders a written offer (the “Company Preemptive Rights Offer”) to issue to the Shareholders such New Securities upon the terms set forth in this Section. The Company Preemptive Rights Offer shall state that the Company proposes to issue New Securities and specify their number and terms (including purchase price). The Company Preemptive Rights Offer shall remain open and irrevocable for a period of sixty (60) days (the “Company Preemptive Rights Period”) from the date of its delivery.
2. Each Shareholder may accept the Company Preemptive Rights Offer by delivering to the Company a notice (the “Subscription Notice”) within the Company Preemptive Rights Period. The Purchase Notice shall state the number (the “Preemptive Rights Acceptance Number”) of New Securities such Shareholder desires to subscribe for. If the sum of all Preemptive Rights Acceptance Numbers equals or exceeds the number of New Securities, the New Securities shall be allocated among Shareholders that delivered a Subscription Notice in accordance with their respective Proportionate Percentage.

<sup>49</sup> See Closely Held Corporations, *supra* note 45. The following is a sample student team discussion of a Voting Bloc agreement from the HADBIA project (on file with the author):

Voting bloc agreements consist of two or more shareholders joining their votes together in the form [of] (*sic*) a written and signed document stating that they will vote based upon preselected terms they believe will benefit them. This is a legally enforceable contract that can be taken into a court of law [if] all parties do not follow the preset terms. These types of contracts can either be set up with a duration or be set in perpetuity. They will also be passed along to the next owner of the shares and they will have to follow the agreement as well. The primary reason for this is to create coalitions between the various shareholders in order to increase the strength of their votes by uniting together.

<sup>50</sup> See Best Efforts?, *supra* note 45. Best efforts “clauses describe these levels of effort and can apply to a variety of obligations in an equal variety of transactions.” *Id.* The following is a sample student team Best Efforts clause from the HADBIA project (on file with the author):

*Best Efforts.*

Each Officer agrees to use all commercially reasonable best efforts to take, or cause to be taken, all action and to do, or cause to be done, all things necessary, proper or advisable under applicable laws and regulations to perform their duties set forth in this Contract. The Officer agrees to devote their time outside their current obligations and/or duties with other companies, businesses, or personal development to the betterment of the Company and its business.

Detailed model answers are contained in Appendix E.

Throughout the semester, the author and students discuss various hypotheticals where certain contract clauses benefit one or more parties to a contract. This Module provides an example of how three such clauses benefit Wilt in the HADBIA business. In section III. D., student teams learn the value of owning intellectual property created for HADBIA, as it contracts with a freelancer to design a company logo.

### ***D. Modules IV & IV.A: Drafting a Work for Hire Agreement for Company to Own Intellectual Property***<sup>51</sup>

In **Module III**, the Shareholder Agreement drafting exercise, it was imperative for students to define intellectual property,<sup>52</sup> and then indicate that any material created by shareholders for HADBIA was wholly owned by the company.<sup>53</sup> Thus, prior to agreeing to Betty and Veronica becoming shareholders, Wilt should conduct due diligence by reviewing contracts that Betty and Veronica signed with current and prior employers, as they will be developing HADBIA's educational content and app respectively. It is equally important for HADBIA to own content developed by non-shareholders for the company. A work-made-for-hire "prepared by an employee within the scope of his or her employment is consequently owned by the employer."<sup>54</sup> If "the creator of the work was an independent contractor, then, absent a work-made-for-hire agreement or an express assignment of the copyright, the creator (not the employer) will be granted the copyright ownership of the work."<sup>55</sup> For that reason, HADBIA needs a Work for Hire agreement for a freelancer to sign, *before* that person designs and creates HADBIA's logo:

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<sup>51</sup> See Appendix F for Modules IV & IV.A.

<sup>52</sup> For a definition of intellectual property, see *supra* note 9. The following is a sample student team clause defining intellectual property in the HADBIA project (on file with the author):

*Intellectual Property.*

Intellectual Property (IP) means any patents, utility models, rights to inventions, copyright and neighboring and related rights, trademarks and service marks, business names and domain names, rights in get-up and trade dress, goodwill and the right to sue for passing off or unfair competition, rights in designs, database rights, rights to use, and protect the confidentiality of, confidential information (including know-how and trade secrets) and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world.

<sup>53</sup> The following is a sample student team clause delineating ownership of intellectual property in the HADBIA project (on file with the author):

*Ownership of Intellectual Property.*

All Intellectual Property (IP) made, developed, conceived, first reduced to practice, fixed in any tangible medium of expression, or created by any Shareholder, Director, Officer, or Employee of the Company, will be the sole and exclusive property, including the entire right, title and interest of the Company given the following:

1. The IP was made, developed, conceived, first reduced to practice, fixed in any tangible medium of expression, or created for the use or benefit of the Company, or otherwise is currently being used and benefitting the business of the Company.

The IP was made, developed, conceived, first reduced to practice, fixed in any tangible medium of expression, or created by a Shareholder, Director, Officer, or Employee of the Company during Company work hours.

3. The IP was made, developed, conceived, first reduced to practice, fixed in any tangible medium of expression, or created by a current Shareholder, Director, Officer, or Employee of the Company, and the IP is necessary for the Company or any Shareholder, Director, Officer, or Employee of the Company to correctly perform their purpose and/or duties.

<sup>54</sup> Ryan Vacca, *Work Made for Hire – Analyzing the Multifactor Balancing Test*, 42 FLA. ST. U. L. REV. 197, 198 (2014).

<sup>55</sup> THE ENTREPRENEUR'S GUIDE TO BUSINESS LAW, *supra* note 40, at 538. An independent contractor is an individual who renders services "free from control or direction over the performance of the service." Scott R. Swier & Molly E. Slaughter, *The Employee/Independent Contractor Dichotomy in South Dakota for Unemployment Compensation and Workers' Compensation Purposes: An Examination and Suggested Analytical Framework*, 43 S.D. L. REV. 56, 60 (1998). Courts look to numerous factors to determine whether a worker is an independent contractor, and the most utilized factors are:

(1) The method of remuneration; (2) The responsibility to provide the necessary tools, materials, and instrumentalities; (3) The right to control the hours of work; (4) The right to hire assistants; (5) The existence of fringe benefits; (6) The right to inspect or control the progress of the work; (7) The right to engage in additional concurrent employment and; (8) The right to terminate.

*Id.* at 89-90.

HADBIA wants to hire a graphic arts college student, Jane, to design and create its logo. Jane will sketch up to five (5) designs on *spec*.<sup>56</sup> If HADBIA approves one design, then it will pay Jane \$200 to create a logo, with HADBIA given three (3) rounds of changes. Thereafter, HADBIA will pay Jane \$100 for each additional significant logo design change.

In class, students learn about intellectual property, including patents, trademarks, copyrights, and trade secrets.<sup>57</sup> In addition, they analyze intellectual property contract clauses, such as Cross-License, Exclusive License, and Non-Exclusive License.<sup>58</sup> Special attention is given to a clause conferring ownership of intellectual property. Within that clause, the freelancer acknowledges that if a court concludes that the purchased content was not a work for hire, the freelancer agrees to transfer ownership of the intellectual property to the company. Such a clause passes “title, control, or possession” from a transferor to a transferee.<sup>59</sup> In particular, the author highlights the ramifications of a business not owning the intellectual property of its company name or logo.<sup>60</sup>

In **Module IV**, students are directed to draft a Work for Hire agreement, which addresses HADBIA’s intellectual property ownership,<sup>61</sup> and includes payment terms and all relevant boilerplate clauses. At first, this assignment seemed like a daunting task to many students. However, the author explained that lawyers typically do not *reinvent the wheel*, and routinely use forms which they carefully tailor to clients’ needs. When told they may use any free online forms for their project, they then believed that this portion of the project was manageable.

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<sup>56</sup> “Spec work (short for speculative) is any job for which the client expects to see examples or a finished product before agreeing to pay a fee.” Eric Miller, *What is Spec Work and Should Designers Agree to It?*, LIFEWIRE (Oct. 26, 2018, updated Nov. 21, 2019), <https://www.lifewire.com/what-is-spec-work-1697435>.

<sup>57</sup> See *supra* note 9. See also Joy R. Butler, *THE CYBER CITIZEN’S GUIDE THROUGH THE LEGAL JUNGLE* (Sashay Comm. 2010).

<sup>58</sup> Examples of intellectual property clauses include Cross-License (“the mutual sharing of patents between patent holders (generally companies) that grant each the right to practice the other’s patents.” Cross-licenses “can vary in scope...and contain geographical restrictions.” They “may involve the...use of as few as two patents (one from each of the parties) to a specified number of patents”), INTELLECTUAL PROPERTY LICENSING: FORMS AND ANALYSIS § 6.02A; Exclusive License (“grant[s] to the licensee the exclusive right – superior even to copyright owners’ rights – to use the copyrighted material in a manner as specified by the license agreement.” “An exclusive licensee of any of the rights comprised in the copyright...cannot be liable for infringing the copyright rights conveyed to it”), *Davis v. Blige*, 505 F.3d 90, 99-100 (2d Cir. 2007); and Non-Exclusive License (“permit[s] licensees to use the copyrighted material and may be granted to multiple licensees.” “A copyright owner who grants a nonexclusive license to use the copyrighted material waives his right to sue the licensee for copyright infringement”). *Id.* at 99-100.

<sup>59</sup> Brett T. Cooke, *Intellectual Property Licenses and Assignments Under Chapter 11 of the Bankruptcy Code: A Brief Survey of the Nature of Property Rights Conferred and Implications Due to Reorganization*, 15 TEX. INTELL. PROP. L.J. 213, 216, 221 (2007). Transfer can occur between parties “by the contractual granting of rights” or by “an outright transfer of ownership.” *Id.* The following is sample transfer of intellectual property language within a Work for Hire agreement: “If for any reason the results and proceeds of Artist’s services hereunder are determined at any time not to be a work made for hire, Artist hereby irrevocably transfers and assigns to Filmmaker all right, title and interest therein, including all copyrights, as well as all renewals and extensions thereto.” *Sample Work-Made-For-Hire Agreement*, VOLUNTEER LAWYERS AND ACCOUNTANTS FOR THE ARTS, <https://vlaa.org/wp-content/uploads/2015/05/Sample-Work-For-Hire-Agreement.pdf> (last visited Nov. 13, 2018).

<sup>60</sup> For example, Hooters of America, LLC, originally licensed the *Hooters* trademark from the restaurant founders, and eventually had to pay \$60 million to own the intellectual property outright. G.G. Rigsby, *Hooters Trademark Sold for \$60 Million*, TAMPA BAY BUS. J. (Apr. 9, 2001, 12:00 AM), <https://www.bizjournals.com/tampabay/stories/2001/04/09/story1.html>.

<sup>61</sup> The following is a sample student team Transfer of Intellectual Property clause from the HADBIA project (on file with the author):

*Transfer/Assignment of Intellectual Property.*

Assignor hereby perpetually, irrevocably, and unconditionally assigns, transfers, and conveys to Assignee and its successors and assigns, all of Assignor’s right, title, and interest in and to the Assigned Property. Assignor further perpetually, irrevocably, and unconditionally assigns, transfers, and conveys to Assignee and its successors and assigns all claims for past, present and future infringement or misappropriation of the Intellectual Property Rights included in the Assigned Property, including all rights to sue for and to receive and recover all profits and damages accruing from an infringement misappropriation prior to the Effective Date as well as the right to grant releases for past infringements.

**Module IV** is a time consuming exercise in the HADBIA project. Thus, professors teaching a *Legal Environment of Business* or other business law class who do not wish to assign a writing project may instead use **Module IV.A**:

**Module IV.A**  
**Discussion on Work for Hire Agreement with a Transfer of Intellectual Property Clause**  
(Alternative to Drafting Agreement)

*Outside of class, find and read a sample Work for Hire agreement (containing a Transfer of Intellectual Property clause) on the internet. In class, be prepared to critically examine the contract and clause, and how they benefit HADBIA in the fact pattern.*

After students complete **Module IV or Module IV.A**, it is vital to discuss HADBIA's need to secure a trademark<sup>62</sup> for the logo. Beforehand, the company should conduct a trademark search<sup>63</sup> to ensure that the logo does not infringe logo artwork of an existing business. One benefit of a federal trademark is that a company can secure legal protection for a name or logo, prior to conducting business.<sup>64</sup> The same may not be true on the state level.<sup>65</sup> In addition, it is wise to copyright company logos.<sup>66</sup> Without giving legal advice in class, students are instructed that they need to identify the appropriate copyright form,<sup>67</sup> and carefully read its instructions.<sup>68</sup>

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<sup>62</sup> "Effective branding," including trademark protection, "improves company recognition and develops goodwill that can ultimately translate into financial value." Walter K. Coronel & Kelly K. Suzuka, *Branding: The Nuts and Bolts of Creating and Protecting a Company Logo*, 20 Haw. B.J. 4 (Aug. 2016). A trademarked logo is "a registered design that identifies the source of goods or services." *Id.*

<sup>63</sup> For information on trademark searches, see *supra* notes 25, 26 and 37.

<sup>64</sup> "If you have not used your mark in commerce yet, but have a good faith intention to do so in the future, you can file an application to register your trademark or service mark under an intent-to-use (ITU) filing basis." *Trademark applications – intent-to-use (ITU) basis*, UNITED STATES PATENT AND TRADEMARK OFFICE, <https://www.uspto.gov/trademarks-application-process/filing-online/intent-use-itu-applications> (last visited Nov. 13, 2018). The application is filed "on the grounds that you intend to use it within six months of the date the mark is approved for registration by the USPTO." *Should You File an Intent-to-Use Trademark Application?*, NOLO.COM, <https://www.nolo.com/legal-encyclopedia/should-you-file-intent-use-trademark-application.html> (last visited Nov. 13, 2018).

<sup>65</sup> In Georgia, the "application must be accompanied by three (3) specimens of the mark *as currently used*." *Trademark and Service Mark Applications and Forms*, GEORGIA SECRETARY OF STATE, [http://sos.ga.gov/index.php/corporations/trademark\\_and\\_service\\_mark\\_applications\\_and\\_forms](http://sos.ga.gov/index.php/corporations/trademark_and_service_mark_applications_and_forms) (last visited Nov. 13, 2018) (*emphasis supplied*).

<sup>66</sup> "[C]opyright protection may be available for logo artwork that contains sufficient authorship." *What Does Copyright Protect?*, UNITED STATES COPYRIGHT OFFICE, <https://www.copyright.gov/help/faq/faq-protect.html#title> (last visited Nov. 13, 2018). Copyrighting a company logo is imperative in "today's globally connected and instant-media world" to allow companies to "protect their intellectual property rights" and acquire rights to their brand's image. *Branding: The Nuts and Bolts*, *supra* note 62, at 4. A copyright applies to a company logo as "a work of art fixed in a tangible medium" which the company should acquire the rights to. *Id.*

<sup>67</sup> For an example of a copyright registration form, see *Form VA*, UNITED STATES COPYRIGHT OFFICE, <https://www.copyright.gov/forms/formva.pdf> (last visited Nov. 13, 2018).

<sup>68</sup> The VA Form instructions include:

Name of Author: The fullest form of the author's name should be given. Unless the work was 'made for hire,' the individual who actually created the work is its 'author.' In the case of a work made for hire, the statute provides that 'the employer or other person for whom the work was prepared is considered the author.' What Is a 'Work Made for Hire'? A 'work made for hire' is defined as: (1) 'a work prepared by an employee within the scope of his or her employment'; or (2) 'a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.' If you have checked 'Yes' to indicate that the work was 'made for hire,' you must give the full legal name of the employer (or other person for whom the work was prepared). You may also include the name of the employee along with the name of the employer (for example: 'Elster Publishing Co., employer for hire of John Ferguson').

*Id.*

## IV. Assessment and Peer Evaluation

Students received a grading rubric<sup>69</sup> before beginning the written portion of the project. With different weights, they are graded on:

- Following project instructions;
- Organization;
- Writing quality; and
- Research and content.

In addition, the Instructor provided overall comments for the students.

After receiving a project grade and feedback, each team was required to present its paper in class, and lead a discussion among fellow students. Though many students dread getting in front of the classroom,<sup>70</sup> this task is an active learning opportunity.<sup>71</sup> However, the author does not grade the in-class presentation<sup>72</sup>—just the quality of the paper—for which each student in a group receives the same grade.

If a teammate does not do his or her part on the project, students may express their concerns to the Instructor on an anonymous Peer Evaluation.<sup>73</sup> Every student turns in that form directly to the Instructor, separate from the team project. The evaluation first assesses personal accountability, by asking: On a 1-10 scale (10 being 100% effort), rate the quality and extent of *your* contribution to the project. Then, the form asks students to rate each fellow student, with the following questions:

Rate this team member on the following items (5 is highest, 3 is average and 1 is lowest).

- Did fair share of the work.	5	4	3	2	1
- Cooperated with other team members and was willing to compromise.	5	4	3	2	1
- Completed tasks on schedule.	5	4	3	2	1
- I would work with this person in the future.	5	4	3	2	1

On a 1-10 scale (with 10 being 100% effort)

- rate the quality and extent of this team member's contribution \_\_\_\_\_

The author does not factor these student responses into project grades. However, if a student receives a very low rating from two or more peers, the author will meet with that student, discuss how the project went, and if the student did not participate in a meaningful way, the instructor may lower that person's grade, applying his discretion.

After their presentations, the instructor may ask students to reflect on where their legal knowledge was when the semester began, where they are towards the end, and their overall experience with the *Entrepreneurs with No Garage* project. In past reflections, students cited their main takeaways, which ranged from learning to be more cautious on who they do business with, to the importance of putting things in writing with business partners. The author appreciated the feedback, including a suggestion to change the project for use with an actual business that the student teams may be developing. Such a revision to the

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<sup>69</sup> See Appendix G for the Grading Rubric.

<sup>70</sup> Students who want to abolish “in-class presentations argue that forcing students with anxiety to present in front of their peers is not only unfair because they are bound to underperform and receive a lower grade, but it can also cause long-term stress and harm.” Taylor Lorenz, *Teens Are Protesting In-Class Presentations*, THE ATLANTIC (Sept. 12, 2018), <https://www.theatlantic.com/education/archive/2018/09/teens-think-they-shouldnt-have-to-speak-in-front-of-the-class/570061/>.

<sup>71</sup> In-class presentations can build an understanding of material. *Id.*, citing Lori Ziemba, *Increasing Student Confidence and Knowledge through Student Presentations*, UNIVERSITY OF NEBRASKA-LINCOLN SUMMATIVE PROJECTS FOR MA DEGREE (2007), <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1038&context=mathmidsummative> (last visited Nov. 13, 2018).

<sup>72</sup> The author strives to reduce students' anxiety by not tying a grade to their oral presentations in class.

<sup>73</sup> See Appendix H.

modules would give the exercise a more practical application. However, if an instructor makes constructive comments for that business, these remarks might be construed by some as the unauthorized practice of law.

Most students cannot afford legal counsel, or even a garage to house their company. Once their businesses become successful, hopefully they can afford attorney assistance. Student entrepreneurs should always bear in mind: “The more that’s at stake—in money and risk—the more you’re likely to need a lawyer’s help.”<sup>74</sup>

## **IV. Conclusion**

Student entrepreneurs need guidance on legal issues prior to starting a business. Most do not attend a university with law school clinics offering free advice. Thus, Legal Studies professors are encouraged to turn their classrooms into laboratories, where students can experiment with real world law scenarios, and discover how to protect their current or future business interests.

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<sup>74</sup> The American Bar Association, *LEGAL GUIDE FOR SMALL BUSINESS* 2d Ed. 40 (Random House 2010). “Early help is better than late; after you’ve signed a contract your lawyer might not be able to do much for you.” *Id.*

## APPENDIX A Technology Law for Entrepreneurs – Backdrop for Group Project

This semester, we discussed the importance of tailoring contracts to your benefit – among your own business partners and with outside contracting parties – including when to use certain clauses in your contracts. In addition, we learned about the value of protecting a company's intellectual property (Copyrights, Patents, Trademarks, and Trade Secrets).

Because this is a law course, I am less concerned with your customer and market verification, business model, and financial analysis. Those topics are taught in other courses. In our class, we worked on getting your legal house in order, prior to and while conducting business, including:

Conducting a proper trademark search and building a domain name portfolio;

Writing a Shareholder Agreement; and

Drafting a Work for Hire Agreement for Freelancers/Independent Contractors, with an ownership of intellectual property clause.

We learned about the above information. That's the good news.

The bad news:

Your professor is not permitted to give you legal advice.

In a perfect world, each partner would have a separate attorney review a Shareholder Agreement, and advocate for that partner's interests. Attorney fees can be tens of thousands of dollars for this and other start-up tasks.

You are an Entrepreneur with No Garage, and have only **\$500** to spend on incorporating a business and accomplishing as much as you are being asked to do for this assignment.

Before beginning the project, recall some of the legal questions we asked and answered this semester, if we started a business to create and build an app:

*Is your app unique?*

- *Can its functions be replicated by others?*

*Is your app legally protectable?*

- *Functionality*
- *Content*

*What is your Business Name and/or App Name?*

- *Have you secured domains names and conducted a trademark search PRIOR TO incorporating?*

*Are you an idea person, a techie, or both?*

- *Do you need partners to succeed?*
  - *Are the partner contributions vital to the success of the business?*
    - *Put a different way:*
      - *Do partners have duplicative skills?*
      - *Can you save equity shares by instead hiring independent contractors?*
  - *If you have partners, do you have a written agreement?*
    - *Do partners actually own their ideas being used by the business (or if working for another company, does the employer?)*
    - *Are you putting in the same amount of money?*
      - *Do some bring sweat equity instead of capital?*
        - *Are the roles well defined?*
        - *Who has voting rights?*
        - *Are time commitments defined?*

*Do you need to hire independent contractors to design and create a logo or web page?*

- *What contracts MUST you have those people sign?*

*Who will sign confidentiality agreements, and who may say no?*

**APPENDIX B**  
**Group Project Facts for Hypothetical Company**  
**Hospitals and Doctors Best Insurance App, Inc. (HADBIA)**

**Introduction**

This assignment is NOT an *A-Z How to Take Care of All Legal Issues* before going into business. Rather, it focuses on the most common mistakes that business people make (in the instructor's opinion) in the formation of a business. By anticipating and addressing the many issues involved (see App legal questions in Appendix A), and clearly defining partner roles and Intellectual Property ownership matters in writing, business people can avoid legal disputes down the road.

**Instructions**

1. You will be graded on how well you organize your thoughts; how well you follow the instructions; and spelling/grammar/transition/organization of the paper.
2. Each team will present their finding in class. (Details given in class).
3. Everyone must fill out a Peer Evaluation Form, and hand it in separate from the team project.
4. Double-spaced (unless otherwise indicated), one-inch margins, 12-point font – Times New Roman or Arial. Feel free to print on front/back of page (preferred). Type each team member name at the top of the paper.

**Fact Pattern**

**You are Wilt in this scenario.**

Wilt and Kareem are best friends.

Kareem is married to Betty.

Betty's friend Veronica is a savvy technical person.

Wilt and Kareem do not know Veronica well, but both trust Betty's judgment.

Wilt and Kareem have long discussed going into business together. For many months, they talked about building an app for hospitals and medical doctors to streamline costs, when submitting claims to patients' insurance companies. The idea was conceived by Betty, who processes medical claims for an insurance company.

Wilt, Kareem, Betty, and Veronica are college juniors with full-time jobs, but have weekends and some nights available to meet and work on the new business.

Betty signed several contracts with her employer when she started working. She does not have copies, and does not remember what they cover.

Veronica signed several contracts with her employer when she started working. She does not have copies, and does not remember what they cover.

Neither Wilt nor Kareem signed employment contracts.

Skills

Wilt has excellent marketing skills, a job function he performs in the retail industry.

Kareem has excellent sales skills, a job function he performs in the retail industry.

Betty has insurance industry knowledge, and wrote a company handbook on processing efficient insurance claims. The handbook contains Betty's original ideas, a few of which she envisions that HADBIA will use for the app.

Veronica has an engineering background.

Duties

Wilt and Kareem will run the day-to-day business, with Wilt focusing on marketing, and Kareem focusing on sales.

Betty will write the app content, continually update it, and leverage her contacts in the medical and insurance industries for the app business.

Veronica will build the app and its updates.

### Contribution and Ownership

Wilt and Kareem each will contribute \$2,000 to start the business. Kareem's parents agreed to lend him \$2,000 to fund the business. His parents expressly told him that this is the only business funding they will provide. Wilt has \$15,000 in the bank.

Like Kareem, Betty and Veronica have very little money. They each will contribute \$0 to start the business. In about one year, Wilt and Kareem project that the business will need another \$4,000 to operate effectively. Wilt, Kareem, and Betty each will own 30% of the company, and Veronica will own 10% of the company.

## APPENDIX C

### Module I. Determining Legal Start-up Costs

Wilt and Kareem agree that at the outset, the business should only commit \$500 to spend on legal protection and business compliance. Assume that the process of incorporating HADBIA costs \$100. Based on what we discussed in class, how will you allocate the remaining \$400? Be specific – list the items and the actual costs of doing so in our state. **(1 page)**

## APPENDIX D

### Module II. Assessing an Individual/Founder's Risk Questions for Wilt to consider in Shareholder Agreement (with Model Responses)

#### **1. What are the risks of including Kareem in this business venture? Explain.**

In class, the author spends time discussing the importance of trust in any business relationship. With respect to Kareem, Wilt and he are best friends, so there is likely a mutual level of comfort and trust. In addition, their business skills may complement each other, as Wilt has expertise in marketing, and Kareem in sales. While Kareem and Wilt contributed equal seed capital to HADBIA, the facts indicate that the former will have liquidity issues, when the business needs more money. This may be a red flag for Wilt, which is addressed with preemptory rights in Section III. C.

#### **2. What are the risks of including Betty in this business venture? Explain.**

Betty is the educational content provider for HADBIA. The initial questions Wilt needs to ask, are if the content is original to Betty, and whether her employer has any rights to the material. Betty signed an employment contract, but does not remember what it says, and she does not have a copy. Further, though Wilt has a close relationship with Kareem, it is unclear whether Wilt's friendship with his wife, Betty, is close. To complicate matters, Betty has an equal share allotment with Wilt and Kareem (30% each), and Wilt should be wary that Kareem and Betty could decide to vote together on important business decisions, since combined they have a majority share in the company. This is a red flag for Wilt, which is addressed with a Voting Bloc agreement in Section III. C.

#### **3. What are the risks of including Veronica in this business venture? Explain.**

The facts state that Wilt and Kareem do not know Veronica well, but both trust Betty's judgment. While all shareholders (including Veronica) will sign contracts, such as a Non-Disclosure agreement,<sup>75</sup> Wilt may want to be careful about bringing in a business partner that he does not know. As in Betty's situation, Veronica signed an employment contract, but does not remember what it says, and she does not have a copy. Finally, Wilt should discuss with Kareem and Betty whether it is prudent to give Veronica 10% of the company, or whether they should consider hiring an independent contractor,<sup>76</sup> and divide Veronica's share among Wilt, Kareem, and Betty. A Work for Hire agreement for independent contractors/freelancers is addressed in Section III. D.

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<sup>75</sup> See *supra* note 45.

<sup>76</sup> See *supra* note 55.

**4. Betty and Veronica are creating content for the business. Include in your Shareholder Agreement that HADBIA will own all intellectual property. For the purposes of this question only, assume that Betty insists on owning her content, and granting a license to HADBIA. Explain all risks that Wilt needs to consider under this arrangement.**

This issue should be a sticking point for Wilt. HADBIA's business is predicated on the unique content that Betty is creating. By merely licensing<sup>77</sup> the work from Betty, not only could she license the content to competitors, she likely could terminate the agreement per the negotiated terms. Thus, if Betty insists on owning the app's intellectual property, this should be a non-negotiable issue for Wilt. HADBIA needs to own the work, in order to have a sustainable business model.

## APPENDIX E

### Module III. Drafting a Shareholder Agreement (for Wilt's Benefit)

You may use any free online form and tailor it to our hypothetical facts. (No page length restriction: single-spaced/double-spaced between clauses).

Now that you have answered the above questions, write a Shareholder Agreement for HADBIA, which best protects Wilt's interests in the company. Identify the job titles and specific skills that Wilt, Kareem, Betty, and Veronica bring to the table. Provide details for each person's capital contribution, equity percentage of the company, shares allotted, and each person's expected time commitment, in making this app business a success. Include all needed boilerplate clauses, and include the following clauses: Voting Bloc, Preemptive Rights, a statement of original work and Indemnification in the event of a dispute, HADBIA's Intellectual Property ownership of content created for the company, and Confidentiality. In addition, address what happens to equity interests if a partner leaves the business. Include Non-Solicitation and Non-Competition clauses as well. Finally, provide language on procedures for the dissolution of the business.

### Module III.A

#### Discussion on Preemptive Rights, Voting Bloc Agreement, and Best Efforts Alternative to Drafting a Shareholder Agreement (with Model Responses)

*Outside of class, find on the internet and read a sample:*

- *Preemptive Rights clause;*
- *Voting Bloc agreement; and*
- *Best Efforts clause.*

*In class, be prepared to critically examine these clauses, and how each benefit Wilt in the HADBIA fact pattern.*

**1. Assume that each party to the contract has voting rights up to his or her percentage interest. Explain what a Preemptive Rights clause is, and based on some of the risks you expressed above, how it may benefit Wilt. Include the clause in your agreement.**

A Preemptive Rights clause "grants each shareholder the right to purchase, in a new issuance of stock by a corporation, a number of new shares proportionate to the percentage of original stock held by the shareholder."<sup>78</sup> The goal is to preserve "the original stockholder's proportionate voting strength and control."<sup>79</sup> Students are told that Wilt and Kareem each contributed \$2,000 to seed HADBIA. Then, they need to assume that HADBIA initially issued 3,000 shares of stock:

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<sup>77</sup> See *supra* notes 58-59.

<sup>78</sup> See Shareholders' Preemptive Rights in West Virginia, *supra* note 45.

<sup>79</sup> *Id.* To read a sample student team Preemptive Rights clause, see *supra* note 48.

Wilt	900 shares (30%)
Kareem	900 shares (30%)
Betty	900 shares (30%)
Veronica	<u>300 shares (10%)</u>
Total	3,000 shares

If HADBIA wants to raise more money in the future, the fact pattern states that Wilt is the only founding shareholder liquid enough to do so. Assume that one year later, the shareholders vote to issue 1,800 new shares, in order to raise \$4,000. If Wilt takes on this obligation, and a majority of shareholders do not object, then the percentage interest in the company would change as follows:

Wilt	2,700 shares (56.25%)
Kareem	900 shares (18.75%)
Betty	900 shares (18.75%)
Veronica	<u>300 shares (6.25%)</u>
Total	4,800 shares

In this scenario, Wilt would have a majority interest in the company, something that Kareem, Betty, and possibly Veronica may object to. With 70% of the votes, they could collectively block Wilt from acquiring all 1,800 shares.

Now assume a different scenario for Wilt: Kareem and Betty agree that HADBIA needs to issue 1,800 new shares for \$4,000, but they want their friend, Camilla, to purchase these shares. Assume that Wilt does not know Camilla, and is uncomfortable with this suggestion. However, with 60% of the company, Kareem (30%) and Betty (30%) could vote to do so. In that scenario, the composition of shares and percentages would be:

Wilt	900 shares (18.75%)
Kareem	900 shares (18.75%)
Betty	900 shares (18.75%)
Veronica	300 shares (6.25%)
Camilla	<u>1,800 shares (37.5%)</u>
Total	4,800 shares

Wilt's percentage of the company was reduced from an initial 30% equity interest, to 18.75%. Clearly, this share distribution is not in Wilt's best interests.

If a Preemptive Rights clause is included in the Shareholder Agreement, Wilt can insist on purchasing shares up to his percentage interest (30%). He will not be able to block Camilla from purchasing the remaining shares, if Kareem and Betty choose to vote that way. If so, the division of newly issued stock would be 1,260 shares for Camilla, and an additional 540 shares for Wilt:

Wilt	1,440 shares (30%)
Kareem	900 shares (18.75%)
Betty	900 shares (18.75%)
Veronica	300 shares (6.25%)
Camilla	<u>1,260 shares (26.25%)</u>
Total	4,800 shares

**2. Explain what a Voting Bloc agreement is, and based on some of the risks you expressed above, how it may benefit Wilt to have one with Kareem. Oftentimes, this is a separate contract, but for the convenience of this assignment, include it in the Shareholder Agreement.**

A Voting Bloc agreement is a contract "among some or all of the shareholders to vote their shares in a specified manner on matters defined in the agreement."<sup>80</sup>

<sup>80</sup> See Closely Held Corporations, *supra* note 45. To read a sample student team discussion of a Voting Bloc agreement, see *supra* note 49.

Wilt maintained his 30% interest with Preemptive Rights. However, he has bigger issues to face. Not only did Kareem and Betty use their majority share for a major company decision, there is a new person with voting rights in the company, whom Wilt does not even know. That is why Wilt should insist, at the formation of the business, to have a Voting Bloc agreement with Kareem.

The fact pattern states that Wilt and Kareem are best friends, and will be running the day-to-day operation of the business. Thus, it is in Wilt's best interest that they are on the same page, and vote together on important HADBIA decisions. With 60% of the company, they possess a majority of the shares in which to do so. A Voting Bloc agreement can solve most issues in this scenario for Wilt.

### **3. Explain what a Best Efforts Clause is, and how its inclusion in a Shareholder Agreement would benefit Wilt.**

A Best Efforts clause is used when businesses want to ensure that people live up to expected levels of responsibility.<sup>81</sup>

Each initial shareholder is a full-time student with day jobs, and likely very little free time. Wilt may wish to include a Best Efforts clause to ensure that fellow shareholders are adequately performing their duties for the business.<sup>82</sup> Wilt, Kareem, Betty, and Veronica need to have their roles clearly delineated in writing, and agree that they will make their best efforts to work hard in their respective company roles.

## **APPENDIX F**

### **Module IV. Drafting a Work for Hire Agreement Freelancer Designing and Creating HADBIA Logo**

You may use any free online form and tailor it to our hypothetical facts. (No page length restriction: single-spaced/double-spaced between clauses).

HADBIA wants to hire a graphic arts college student, Jane, to design and create its logo. Jane will sketch up to five (5) designs on spec. If HADBIA approves one design, then it will pay Jane \$200 to create a logo, with HADBIA given three (3) rounds of changes. Thereafter, HADBIA will pay Jane \$100 for each additional significant logo design change.

Draft a Work for Hire Agreement with an ownership of intellectual property clause.

Remember from class that we discussed the trademark and copyright implications of hiring a freelancer without a written contract. Draft an agreement which includes the terms, all boilerplate clauses (including a statement of original work and Indemnification in the event of a dispute), and language where the independent contractor agrees to transfer all Intellectual Property to HADBIA, in the event the artwork is not determined to be a work for hire.

## **Module IV.A**

### **Discussion on Work for Hire Agreement with a Transfer of Intellectual Property Clause Alternative to Drafting Agreement**

Outside of class, find and read a sample Work for Hire agreement (containing a Transfer of Intellectual Property clause) on the internet. In class, be prepared to critically examine the contract and clause, and how they benefit HADBIA in the fact pattern.

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<sup>81</sup> For a definition of Best Efforts, see Best Efforts?, *supra* note 45. Best efforts "clauses describe these levels of effort and can apply to a variety of obligations in an equal variety of transactions." *Id.*

<sup>82</sup> To read a sample student team Best Efforts clause, see *supra* note 50.

**APPENDIX G**  
**Grading Rubric**

	Needs Improvement	Good	Excellent
<b>Following Project Instructions</b>			
Answered all questions presented			
Drafted Shareholder Agreement and Freelancer Contract			
<b>Organization</b>			
Professional Format			
Clear Headings			
“Readability”			
<b>Writing Quality</b>			
Correct and appropriate use of grammar, spelling, punctuation, etc.			
Careful proofreading with no typographical errors, omissions, and/or additions			
<b>Research and Content</b>			
Quality of Responses to Questions			
Quality of Contracts Drafted			
<b>Overall Comments</b>			

	Possible Points	Actual Earned
<b>Instructions</b>	<b>10</b>	
<b>Organization</b>	<b>15</b>	
<b>Writing</b>	<b>25</b>	
<b>Content</b>	<b>50</b>	
	<b>Total</b>	

APPENDIX H

Team Project Evaluation Form – Everyone fill out a form and hand in separately

Your Name \_\_\_\_\_

On a 1-10 scale (10 being 100% effort), rate the quality and extent of your contribution to the project \_\_\_\_\_

Complete this form for each team member below. Responses will be kept confidential.

1. Name of team member being evaluated \_\_\_\_\_

Rate this team member on the following items (5 is highest, 3 is average and 1 is lowest).

- Did fair share of the work.	5	4	3	2	1
- Cooperated with other team members and was willing to compromise.	5	4	3	2	1
- Completed tasks on schedule.	5	4	3	2	1
- I would work with this person in the future.	5	4	3	2	1

On a 1-10 scale (with 10 being 100% effort),

- rate the quality and extent of this team member’s contribution \_\_\_\_\_

2. Name of team member being evaluated \_\_\_\_\_

Rate this team member on the following items (5 is highest, 3 is average and 1 is lowest).

- Did fair share of the work.	5	4	3	2	1
- Cooperated with other team members and was willing to compromise.	5	4	3	2	1
- Completed tasks on schedule.	5	4	3	2	1
- I would work with this person in the future.	5	4	3	2	1

On a 1-10 scale (with 10 being 100% effort),

- rate the quality and extent of this team member’s contribution \_\_\_\_\_

3. Name of team member being evaluated \_\_\_\_\_

Rate this team member on the following items (5 is highest, 3 is average and 1 is lowest).

- Did fair share of the work.	5	4	3	2	1
- Cooperated with other team members and was willing to compromise.	5	4	3	2	1
- Completed tasks on schedule.	5	4	3	2	1
- I would work with this person in the future.	5	4	3	2	1

On a 1-10 scale (with 10 being 100% effort),

- rate the quality and extent of this team member’s contribution \_\_\_\_\_

Supplemental Comments, if any: