

# Social Entrepreneurs and Intellectual Property Management

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## **I. Background**

Intellectual property assets are strategically used by industry to generate revenue, expand business opportunities, recruit and retain talent, attract investors, and to secure a market niche. In the United States (U.S.), which is the legal framework used for this survey research, four primary forms of legally defensible intellectual property rights are granted: patents, trademark, copyright, and trade secret. Patents and trademarks are granted and administered through the U.S. Patent and Trademark Office. Patents are available for new, useful and non-obvious processes or products and must be vetted against existing patents and registered to be valid (Clowney, 2011). A trademark is defined as "...a word, symbol, or other signifier used to distinguish a good or service produced by one firm from the goods or services of other firms" (Landes and Posner, 2003, p. 166) and must be registered to be enforceable. Copyright is the protection of facts or ideas in a work of original authorship, such as books, training manuals, computer programs, databases, and various forms of art, once they are in any tangible form of expression (Akin, et al., 2007). Copyright can be registered, but need not be to be legally protected; rather it simply needs to be marked as copyrighted material. Trade secret, by contrast, is not registered or disclosed publicly as it "...is an item of information—commonly a customer list, business plan, recipe, or manufacturing process—that has commercial value and that the firm possessing the information want to conceal from its competitors in order to prevent their duplicating it." (Landes and Posner, 2003, p. 354)

Innovation in industry is often marked by the creation of some form of intellectual property (IP). Historically, firms have chosen from defensive, offensive, and/or open strategies to manage and leverage their IP assets (Fisher and Oberholzer-Gee, 2013). Increasingly firms employ a mix of strategies to optimize business objectives (Henkel, Baldwin and Shih, 2012;

Phelps and Kline, 2009; Roijakkers, et al., 2013; World Intellectual Property Office, 2011, p. 109-136). Firms are increasingly acknowledging that IP is a primary source of a firm's value and represents a large portion of the market capitalization in publicly traded firms (Johnson, Neave and Pazderka, 2001; Phelps and Kline, 2009, p. 137). From a governance perspective, the industrial firm's executives have a vested interest in the increasing pool of IP assets and the associated or realized value of the IP asset pool. External stakeholders, such as shareholders, institutional investors, collaborating firms, complementary firms, or customers, value intellectual property assets, too, and it is expressed through financial and/or contractual transactions with the firm.

Social entrepreneurship and social enterprise (SE), defined as innovation in the social sector, is also accompanied by the creation of intellectual property assets. Does it therefore follow that the executives and stakeholders of SEs recognize and value the IP in these organizations, too? To the best of our knowledge, no research has been conducted or published on the management of intellectual property by SE to generate revenue, expand organizational opportunities, recruit and retain talent, attract investors (donors), or secure their niche, as is done by industry. Understanding these uses of intellectual property in SE is important to gaining a richer understanding of how SEs operate, how their governance teams think about and manage the SE's innovations for addressing social problems, and how they communicate or leverage the value of their IP with stakeholders.

## **II. Social Innovation Context**

The social sector is composed of organizations and individuals that work on solving social problems, but are neither industry nor government, though they may work with industry and government to solve identified problems. SEs, for the purposes of this survey research, were

limited to social sector organizations classified by and registered with the U.S. Internal Revenue Service (IRS) as 501(c)3 organizations and vetted by the Social Impact Exchange (2014) for meeting specific impact, growth, and evidence benchmarks. The 501(c)3 classification refers to nonprofit organizations in the U.S. that meet standards for public benefit and are granted exemption from federal income tax, except as it applies to unrelated business income. The 501(c)3 status also confers a second tax advantage that is limited to the 501(c)3 designation: donors to these organizations may claim a deduction on income taxes if they itemize their federal tax filings with the IRS.

The goal of this survey research is to gather basic information from social entrepreneurs/social enterprises on their management of intellectual property. The survey questions are a first step towards understanding SE organizational strategy and philosophy for growth, scaling, and/or replication activities and the IP policies that support that organizational strategy. First, we are interested in whether SEs recognize the intellectual property within their organizations. For example, do SEs think of their innovations, like activity sheets for an after-school arts program developed by staff, as qualifying as IP under copyright law? Further, we ask how they protect it: do SEs have written policies regarding their IP? Who/what was the impetus for these policies come from: internal or external stakeholders? Who is responsible for enforcing the policies? Finally, we want to know the consequences, if any, of the existence of those policies. Are there variations in the IP policies across organizations? Do these policies support employee and trustee recruitment and retention? Do these policies enable revenue generation, business expansion (i.e. scaling/replication), or niche protection?

### **III. Intellectual Property Literature**

It became evident after an extensive search for existing social enterprise IP literature that there was no available survey data to build from for this project. The literature review therefore started with the texts listed in Appendix A in order to develop an informed IP strategy and management framework. The texts selected for the strategy and management framework were chosen so as to include multiple perspectives on IP as a strategic tool in industry. This was important for the development of succinct and focused survey questions that would elucidate IP policies and management in SE organizations, and which could be compared with the predominant IP strategies in industry. Strong and weak IP management choices are lie on a continuum and are considered to be reflective of a philosophical choice towards protectionist or open source strategies, respectively. The Phelps and Kline (2009) selection included perspectives on strong IP regimes and active IP management as a revenue generator and niche protector. Strong IP regimes are associated with higher levels of IP protection through fees, licensing, and legal enforcement against infringers. Weak IP regimes are associated with asset owners granting a varying array of free access, modification, and sharing rights to other users (Chesborough, 2006; Bingham and Spradlin, 2011). Generally, in a weaker system, revenue models are based on providing services related to the IP or the generation of reputational capital for firm managers, rather than selling products. Gosseries, Marciano & Strowel (2008) edited a collection of essays that provided ethical and philosophical dimensions to what intellectual property is and how legal structures for IP impact justice and equity. The essays added perspective on IP's role in addressing social problems to a discourse dominated by arguments of capitalism, competition, and innovation. Lessig (2002) and Landes and Posner (2003) focused on the moral, legal, and economic theories and implications of IP strategy on modern capitalism and global society.

The majority of peer-reviewed and professional literature on IP in the social sector is focused on basic legal rights in copyright and trademark. There is, however, a segment of literature that focuses on the economic and social justice impacts of strong and weak IP regimes on the development of pharmaceuticals in areas of critical global health needs. In adjacent intellectual capital literature there are some references to IP management by nonprofits as part of a larger knowledge asset management strategy (Kong, 2003; Kong 2007). Additionally, some anecdotal insight on the philosophy of IP management can be gleaned from blogs, interviews, and discussions with practitioners (Jewell, 2013; Tripp, 2013; Strickland, 2013), but that is not enough to establish standards of practice or generalizations for the sector at-large.

#### **IV. Survey Development**

A scan of available IP surveys was conducted, but there were no surveys found that focused on non-profits/social enterprises and intellectual property. However, there were four surveys found that helped shape the format and question design of this survey. One was a survey of IP enforcement by small firms in the United Kingdom (Intellectual Property Office, October 2010). Another survey was from the National Sciences and Engineering Research Council of Canada (NSERC) to recipients of NSERC research funding (NSERC, 2008). A third survey asked Australian Cooperative Research Centres how they manage IP issues and relationships with their partners (Sheen, 2000). The fourth survey was from the Intellectual Property Owners Association. The survey was sent to association members who were asked questions specifically about the strategic management of IP (Cockburn & Henderson, 2003). These surveys were helpful in the early stages of question development and in the assessment of each question's relevance to the information the survey is intended to gather.

Development of the survey questions and survey logic went through several stages of review and testing. The initial survey included more than 50 questions, which was too long to ensure completion. Questions about organizational structure, registration, and operations that could be found in other ways were therefore eliminated. The next iteration was 30 questions. The incorporation of simple skip logic made it possible to answer as few as two questions based on the response to the first question and up to 30 questions if a respondent chose every skip logic answer.

This 30-question survey was drafted in a digital survey service to facilitate distribution and data collection for the final sample group. A group of colleagues were asked to pre-test the online survey for clarity, proofing, and respondent experience. Feedback from the pre-test led to several wording changes to increase question clarity. The pre-test also led to some formatting changes and response field format changes to streamline the respondent experience.

Next, a pilot test was sent to colleagues who exclusively work in the social sector as at least managers of programs. This group was selected for the pilot test so that they could answer the questions from a leadership perspective. There were minor question edits and navigation changes made based on pilot group feedback. The final survey questions are available in Appendix B.

## **V. Survey Sample**

The intended recipients of the survey were executives of SE organizations since they are likely to have primary control over the implementation of policies and the IP decisions of the organization on a daily basis. Executive level for this survey means Chief Executive Officer, Executive Director, Chief Financial Officer, Chief Operating Officer, Chief Counsel, President, Vice President, and similar positions.

The sample used was a convenience sample. An initial sample was developed by scanning “best of” or “top 25” lists found online to create a group from the overlaps among those lists. The generation of the sample through this method led to several concerns. First, each of the lists were using unique criteria for inclusion on the ranked list, including definitions of social entrepreneurship which did not always match the definition used for the purposes of this research. Not all of the organizations conducted programs in the United States, which made those organizations ineligible for this sample since an organization not operating in the U.S. would be unlikely to utilize or manage IP based on U.S. intellectual property law and protections. Finally, contact information for the current executive leadership was difficult to access since not all organizations make emails for leadership available on their websites.

The S&I 100 Index (2014) was discovered in the course of scanning “best of” lists. This index is curated and compiled by the Social Impact Exchange. Using the organizations on the S&I 100 Index as the sample offered a solution to the issues created by the method outlined above. The Social Impact Exchange only lists SE organizations based in and operating in the United States. In addition, they vet each SE on their list against a standard rubric for impact, growth, and evidence criteria. The Social Impact Exchange, though not willing to provide a file of contact information for their list, did give permission to join their organization. Membership with the Social Impact Exchange provided access to the email address of the CEO for every organization on the S&I 100 Index. All 107 organizations on the S&I 100 index were included in the convenience sample for this survey.

## **VI. Findings**

The 107 executive contacts were emailed an invitation to participate in the survey with a link to the survey included in the email (Appendix C). Five of those emails were undeliverable.

Three of the undeliverable receipts provided alternate contact information. Those three alternate contacts were also sent an invitation to the survey. In total, 110 invitations were emailed to 105 contactable organizations.

Twenty-one organizations registered and completed surveys for a 20% participation rate. All responses were anonymous. Fifteen (71.43%) respondents identified as CEO/Executive Director, two (9.52%) selected COO, one (4.76%) indicated Chairman of the Board, or similar position. There were three write-in responses; two (9.52%) wrote legal counsel and one (4.76%) was general counsel. All of the respondents met the requirement that a member of the organization's executive leadership complete the survey.

The first question in the survey asked respondents to identify which forms of IP the organization has as a part of its assets, brand, services, marketing and/or program materials. One of the possible answers to this question is "none of the above". The two respondents (9.52%) that chose "none of the above" were skipped to the end of the survey where they were asked to identify their position in the responding organization and thanked for their participation.

The remaining 19 (90.47%) respondents identified as having one or more forms of IP assets forms within the organization. This is a high percentage, but seems reasonable for two reasons. First, the sample is composed entirely of SE firms who, by definition, are innovative and are likely more cognizant that IP is a product and tool of the innovation process. Second, there is a distinction between recognizing and identifying IP in an organization and actively managing that IP. It is not unreasonable to assume that most executives can identify and define patents, copyrights, trademarks, and trade secrets within their organization since they are skilled leaders. This does not imply that those leaders or their organizations actively manage the IP however, simply that they can recognize and identify it.

Seventeen (89.47%) of these 19 respondents have trademark(s). Seventeen (89.47%), though not the same 17 as the trademark respondents, indicated having copyrights. Two (10.52%) indicated trade secrets. Those same two organizations indicated having all three forms of IP. None of the respondents indicated a patent as part of their IP assets.

The 19 respondents indicating that their organization had IP assets were then asked whether the IP was officially registered with either the U.S. Copyright Office or the U.S. Patent & Trademark Office. Three of these 19 respondents (15.79%) indicated that none of the IP were registered with either office. One (5.26%) indicated that only the copyright is officially registered. Five (26.32%) indicated that the trademark is officially registered. And 10 (52.63%) indicated that both are officially registered. Copyright law does not require registration to provide legal protection, so the fact that only 11 (64.70%) of 17 organizations with copyrights have them officially registered is not surprising. However, a trademark is not enforceable unless it is registered. The responses indicate that 15 (88.23%) of 17 organizations with trademarks have secured proper trademark registration. Although this seems a high percentage, and indicates that leaders recognize IP, some have not undertaken all of the basic and necessary legal steps to secure the enforcement of the organization's property rights.

Next, the 19 respondents with IP (hereafter referred to as "respondents") were asked if the organization has written policies regarding IP. Ten (52.63%) of the respondents indicated yes, 8 (42.10%) indicated no, and 1 (5.26%) indicated that they do not know. Although 16 (84.21%) respondents have undertaken the required protocols to legally protect their IP, only 10 (52.63%) of them have internal controls guiding the management of their IP.

The 10 respondents with written policies were given the following policy topics and asked to indicate all that applied to their organization's IP policies. The number of respondents selecting each policy precedes each option:

- 6 (60.00%): Licensing of intellectual property
- 5 (50.00%): Sale or transfer of intellectual property
- 9 (90.00%): Safeguarding of intellectual property through non-disclosure agreements when partnering with other organizations
- 5 (50.00%): Registration of intellectual property with relevant governmental agencies (e.g., U.S. Patent Office)
- 6 (60.00%): Using intellectual property as a strategic tool
- 5 (50.00%): Enforcement of intellectual property rights through legal means (e.g., patent enforcement or copyright infringement)
- 4 (40.00%): Non-compete clause in employment agreements
- 8 (80.00%): Proper use and display of brand and trademark
- 0 (0.00%): Other, with text box for further description.

None of the respondents selected all of the policies. The most common policies in place in organizations with written policies are non-disclosure agreements and proper use and display. This indicates an IP-safeguarding preference among SE organizations that have policies in place. Those indicating policies for licensing, sale or transfer, legal enforcement, strategic use, and non-compete clauses suggest that some SE organizations have looked at the IP in terms of the traditional industry IP strategies of niche protection, revenue generation, attracting investors, recruiting and retaining talent, and business expansion.

Respondents with written policies were then asked who suggested the need for written IP policies. Two (20.00%) indicated that the Board of Directors was the originator. Five (50.00%) chose management as the originator. Two (20.00%) of the organizations had IP policies suggested by outside legal counsel. Finally, one (10.00%) wrote in that the policy originated from internal legal counsel, which can be classified as management, bringing management's share of origination to 60.00% and all other sources totaling 40.00%. Within this sub-group of 10

respondents, the majority of management teams appear to be cognizant of the role of IP within their organization and are proactive in the policy development to manage it.

This same written policy group was then asked who has day-to-day responsibility for IP management in the organization. Respondents could select CEO/Executive Director, COO, CIO, Chairman of the Board, or Other with a write-in field. Five (50.00%) of the organizations indicated the day-to-day IP management rests with the CEO/Executive Director or the COO. None of the organizations indicated the CIO or Chairman of the Board. The following write-in responses were collected: “Director of Finance and Administration”, “Office of General Counsel”, “the overall organization”, “Chief Financial and Administrative Officer”, and “Marketing and Operations work together to ensure IP protection”.

The number of write-in responses reflects as much about organizational structure as it does IP management. Some organizations appear to rely on executive leadership to manage the IP and others seem to take a more broadly-distributed view of IP management. This could be related to the nature of the organization’s work. For example, IP could be a discreet asset such as a donor contact list. Or, the IP could be shared across the routine programs and services, which could lead to a more diffuse decision-making process for leadership. Although all 10 respondents were able to indicate who is responsible for IP management, only 4 (40.00%) indicated that this responsibility was outlined in a policy.

Only 10 (52.63%) of the 19 respondents answered a question about whether the organization has enforced its IP rights through legal action. Four (40.00%) indicated yes, five (50.00%) indicated no, and one (10.00%) did not know. The low response rate to this question could indicate that the question was unclear to respondents, or, for some reason, they were

unwilling to answer. Those that did answer indicate that SEs are willing to defend their IP rights, though we do not know to what extent, since legal action can take many forms.

All 19 respondents were then asked if any of the organization's IP was developed with funds from a foundation or government agency. Nine (47.37%) indicated yes. These nine were then asked if the organization retained the rights to the IP developed. Five (55.56%) indicated that the organization retained the IP and four (44.44%) indicated that it depended on the funder. Nine (47.37%) respondents indicated that none of their IP was developed with foundation or government money and one (5.26%) did not know.

The funding and the assignment of an SE's IP rights are important to the long-term management of the IP. External funding that does not come with clear guidelines on assignment of rights can lead to disputes over ownership and rights to revenue (Bloom 2011a; Bloom 2011b). Five (55.56%) of the nine organizations that have IP developed from foundation or government funds indicated earlier in the survey that they do not have written policies for IP management. Only three (33.33%) of the nine with IP developed without foundation or government funding do not have written IP policies. This suggests that although an organization might recognize IP, it is less likely to have internal controls in place when the IP is developed with foundation or government funding.

In a related question, 18 respondents replied that no individuals hold rights to the organization's IP. Though one respondent did not answer this question, all 19 respondents answered the follow-up question of whether there is a written policy in place for the vesting of property rights for IP developed by an employee. Seven (36.84%) indicated that there is a policy, nine (47.36%) replied that there is no policy, and three (15.79%) did not know if there is a policy. Organizations unanimously indicated that individuals do not hold the rights to any of the

IP, but 12 (63.15%) indicate that either there is no policy, or are uncertain if there is a policy. IP is generally considered an intangible property (Landes and Posner, 2003) and without clear policies related to the assignment of employees' work product the assumption that IP rights vest with the organization is problematic (Lenkowsky, 2013; Bloom, 2011a; Bloom, 2011b). It is problematic because the intangible nature of IP leads to questions of what is a person's accumulated knowledge brought to the workplace versus new work created for the employer. Gosseries, Marciano, and Strowel (2008, p. 9) also point out that it is difficult to separate an idea from its' expression, but some delineation must be made for expression to transform into intellectual property.

Next, all respondents were asked who is authorized to make decisions regarding the use of IP on behalf of the organization. This question is distinct from the one asked earlier about the day-to-day management because it gets at the strategic, rather than tactical, usage of IP. Ten (52.63%) respondents selected the CEO/Executive Director. Six (31.58%) respondents wrote-in the following:

- CEO, Director of Finance and Administration, Board
- Office of General Counsel
- Full Board of Directors
- Contract with Copyright holder
- Combination of Chiefs of Academic office and Program and Partnerships
- General Counsel

One (5.26%) indicated COO and two (10.53%) indicated Chairman of the Board. Comparing with the earlier IP management question, two (10.53%) organizations indicated that the day-to-day management and strategic decision-making reside with the same person/office. Only three (15.79%) indicate that this strategic decision-making authority is captured in a policy. The other 16 (84.21%) indicated that there is no policy on IP decision-making for the organization.

The lack of a decision-making policy is surprising given the responses to the next series of questions in the survey about the strategic use of IP to earn revenue, scale the organizations, leverage resources, and expand partnerships. Most of the organizations indicate that they engage in at least one of those strategic activities with their IP, but the internal controls about who has the decision-making authority to commit the organization's IP are weak in the majority of SE respondents. Over time, with changes in staff and governance, the lack of clear authority for a critical organizational asset can lead to larger organizational issues.

The 19 respondents were asked if the organization licenses any of its IP to other external users. Eighteen answered the question and one skipped it. Nine (47.37%) of the respondents indicated yes and nine (47.37%) selected no. The nine respondents indicating yes were then asked five follow-up questions to understand the nature of the licensing. Three (33.33%) of the nine that license charge licensing fees to other users, one (11.11%) does not, and five (55.56%) charge for licenses only sometimes. When asked about the type of organizations that license the IP from our respondents, all nine (100%) organizations license to other non-profits, four (44.44%) license to for-profits, six (66.67%) license to government agencies, and one (11.11%) licenses to all three.

Three (50.00%) of the six organizations that indicated they only sometimes charge for the license will only license to for-profit and non-profit organizations. One (11.11%) of the six only licenses to non-profits and government agencies. This suggests that SE organizations potentially differentiate pricing based on customer or the perception of the ability to pay.

The nine organizations that license were then asked about permission to modify and resell licensed IP to gain an understanding of niche protection and whether SEs prefer weak or strong IP strategies, as defined earlier. Three (33.33%) of the nine organizations permit licensees

to make modifications to the IP to meet licensee needs. However, eight (88.89%) organizations will consider licensee modification if the licensee seeks permission prior to making changes to the IP. This small sample indicates that though SEs are protective, they are not inflexible. Only one (11.11%) permits licensees to resell the licensed IP to other organizations. Three (33.33%) organizations permit licensees to give the IP to other organizations, but they are not permitted to charge for the IP. This suggests that organizations fall on a continuum of philosophies on weak vs. strong IP strategies, but respondents in this sample are skewed towards protectionist rather than open source philosophies.

All 19 respondents were then asked if the organization's IP is used to earn income via program fees, sales, or contracts to provide goods or services. This is distinct from the licensing revenue question presented earlier as it is related to the operations and services of the organization rather than scaling and/or replicative goals usually sought through licensing. Eleven (57.89%) selected yes and eight (42.11%) selected no. This suggests that more SE organizations in the sample utilize IP as a source of revenue generation than do not. However, this limited sample does not indicate that leveraging IP for revenue is a top strategic priority. Of the 11 earning income with IP, seven (63.64%) go about it using at least two of the three options. The other four (36.36%) organizations rely exclusively on either sales or contracts to provide goods or services as the IP revenue generator.

In industry, IP assets are used to expand market opportunities, and partnering with other brands or companies is one strategy for market expansion. The 19 respondents were asked if the organization's IP is used to create partnership opportunities with other organizations or agencies. Seventeen (89.47%) indicated yes and two (10.53%) indicated no. Those indicating yes were asked to identify the purpose of those partnerships. The response selections are as follows:

- 16 (94.12%): Reach new constituents
- 6 (35.29%): Advocate
- 12 (70.59%): Generate revenue
- 4 (23.53%): Other

The write-in responses for “Other” were:

- scale our mission efficiently and effectively
- educate/build capacity
- maintain quality control, consistency among programs, and fidelity to model
- serve teachers and help districts develop robust induction programs

Except for the quality control response, the write-in responses could be categorized with the answers provided. The responding SEs generally do utilize their IP for market expansion, and with this sample it is a priority.

All 19 respondents then indicated that the organization has specific growth/scaling goals and that IP is leveraged to grow or scale the organization. From responses to previous questions, we know that nine (47.37%) license the IP, eight (42.10%) use it to generate revenue, and almost all use IP to expand market opportunities. All of these IP strategies can be critical components for scaling the organization. However, only 7 (36.84%) of 19 utilize all three strategies. Five (26.34%) use two of the strategies while six (31.58%) only attempt one strategy. One (5.26%) SE indicated that it did not use any of the strategies in its operations.

Another use of IP in industry is to create a competitive advantage for recruiting and retaining employees and corporate board members (Bingham and Spradlin, 2011, p. 39-44). Five (26.32%) of the 19 respondents leverage IP to recruit either staff or board members. Three (60.00%) of those five SEs believe that this strategy has resulted in a larger candidate pool. Two (40.00%) did not know if the IP attracted more candidates. Though this is too small of a sample to be conclusive, it is interesting that none of the organizations said that this strategy had not

increased the candidate pool. This suggests that some SEs are proactive in showcasing their IP to potential employees and board members.

Finally, respondents were asked a series of questions to determine if IP is used to generate revenue through grants, contracts, and program related investments (PRIs). These questions differ from those related to license fee and income questions because they are targeted at identifying if SEs use IP to obtain “investors” like a for-profit company would, but in the form of donors or grantors. Fifteen (78.95%) SEs indicated that the organization seeks grants/contracts from government agencies, three (15.79%) do not, and one (5.26%) does not know. Eleven (73.33%) of the 15 seeking government grants/contracts currently have government grants or contracts that incorporate the SE’s IP in the execution of the agreement. Fourteen (73.68%) of 19 respondents leverage IP to seek grants or PRIs from foundations, three (15.79%) do not, and two (10.53%) do not know. Of the 14 seeking grants or PRI’s, 10 (71.43%) currently have grants or PRIs that incorporate the SE’s IP in the achievement of goals and/or deliverables. SEs do leverage IP to attract investors, but it is not a universal strategy since one organization uses neither strategy to attract investors.

## **VII. Governance and Stakeholder Implications**

As an organizational task, the concept of governance appears to be a fairly simple activity. Hopkins and Gross (2010, p. 55-56) give us an elegant definition that “governance refers to how an organization is governed, meaning how it is controlled and managed.” *Defining* governance is easier than *executing* or *ensuring* good governance. There are numerous guides, theories, standards, and benchmarks that an organization can refer to in adopting and implementing its preferred model of governance. In the context of this research, we are most interested in the fiduciary duties required of governing boards as required by law. In the U.S.,

most nonprofit laws, particularly those of the fiduciary duties of boards, are at the state level and enforced by state officials, with a few exceptions for federal statutes.

There are three fiduciary standards required of the members of a 501(c)3 governing board in the U.S.: care, loyalty, and obedience. The duty of care requires that directors be informed, exercise independent judgment, and act in good faith (Brody, 2006, p. 247). The duty of care is about the manner in which directors undertake their responsibilities. A director can fail in two ways under the duty of care: first, by failing to supervise the organization, and, second, by failing to make an informed decision about an action before the board (Fishman and Schwarz, 2010, p. 137). The loyalty requirement expects directors to make decisions objectively, act in a manner that does not harm the organization, and avoid using their position to obtain personal benefit or advantages (Fishman and Schwarz, 2010, p. 163). Brody (2006, p. 247) points out that separating the related duties of care and loyalty is not always easy as they implicate each other, especially when a conflict of interest transaction (loyalty) is being debated and considered (care) by other directors. Finally, the duty of obedience requires directors to carry out the purpose of the organization (Fishman and Schwarz, 2010, p. 199), such as the expressed mission and vision. Various applications of this duty include the requirement that directors obey applicable laws, ensure compliance to donor restrictions, and consider the impact of organizational decisions on stakeholders (Fishman and Schwarz, 2010, pp. 200-202). These three standards are intended to focus the efforts of the members of the governance team on thoughtful, responsive, ethical, and prudent actions to protect and support the continued viability of the organization's operations and assets.

Bowen (as cited in Fishman and Schwarz, 2010, p. 127), summarizes the essential functions of all boards to be:

- “1. to select, encourage, advise, evaluate and, if need be, replace the chief executive officer;
2. to review and adopt long-term strategic directions and to approve specific objectives...;
3. to ensure to the extent possible that the necessary resources, including human resources, will be available to pursue the strategies and achieve the organization’s objectives;
4. to monitor the performance of management;
5. to ensure that the organization operates responsibly as well as effectively; and
6. to nominate suitable candidates for election to the board, and to establish and carry out an effective system of governance at the board level...”

These roles are performed against the framework prescribed by the fiduciary duties of governance teams. In order to fulfill their fiduciary obligations directors are free to use whatever processes or methods they feel are applicable to their organization within the boundaries of local, state, and federal laws. The governance work of organizational leadership is not confined to a set of actions on a meeting agenda; rather, in all practical application the directors execute governance through a variety of active high-level management activities and decisions.

From a practical perspective, social sector organizations and their governing teams tend to focus on the management of financial assets and the relation of those assets to achieving their particular mission and social impact. The limitations of the financial management model for achieving long-term growth and impact have led to many of the innovations in the social sector business model (Tuckman and Chang, 2006), the creation of new organizational forms over the past two decades such as L3C and B-Corp, and the rise of alternative delivery models for social problem solving (Bugg-Levine and Emerson, 2011; Vogel, 2005).

The framework of intellectual capital theory is useful to our understanding of the need for social sector governance teams to consider all organizational assets, not just financial assets, when assessing the resources available for achieving missions (Kong 2003; Kong 2007).

Intellectual capital is the identification and management of the human, network, and structural

assets of a firm (Bontis, 2001). The accepted definition of the theory incorporates the intellectual property assets into the structural assets of the organization (Bontis, 2001). If we accept that there are more assets in social sector organizations than just the financial assets, we can see that part of the governance role of the directors would include the active oversight and management of these assets, too. Directors should be as aware of intellectual property assets and how they are deployed to achieve the mission, generate revenues, recruit and retain staff, etc., as they are about the current financial health and future financial prospects of the organization. Indeed, we see some evidence of this governance behavior in the survey responses. Let us examine a fictional, but practical and realistic, example.

A growing social enterprise, Team A, has developed a curriculum used to educate participants in their after-school education program. Contained in the curriculum are detailed lesson plans, rubrics for evaluating participant learning, supportive materials for the instructor's professional development, tools and processes for engaging with participants and encouraging their continued self-study, and activity guides for expanding core lessons. In evaluating the effectiveness of the after-school program, independent evaluators note that the curriculum is particularly effective and plays a key role in the overall impact of the program.

The after-school education program is delivered by a team of dedicated volunteers not all of who are trained, certified teachers. Two years ago, in order to ensure greater delivery efficacy, and in response to volunteer instructor feedback, the social enterprise sought and received grant funding from a local private foundation to develop the instructor supportive materials in the curriculum. The activity guides were partially funded by a corporate foundation that supports organizations with missions similar to Team A's in many locations globally. The curricula writing and revision has been done over a number of years utilizing staff knowledge assets,

including those of a key senior staff member who has just taken employment with Team B, a new organization across town that has a mission similar to Team A. Financially, except for the grant funding for specific components, the rest of the curricula components were financed through unrestricted donations and revenue earned through fees for services that are unrelated to this after-school program.

The social enterprise's board of directors is excited by the findings of the independent evaluator. In line with their governance duties, the team has been debating new methods for revenue generation to support the organization. They are in agreement that scaling the impact of this after-school program is a priority and have some ideas as to how they might do that, but each requires a different financial model. They could continue to underwrite the cost of the program through unrestricted financial resources, but that does not seem to be sustainable long-term. A second option is to seek grant funding for scaling, but that, too, based on the shrinking amount grant funds available does not appear to be a responsible option. They debate between two options: licensing the curriculum they know is robust enough to be implemented without particular professional skills or delivering the curriculum in external organizations through a contracted service model. Both options require a similar commitment of resources up front to launch. Reviewing some market research and reasonable forecast scenarios, the board concludes that both options would yield similar net revenues over the next five years. The board is confident that either model would secure the available market. The board debates their options and votes that licensing the curriculum is more aligned with their values of remaining a small, nimble organization and fits with their strategic scaling goals by not being limited geographically.

Within the first year of licensing the curriculum, several challenges arise. First, a few weeks after launching the licensing program, the Team A's CEO receives a call from a program officer at the private foundation that funded the development of the supportive tools in the curriculum. They are excited that the organization has decided to leverage the curriculum to generate revenue since the foundation values business-like thinking in its grantees. The foundation staff tells the CEO that they received a request from Team B to develop an almost identical tool and wants Team A to send a copy to Team B so that Team B can add it to their programming. The foundation staff explains that they have a policy to be efficient with their grant-making budget, and it's not efficient to recreate essentially the same material through a second grant.

The staff and the Licensing Committee of the board meet to discuss. Neither group is particularly happy to turning over a key component of the organization's valuable copyright. The staff points out that there is no policy to guide the management of IP assets developed with grant funding. After thorough consideration of the efficiency argument made by the foundation, who is a key stakeholder for Team A and an influential partner in supporting many of the organizations licensing from Team A, they agree that it is in line with their fiduciary duties to share the content. The team also makes a point in their report to the full board that both Team A and the private foundation are tax-advantaged organizations. Even though there are no legal requirements for efficient grant making, it is an ethical and economic argument that aligns with Team A's written financial policy for efficient and effective use of donor support. A second, and equally important, consideration for the Licensing Committee is it is in the best interest of the short-term financial health of Team A to cooperate with the request of this funder. This decision, the committee concludes, facilitates the continued goodwill with the funder as a key stakeholder.

A few months later, a new board member, who is affiliated with the corporate foundation that funded a portion of the activity guides, calls the Director of Development upset that the staff member in charge of licensing will not send the corporate foundation a copy of the curriculum. The board member explains that the corporate foundation has an open source policy related to any materials developed with their grant funds and expects that grantees adhere to that open source policy as outlined in the grant agreement. The Director of Development reviews the grant agreement and sees that Team A did agree to an open source policy related to the copyrighted materials developed with the grant funds. What is not clear, based on the grant agreement, is if that entitles the corporate foundation to just the activity sheet or the entire curriculum. The Director of Development raises the issue with the CEO who then calls a meeting with the Development and Licensing committees of the board to discuss their options.

The Development Committee concludes that it was within the scope of the Director of Development's authority to sign and execute to the grant agreement based on the job description for the position and the written gift acceptance policy of Team A. The Development Committee points out that there is no distinction in either the job description or the gift acceptance policy of an exception or extra level of review for gifts that create intellectual property. The Licensing Committee deliberates the multi-layered conflict they face in honoring the grant agreement by sharing only the content developed with grant funds, honoring the agreement as the corporate foundation is requesting by sharing the entire curriculum, and the politics of an affiliate of the corporate foundation now serving as a member of Team A's board. The Licensing Committee decides that this is a scenario that requires full board attention. The summary they present is that some years prior to the board's decision to leverage Team A's intellectual property for revenue, a staff member executed a grant agreement within the scope of their duties that obligated Team A

to make the materials developed with the grant available as an open source asset. The Licensing Committee, hoping to head off further IP-related issues, asks the board to assign a task force to review all grant agreements to determine if other organizational IP assets have been obligated out of Team A's sole control. The Licensing Committee meets with the new board member and the corporate foundation to inform them that sharing more than the activity sheets, the only component supported with their grant support, would compromise an important revenue stream for Team A and materially disadvantage the organization in their market niche. The corporate foundation agrees to the compromise because they recognize that the grant agreement is not more specific. Shortly after this meeting the corporate foundation convey to Team A's board president that they agreed to the compromise to avoid a conflict of interest now that their affiliate is on Team A's board. Further, the corporate foundation makes it clear to Team A's board president Team A licensing the activity sheets as part of a curriculum product conflicts with the corporate foundations core organizational values and the intention of their grant support to Team A.

Finally, 11 months after the start of the licensing business, Team X, the first organization to license the curriculum calls the CEO of Team A upon receiving the license renewal contract. Team X has been really pleased with the licensed curriculum and the collegial support offered by Team A. But, Team X received a proposal from Team B for almost the same curriculum at half the licensing fee that Team A is charging. Team X needs to renegotiate the contract terms or will have to go with Team B's proposal. The CEO calls a meeting of Team A's board president, external counsel, and the members of the Licensing Committee to share the news that Team B is competing in their market with a very similar curriculum. The general counsel asks the group about Team A's policies: is there a non-compete agreement required of employees and is there a

written policy that the work product of employees is the property of Team A? The group says they have neither protocol in place, but says that the curriculum is clearly and correctly copyrighted by Team A. The general counsel points out that a key employee in the development of the licensed curriculum is now an employee at Team B and is potentially the source of this competitor product. The group agrees that their best recourse is to send a cease and desist letter but acknowledges that without the internal protocols at Team A there is not much that can be done to enforce it without a potentially costly legal battle since a person's knowledge is difficult to separate from the expression of that knowledge. Further, Team A knowingly gave portions of the copyrighted to funders who, in turn and not in violation of any contract, gave it to Team B.

At the next board meeting, the directors' discussion centers on the difficulties faced by the licensing project over the past year. They note that despite the financial forecasts there have been many different issues surrounding the management and control of intellectual property in the licensed product. The task force reports that there are three additional gaps and potential issues in the management of IP assets beyond what the board has already discovered. First, the contents of the donor database are not covered in the non-disclosure policy and staff members with no need to use the donor database have full administrative access to the data. Second, the task for found that while the current board wants to leverage IP as revenue, the founding board voted in the first year of operations to make all material developed by the organization available as open source and an administrative oversight kept the policy from being added to the policy manual. Third, Team A has two brand identities that it uses, one of which is highly recognizable in the market, but neither of them are registered as trademarks with the U.S. Patent and Trademark Office.

The directors note that these issues would not have arisen in their for-profit companies, because the knowledge assets of the industrial firm are at least as important as the financial assets and have explicit policies and protocols for the IP asset management. The directors agree that they failed to be aware of and to manage the IP assets of the social enterprise despite their attempt to leverage the assets as a product for revenue generation. They reflect that not only did their revenue strategy falter within a year, the costs of dealing with the IP issues after launching the curriculum product have been a strain on the staff, volunteers, board members, and financial resources to the detriment of all stakeholders. The board resolved to review their fiduciary duty to organizational assets by re-examining Team A's founding documents, vision, mission, and values statements. Once that was complete, they would consider how to craft policies to manage all of the organizational assets so that future directors do not encounter the same asset management challenges in governing for the successful achievement of strategic objectives.

The example is fictitious, but all of the scenarios presented are realistic conflicts that are routinely encountered in the governance and stakeholder relations of social sector organizations. The survey responses also give a good indication that these are actual gaps in IP management that exist in their organizations. As the sector increasingly prioritizes innovation, the acceleration of problem solving, and the introduction of new organizational forms, the need for those in governance positions to be aware of and managing for all organizational assets is crucial. It is also important that staff identify and catalog the knowledge assets being used, developed, and revised within the organization and communicate that to their governance teams.

There is no right way for a social sector organization to choose *how* they manage and protect their IP assets. Indeed, as discovered reviewing case studies of social enterprises, nonprofits SEs vary greatly in the way they manage their IP to meet strategic objectives (Walker,

2013). They do, however, share the common trait of leveraging their innovations to achieve scaling, growth, or replication objectives. Successfully leveraging the innovation for long-term achievement and sustainability requires governance teams to look beyond the financial asset management model. Leadership teams must learn to identify, articulate, and manage intangible knowledge assets that are the crucial components of how social sector organizations solve problems and create impact.

### **VIII. Future Research**

The responses from this survey provoke many questions for further study, though the questions that follow are by no means exhaustive. The first of which is how does SE IP management compare with a sample of 501c3 organizations that disregards the concept of innovation? Are SEs more aware of and actively managing IP than any other 501c3?

The sample is too small to know how representative it is across the SE landscape. In addition to a larger sample and response rate, the data collected with this survey would be enhanced with information about the age of the SE, the composition of the board of directors, the number of staff and constituents served, and financial statements. This information could be used to show how differences in IP management correlate to the financial and impact metrics of the SE.

It is clear that, at least among those that participated in the survey, SEs are able to identify IP among the organization's assets and that most take the necessary steps to ensure legal protection. Further, some will even defend their legal rights by taking action against infringers. This prompts questions of whether SEs are more apt to take legal action, in general, to protect IP, or if this is true of all non-profits. How do they scan for infringers? Are certain types of IP more

zealously defended than others? What legal recourse do they take and what resources do they expend in that process?

Only slightly more than half of the respondents with IP also have written policies for management and strategic use of their IP. By far, the most common policy is on non-disclosure when partnering with other organizations, making protection of the IP a clear priority. Also common among the written policies are standards for brand and trademark display which signals that this is important to the organization. Policies on strategic use, non-compete clauses, and enforcement of rights through legal means were less common, but this does not prove that organizations do not manage the IP via these methods. It only indicates that these processes are not a part of codified internal controls. Future inquiries could look at organizational management of IP versus the written policies that guide that management to discover whether SEs forgo written policies but are still active and strategic IP managers, which is what the respondents' answers to questions about leveraging IP seem to imply. It would also be useful to know the form and function of IP within an organization to know if certain policies or management tools are even necessary. For example, if an SE's only IP is its logo, which is a trademark, is a policy on non-compete clauses necessary?

The data also indicates, as mentioned earlier, that organizations with IP developed with foundation or government money are less likely to have written policies on IP management. Why is this the case? Do SEs that capitalize their own intellectual property create policies because the IP is an investment of finite resources and therefore more dear? Do SEs consider IP developed with a funder's capital to be more of a public good, rather than a private one, given the public-benefit origins of the capital? Is this dichotomy unique to SEs or does it exist across all 501c3 organizations?

SEs responded that IP management is a mix of strategies. Only one firm licensed IP, leveraged it for revenue generation, and incorporated it into market expansion opportunities. The same firm uses IP to recruit both employees and board members. However, that organization did not use it to leverage investors via government grants or contracts. The rest of the 19 respondents ranged from indicating none of those strategies to a mix of, on average, 3 or 4 strategies. IP strategy maximization is not required of firms and may not be relevant to many firms. Future investigations could look at the type and function of a firm's intellectual property and compare it to the management strategies utilized and correlate it to specific organizational goals for revenue generation, recruitment, niche protection, and scaling/growth. The data suggests that SEs, especially those not engaging in any IP strategy, utilize other assets or methods to achieve their goals. If this is the case, does this differentiate an SE from any other 501c3, or is the strategic use of IP a critical component of SE?

Finally, the number of follow-up emails from respondents interested in the results indicates a high level of interest in some organizations for comparing and understanding the landscape of IP strategy and management in SE. Given the prevalence of intellectual property in non-profits, this knowledge could be useful to the entire non-profit sector by providing another set of strategies that manage IP assets to help organizations achieve mission. More time, resources, and different methodologies could very quickly add to the baseline data collected from this small sample. This survey is, hopefully, a starting place for future research into the innovations of social entrepreneurs and social enterprises.

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## Appendix A

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## Appendix B: Final Draft of Complete Survey

Thank you for participating in this survey of intellectual property in the nonprofit sector. The survey should take approximately 15 minutes to complete and all responses will remain confidential. Please limit your responses to reflect only the organization at which you currently work.

Please indicate which of the following forms of intellectual property the organization has as part of its assets, brand, services, marketing and/or program materials. Please check all that apply.

- Trademark
- Copyright
- Trade secret
- Patent
- Other (please describe in box below)
- None of the above

In the previous question you indicated that the organization has trademark, copyright, or both. Please indicate which, if any, are officially registered.

- Copyright is registered with the U.S. Copyright Office
- Trademark is registered with the U.S. Patent & Trademark Office
- Both are registered
- Neither are registered
- I don't know

Does the organization have a written policy (or policies) regarding the intellectual property?

- Yes
- No
- I don't know

What does that policy (or policies) cover? Please check all that apply.

- Licensing of intellectual property
- Sale or transfer of intellectual property
- Safeguarding intellectual property through non-disclosure agreements when partnering with

other organizations

- Registration of intellectual property with relevant governmental agencies (e.g., U.S. Patent Office)
- Using intellectual property as a strategic tool
- Enforcement of intellectual property rights through legal means (e.g., . patent enforcement or copyright infringement)
- Non-compete clause in employment agreements
- Proper use and display of brand and trademark
- Other (please describe in the box below)

Who suggested the need for intellectual property policies?

- Board of Directors, or similar
- Management
- Outside legal counsel
- Other (please describe in box below)

Who has the day-to-day responsibility for intellectual property within the organization?

- CEO/Executive Director
- COO
- CIO
- Chairman of the Board, or similar
- Other (please describe in box below)

Is this responsibility outlined in a policy?

- Yes
- No

Has your organization ever enforced its intellectual property rights through legal action?

- Yes

- No
- I don't know

Was any of the organization's intellectual property created with funds from a foundation or government agency?

- Yes
- No
- I don't know

Does the funder retain any rights to the intellectual property their funds developed?

- Yes
- No
- Depends on the funder
- I don't know

Does the organization hold the rights to the intellectual property developed with a funders money?

- Yes
- No
- Depends on the funder
- I don't know

Does an employee of the organization hold the rights to any of the intellectual property in use by the organization?

- Yes
- No
- I don't know

Is there a policy regarding the vesting of rights for intellectual property developed while a person is employed by the organization?

- Yes
- No
- I don't know

Who is authorized to make decisions regarding the use of intellectual property on behalf of the organization?

- CEO/Executive Director
- COO
- CIO
- Chairman of the Board, or similar
- Other (please indicate in box below)

Is this decision-making authority outlined in a policy?

- Yes
- No

Does the organization license any of its intellectual property to other users?

- Yes
- No

Does the organization charge a fee for the license to the intellectual property?

- Yes
- No
- Sometimes

Who do you license your intellectual property to? (Please check all that apply.)

- For profit organizations
- Non profit organizations
- Government agencies

Are licensees permitted to modify the intellectual property for their own purposes?

- Yes
- No

Do licensees need to seek permission before making modifications to the intellectual property?

- Yes
- No

Are licensees authorized to sell the intellectual property to others?

- Yes
- No

Are licensees authorized to give the intellectual property to others as long as they do not charge for it?

- Yes
- No

Is the organization's intellectual property used to earn income?

- Yes
- No
- I don't know

How is intellectual property used to earn income? Please check all that apply.

- Program fees
- Sales
- Contracts to provide goods or services

Is the organization's intellectual property leveraged to create partnership opportunities with other organizations or agencies?

- Yes
- No
- I don't know

What is the primary purpose of the partnerships leveraged through intellectual property? Please check all that apply.

- Reach new constituents
- Advocate
- Generate revenue

Other (please describe in text box below)

Does the organization leverage the intellectual property to grow or scale the organization?

- Yes
- No
- I don't know

Does the organization have specific growth/scaling goals?

- Yes
- No

Does the organization leverage the intellectual property to recruit employees or board members?

- Just employees
- Just board members
- Both employees and board members
- Neither employees or board members
- I don't know

Has leveraging the intellectual property resulted in a larger candidate pool in the organization's efforts to recruit either staff or board members?

- Yes
- No
- I don't know

Does the organization leverage the intellectual property to seek grants or contracts from government agencies?

- Yes
- No
- I don't know

Does the organization have any current grants or contracts from government agencies that incorporate the use of any of the organization's intellectual property to achieve the goals/deliverables of the agreement?

- Yes
- No

Does the organization leverage the intellectual property to seek grants or PRI (program-related investment) support from foundations?

- Yes
- No
- I don't know

Does the organization have any current grants or PRIs from foundations that incorporate the use of any of the organization's intellectual property to achieve the goals/deliverables of the agreement?

- Yes
- No

What is your position at the organization?

- CEO/Executive Director
- COO
- CIO
- Chairman of the Board, or similar
- Other (please indicate in box below)

May we contact you with further questions?

- Yes
- No

Please provide your first and last name.

Please provide a daytime phone number.

Please provide your email address.

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Thank you for taking the time to respond to this research survey.

If you have questions regarding the survey, please contact Michelle Walker at [walkermi@iupui.edu](mailto:walkermi@iupui.edu).

## Appendix C: Survey Invitation

Dear (Recipient Name):

I am a graduate student at the Lilly Family School of Philanthropy at Indiana University doing a survey on the use of intellectual property by social-sector enterprises. Intellectual property (IP), consisting of patents, copyright, trade secrets and trademarks, is a powerful tool used by the for-profit world to generate revenue, expand business opportunities, ensure quality, or protect market niches. Innovation in business is often marked by the creation of some form of IP. Many businesses either actively guard or leverage their IP as a facet of their daily business. Staff, resources, and policies are deployed to strategically manage the intellectual property as prescribed by the company's strategic plan.

Intellectual property is created in social-sector organizations too, but there is little documentation of how they manage it. Under the direction of Professor Leslie Lenkowsky, I am doing a survey to obtain some insights into that. Specifically, I am interested in understanding the basic IP policies in place among organizations recognized as exemplars of social entrepreneurship.

I am inviting you to participate in this survey. I identified you as a potential respondent through your organization's listing on the S&I 100 Index. I did not receive organization referrals from the Social Impact Exchange. You will find the survey at this link: <http://eSurv.org?u=IPsurvey>.

The survey should take approximately 15 minutes to complete and all responses will remain confidential. I would appreciate your responding within the next 14 days. Please limit your responses to reflect only the organization at which you currently work. If you have questions regarding this survey, please contact me directly by email at [michellepgh250@gmail.com](mailto:michellepgh250@gmail.com) or by phone at 412-983-3547.

Thank you for your time and consideration in completing this survey. I will, of course, be delighted to share the results of the survey with you.

Sincerely,

Michelle Walker  
Candidate for MA, Philanthropic Studies