



# INTELLECTUAL PROPERTY

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## Creatives, entrepreneurs, and startups

By [Daniel Kegan](#)

Tolstoy suggested happy families are the same, unhappy ones are distinctive. Many large, established corporations may appear to have similar cultures, while creatives, entrepreneurs and startups (CES) hear Thoreau's different drummer. "There are those who look at things the way they are, and ask why... I dream of things that never were, and ask why not?" (Robert F Kennedy). While CESs follow unique paths, there typically are a few major pitfalls to minimize.

**1. Humans make mistakes.** People and organizations develop procedures to reduce mistakes and to recover from them. Hannah Arendt saw mistakes as half the core of the human condition, with forgiveness its twin. Often most hard is forgiving oneself, and if so, that unresolved issue is often projected to others as destructive harshness. Talk early to a good insurance agent, who can scare you with many risks of your proposed new endeavor, and then reasonably advise you of the premium costs and which risks at your startup stage likely need no insurance.

**2. Reinforce the positive.** A common corporate measure is the quarterly bottom line, net profit, with some navigating by the ticks of daily stock movements. A stronger measure of health is the ratio of positive to negative reinforcements a person experiences in a day. Short term, one cannot readily alter others' toxic behaviors, but one can notice their own behavior. If you're giving more negative comments, pointing out what's wrong, rather than encouraging the positive, you're contributing to the organization's, and your own, ill-health. Increase awareness, good training, and fitting tasks to skills and interests should increase productivity—and morale.

**3. Memories melt.** People's memories change over time. Memories are warped by self-interest. Memories and behavior are warped by self-interest even when the self-interest is disclosed. (Dan Ariely, *The Honest Truth About Dishonesty*). For creatives, entrepreneurs, and startups, get important expectations and agreements in writing, no matter how much you trust or love the others.

**4. Success breeds failure.** Much is overlooked and forgotten when a new venture honestly fails. Stockholders' liability is limited to their investment. Few seek ownership of the apparently worthless intellectual property assets (Mel Brooks' "The Producers" film, 1967). However, when Fortune delivers on one's "Rich and Famous" contract (Kermit Frog), memories melt. Although a court can find a contract in behavior without a writing, having expectations and important rights and duties in writing limits other's creative interpretations.

**5. Neither a borrower nor a lender be, very much.** Hamlet's Polonius advised: "Neither a borrower nor a lender be; For loan oft loses both itself and friend, And borrowing dulls the edge of husbandry." Briarpatch Business Network suggests

startups borrow little, for at the start many mistakes are made. Better to make them in inexpensive frugality than borrowed expense. Thus initially, often rent rather than buy much. A Briarpatch exception is for those key tools essential to doing quality work. Often that may be a good computer, smart phone, and fast Internet connection.

**6. No Free Lunch, even if Crowd-Funding.** The Internet has made capital more easily available to startups. Some traditional practices are still advisable. Thou shalt not lie, deceive, misrepresent. Consider under-promising and over-performing. Remember that the federal Securities and Exchange Commission (SEC) and the states regulate how money may be solicited, especially by unrestricted appeals to the public.

**7. A stitch in time saves at least nine.** Trademarks, copyrights, inventions, trade secrets, and know-how—intellectual property—are created without government registration, and typically many are created by CESs. Although government registrations may provide tangible evidence of intangible assets, a startup needs to navigate between the Scylla of ignoring its intellectual property and the Charybdis of spending too much on ephemeral wasting assets. A short conference with a CES-oriented intellectual property attorney can identify otherwise overlooked assets, and reduce potential liabilities.

**8. PCT Etc.** Many people and too many national media confusedly intermix trademarks, copyrights, patents, and trade secrets. Each is quite different, with different requirements, different ease of creating, different registration requirements, and different costs. Don't worry about the legal details, but do tell your intellectual property professional you're interested in protecting what you and your company create and avoiding infringing others' lawful rights. You should expect a menu of choices with differing strengths, time to acquire, cost, and ease of obtaining and defending.

**9. Taffy Time.** In business and legal matters, many things take time, more time than initially estimated. Looking backwards, months and years have swiftly passed. Forward, sales, revenues, government decisions, diverse good things work on their schedule, not yours. The best business protection generally is to be successful in the marketplace; having proper intellectual property in place can help, but it's often secondary.

**10. Know Your Gifts, NDAs.** If you tell someone your great, new, idea, and then ask them to keep it confidential, you have likely made them a gift of the idea. If you first ask them to keep the information you are about to tell them confidential, not to disclose it to anyone else, and to use it only for your benefit with your permission, and if they agree, then they have contracted with you. But memories fade, and often twist when early projects are financially successful. Much better than an oral promise, with likely differing memories, is a signed, written Non-Disclosure Agreement.

**11. Time and tide wait for no one.** Some deadlines have expensive consequences when missed; some missed deadlines forfeit options and assets. Applications for patentable inventions need to be filed for foreign nations before any public disclosure or commercialization, for a USA patent there may be a one year grace period, after which patent rights are prohibited.

**12. Selectively do it yourself.** With pervasive digital forms and Internet access anyone can file many government forms. Whether you should do it yourself (DIY) or consult with a professional depends on your skills, your willingness to take the time to learn the specific rules and "tricks," and how expensive an initial mistake will be. For intellectual property matters, the Patent and Trademark Office, the Copyright Office, and most Secretary of State offices provide educational information, but not legal advice, on their websites.

**13. Don't rush to inc.** Every creative and business venture has a legal entity status. It's better to choose the one that fits rather than the one the state gives you by default, and it's better to wisely choose among sole proprietorship, partnership, limited partnership, limited liability company, corporation, S-corporation, non-profit corporation, and the other available entities. Some not-for-profit corporations make a lot of money; many for-profit businesses make little or become net debtors. Most entities, if they make money, the profit can go to the owners; but for a "non-profit," the founders/directors are not to keep

the excess of income over expenses. Most entities, if they make money, the profit can go to the owners; but for a “non-profit,” the founders/directors are not to keep the excess of income over expenses. If your major goal is to make money, then you don’t want to be a nonprofit. The owners get to keep the excess income over costs. The business can be sold and the owners get the sales price, net of paying sales costs. If your major goal is community betterment, then sometimes being a nonprofit entity may be appropriate. Some nonprofits qualify with the Internal Revenue Service to have contributions be tax deductible. Nonprofits can pay their employees and managers reasonable salaries. If a nonprofit stops business, its assets do not go to its founders/managers, but to a similar nonprofit, or to the state.

**14. Partner with more care than marriage.** Partners are generally responsible for one another’s debts and liabilities. Perceived agents may bind their assumed principals to agreements and debts. Less than a handshake can create a legal partnership. Marketing, many claim they have “partners,” meaning companies that work with or buy from or market for them. Startups should avoid calling anyone a “partner,” unless they have a written partnership agreement vetted by an attorney. Before then, have friends, business associates, potential investors, or helpful people and companies. This advice is often ignored; then soon write down each “partners” expectations for the endeavor, including show profits and losses will be shared (need not be equal among partners, nor the same for profits and losses), what initial capital and labor will be contributed, when there is a dispute how will it be resolved, when/if the business ends or a partner dies or becomes disabled what happens, what are the limits each partner may do without consent of others—including buying, contracting, and borrowing. Still helpful to have your agreements legally reviewed.

**15. Ask and get good help.** Half of any group of professionals are below average. Sometimes it seems much more than half. Additionally, people differ in their styles, values, and preferences. I have a colleague whose movie recommendations may be great for him, but I’m less fond of his chainsaw-genre films. No matter how well recommended and how well you like your professionals, review what they do. Humans make mistakes. “A computer lets you make more mistakes faster than any invention in human history—with the possible exceptions of handguns and tequila.” Judge Ruggero Aldisert, *US v. Carelock* [459 F3d 437](#) (3rd Cir 2006), quoted in *Vince v. Rock County, Wisconsin* (7th Cir 2010).

**16. Ignorance can help.** Steve Wozniak early invented for Apple Computer a variable-rotational-speed computer disk drive yielding relatively constant linear tracking, because he didn’t know that most disk drives were constant angular speed, like a 33 rpm vinyl phonograph record, and thus variable linear tracking speed. Not knowing what “everybody knows” or that what you want to do “can’t be done” sometimes frees you for creativity. Sometimes ignorance leads to lost time and wasted funding. So it goes.

**17. Reduce your asset anxiety.** Salli Rasberry & Michael Phillips, *The Seven Laws of Money*, Kindle (\$3). [http://www.amazon.com/Seven-Laws-Money-Salli-Rasberry-ebook/dp/B006VOK7DO/ref=sr\\_1\\_12?s=books&ie=UTF8&qid=1396322114&sr=1-12&keywords=seven+laws](http://www.amazon.com/Seven-Laws-Money-Salli-Rasberry-ebook/dp/B006VOK7DO/ref=sr_1_12?s=books&ie=UTF8&qid=1396322114&sr=1-12&keywords=seven+laws); Élan’s MoneyLab®: Twelve Steps to Money literacy, Avoiding Asset Anxiety <http://www.keganlaw.com/KeganLaw-Elan/MoneyLab.html>

**18. You are not Louis XIV.** The 17th Century King of France is rumored to have said “L’État, c’est moi” (“I am the state”). Keep your business sufficiently separate from you personally. Especially if your business is an entity (partnership, corporation, LLC, etc), you increase your potential liability and risk when you commingle personal and business funds, don’t maintain periodic business records, or otherwise invite an adverse party (perhaps a current friendly business associate or employee) to “pierce your corporate veil.”

**19. Consider the Exits.** No one lives forever, even established corporations seldom outlast a century or two. Consider possible desirable, and undesirable, exit strategies. Reconsider them as your endeavor develops, grows, and changes. Even a closed business typically has some salvage assets of value. Government certificates for intellectual property may increase the business’ perceived value to potential buyers: trademark, copyright, patent have government certificates; trade secrets can be confidentially documented, know-how can be inventoried. ■

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