

MAKING LAW SCHOOL A BETTER PLACE:¹ USING HBO'S *SILICON VALLEY* TO TEACH INTELLECTUAL PROPERTY LAW AND ENTREPRENEURSHIP

DOV GREENBAUM JD PHD²

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¹ See, e.g., Evelyn M. Rusli, 'Silicon Valley': Welcome to the Valley of Insecurity, WALL ST. J. (Apr. 6, 2014), <http://blogs.wsj.com/digits/2014/04/06/welcome-to-the-valley-of-insecurity/> [<https://perma.cc/LVZ2-69KG>] (pointing out the a version of the often overused and pretentious line in the show: "Most importantly, we're making the world a better place through constructing elegant hierarchies for maximum code reuse and extensibility."); see also, Andrew Marantz, *How "Silicon Valley" Nails Silicon Valley*, THE NEW YORKER (June 9, 2016), <http://www.newyorker.com/culture/culture-desk/how-silicon-valley-nails-silicon-valley> [<https://perma.cc/G86E-BKHM>].

² Dov Greenbaum JD PhD, Assistant Professor in the Department of Molecular Biophysics and Biochemistry at Yale University in Connecticut, USA, and Director of Zvi Meitar Institute at Radzyner Law School, Interdisciplinary Center, in Herzliya, Israel. The author would like to especially thank the Meitar Family for their continued support in all of our endeavors. The author would also like to thank Inbar Carmel, Program Manager, Zvi Meitar Institute for Legal Implications of Emerging Technologies, for all of her incredible efforts throughout all aspects of the Institute.

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INTRODUCTION

Not only are law schools struggling to stay relevant for potential students in times of economic downturns,³ but they are also finding it hard to keep the attention of the students already enrolled.⁴

To some degree, students in law schools are no different than their undergraduate peers or students in other professional schools; there are an ever-growing number of demands on their limited time and shrinking attention spans. These demands do not only include substantial extra-curricular activities or necessary part-time jobs, but perhaps more distressingly, the internet and all of its iterations provide an impossibly attractive distraction for the entire class⁵—even for the most diligent of students.⁶

³ Natalie Kitroeff, *Law School Applications Set to Hit 15-Year Low*, BLOOMBERG (March 19, 2015), <http://www.bloomberg.com/news/articles/2015-03-19/law-school-applications-will-hit-their-lowest-point-in-15-years> [https://perma.cc/7TD5-STBP]; see also, Ellen Rosen, *Law School Enrollment Plummets to 27-Year Low*, BLOOMBERG (Dec.18, 2014), <http://www.bloomberg.com/news/articles/2014-12-18/law-school-enrollment-plummets-to-27-year-low-business-of-law> [https://perma.cc/HYE9-X922]; Natalie Kitroeff, *The Best Law Schools Are Attracting Fewer Students*, BLOOMBERG (January 26, 2016), <http://www.bloomberg.com/news/articles/2016-01-26/the-best-law-schools-are-attracting-fewer-students> [https://perma.cc/3UP5-YQFJ].

⁴ Kristen Purcell et al., *How Teens Do Research in the Digital World*, PEW RESEARCH CENTER (Nov.1, 2012), <http://www.pewinternet.org/2012/11/01/how-teens-do-research-in-the-digital-world/> [https://perma.cc/K3AS-LBQQ] (Noting that research benefits from the internet come at the cost of increased classroom distraction).

⁵ Natalie E. Phillips et al., *Examining the Influence of Saliency of Peer-Induced Distractions on Direction of Gaze and Lecture Recall*, 99 COMPUTERS & EDUC. 81, 82 (2016).

⁶ Stuart Green, *I'm Banning Laptops From My Classroom: Students Use Computers to Take Notes, Sure, But That's Not All. One Spent Class Time Streaming a Hockey Game*, WALL ST. J. (July 10, 2016), <http://www.wsj.com/articles/im-banning-laptops-from-my-classroom-1468184264> [https://perma.cc/VD7J-UTLN]; Jacob Gershman, *Law*

Professor: Laptops in the Classroom Are Making Students Dumber, WALL ST. J. (July 10, 2016), <http://blogs.wsj.com/law/2016/07/11/law-professor-laptops-in-the-classroom-are-making-students-dumber/> [<https://perma.cc/4PZY-CDDD>]. See generally, Dakota Lawson & Bruce B. Henderson, *The Costs of Texting in the Classroom*, 63 C. TEACHING 119 (2015); Chris A. Bjornsen & Kellie J. Archer, *Relations Between College Students' Cell Phone Use During Class and Grades*, 1 SCHOLARSHIP OF TEACHING & LEARNING IN PSYCH. 326 (2015) (“Mixed-effects regression model analyses indicated that cell phone use was significantly and negatively associated with test scores regardless of student sex and grade point average.”); Jesper Aagaard, *Drawn to Distraction: A Qualitative Study of Off-Task Use of Educational Technology*, 87 COMPUTERS & EDUC. 90 (2015) (“Because of deeply sedimented bodily habits, students often experience habitual distraction in the form of prereflective attraction towards certain frequently visited websites (e.g., Facebook). Laptops are experienced as endowed with an attractive allure that “pulls you in”. Students sometimes go as far as closing the lids of their laptops to avoid this habitual distraction.”); Susan M. Ravizza et al., *Non-Academic Internet Use in the Classroom is Negatively Related to Classroom Learning Regardless of Intellectual Ability*, 78 COMPUTERS & EDUC. 109 (2014); Faria Sana et al., *Laptop Multitasking Hinders Classroom Learning for Both Users and Nearby Peers*, 62 COMPUTERS & EDUC. 24 (2012) (“The results demonstrate that multitasking on a laptop poses a significant distraction to both users and fellow students and can be detrimental to comprehension of lecture content.”); Bernard McCoy, *Digital Distractions in the Classroom: Student Classroom Use of Digital Devices for Non-Class Related Purposes*, 4 J. OF MEDIA EDUC. 2 (2013) (“The average respondent used a digital device for non-class purposes 10.93 times during a typical school day for activities including texting, social networking, and emailing. Most respondents did so to fight boredom, entertain themselves, and stay connected to the outside world. More than 80% of the respondents indicated such behavior caused them to pay less attention in the classroom and miss instruction.”); Eric D. Ragan et al., *Unregulated Use of Laptops Over Time in Large Lecture Classes*, 78 COMPUTERS & EDUC. 78, 78 (2014) (“Overall, the data show that students engaged in off-task computer activities for nearly two-thirds of the time.”); Aakash Taneja et al., *Cyber-Slacking in the Classroom: Potential for Digital Distraction in the New Age*, 82 COMPUTERS & EDUC. 141 (2015); Erping Zhu et al., *Use of Laptops in the Classroom: Research and Best practices*, 30 C.R.L.T. OCCASIONAL PAPERS 1, 3 (2011) (“While students see laptops . . . as helpful tools for learning, they

In particular, social media often demands that students remain in a constant and perpetual state of consciousness regarding all aspects of their social lives, 24/7.⁷ Against this impossible tide, law school professors struggle to stay relevant and remain interesting to an increasingly jaded and cynical audience of otherwise preoccupied students.

In this struggle to get and maintain eyeballs, a number of technologies have been introduced into the classroom in an effort to make the admittedly often boring instruction more interesting to students.⁸ Even if their often-inept adoption doesn't create even bigger problems,⁹ most of

also clearly recognize that laptops can become a distraction for themselves and others during class. Three-quarters of the students from both groups reported that using a laptop during class increased the amount of time they spent on non-course tasks. In addition, approximately 35% of the respondents ... spent more than ten minutes per class using social networking sites and email. When asked how they are affected when other students seated near them use their laptops, ... 46% [or . . .] 40% reported feeling somewhat or significantly distracted.”).

⁷ Abraham E. Flanigan & Wayne A. Babchuk, *Social Media as Academic Quicksand: A Phenomenological Study of Student Experiences in and Out of the Classroom*, 44 LEARNING & INDIVIDUAL DIFFERENCES 40, 40 (2015) (“Participants reported that using social media during academic activities diminishes achievement, increases the amount of time it takes to complete tasks, and reduces how much information students retain from study and lecture sessions. Additionally, participants indicated how a lack of situational and topic interest increases social media's temptation.”)

⁸ Paul L. Caron & Rafael Gely, *Taking Back the Law School Classroom: Using Technology to Foster Active Student Learning*, 54 J. OF LEGAL EDUC. 551, 558 (2004); Stephen M. Johnson, *Teaching for Tomorrow: Utilizing Technology to Implement the Reforms of MacCrate, Carnegie, and Best Practices*, 92 NEB. L. REV. 46, 81 (2013); Susan Park & Denise Farag., *Transforming the Legal Studies Classroom: Clickers and Engagement*, 32 J. OF LEGAL STUDIES EDUC. 47 (2015).

⁹ Tahirih Lee, *Technology-Based Experiential Learning: A Transnational Experiment*, 64 J. LEGAL EDUC. 455, 458 (2014) (“The haphazard and incomplete integration of technology into the classroom

these technologies lose their luster rather quickly, or they require substantial and often unappreciated preparation by the professor to make them work optimally in a teaching environment.¹⁰

An alternative to the technology fatigue¹¹ resulting from introduction of clickers, apps and other Band-Aid efforts to regain the fleeting attention of perpetually distracted students is the simple incorporation of video. It is generally assumed that video, when done right, is an excellent teaching tool, stimulating our visual senses and using emotional stories to draw in the student's attention,¹² engaging both hemispheres of our brains.¹³ This isn't a new revelation. There are numerous papers,¹⁴ which outline how movies can be useful texts for almost any area of study,¹⁵ including legal texts and primary legal sources for learning, particularly as they can be entertaining without sacrificing their educational value.¹⁶ Moreover, continued concerted

lowers the expectations of students. Students roaming around on the Internet without having to put their computers to good use creates an impression of wasted time that stretches throughout legal education, the memory of which surely carries into life on the bench and at the bar and dims the views of these legal professionals about the quality of legal education.”)

¹⁰ Denise M. Farag et al., *Faculty Perceptions of the Adoption and Use of Clickers in the Legal Studies in Business Classroom*, 90 J. OF EDUC. FOR BUS. 208 (2015).

¹¹ Lee, *supra* note 9.

¹² Brian Levey, *Using Film Clips in the Classroom: Something Old, Something New?*, 4 J. OF TEACHING & LEARNING WITH TECH. 41, 45 (2015).

¹³ Ronald A. Berk, *Multimedia Teaching with Video Clips: TV, Movies, YouTube, and mtvU in the College Classroom*, INT’L J. OF TECH. IN TEACHING AND LEARNING 1, 3 (2009).

¹⁴ Barbara Seels et al., *Research on Learning from Television*, 2 HANDBOOK OF RES. ON EDUC. COMM. & TECH 249, 249 (2004).

¹⁵ *Id.* at Appendix A.

¹⁶ Allen K. Rostron, *Lawyers, Law & the Movies: The Hitchcock Cases.*, 86 CAL. L. REV. 211, 239 (1998).

efforts by content producers to be more realistic¹⁷ have arguably resulted in television that is better designed to reflect reality. But ask anyone building a massive open online course (MOOC) about the time and commitment it takes to get it done right. Designing and implementing a MOOC or other video based class from the ground up is non-trivial. Thus, while the use of video is obvious, it isn't necessarily easy to implement—designing an entire class based on popular videos and movies is not easy. Once in a while, however, the entertainment industry creates a perfect storm of content and entertainment that is nearly perfect for instruction. This paper outlines the efforts the author made in using the HBO television program, *Silicon Valley*, as the basis for a semester-long class on intellectual property and entrepreneurship.

As the course deals with various issues of intellectual property it is important to set out 17 U.S.C § 110. This part of the U.S. Copyright Code describes some limitations on the exclusive rights of the copyright owner, particularly performance and display rights. The law sets out a very clear exception for the showing of even entire films within a classroom setting.¹⁸ While on the topic of caveats, it should also be stressed that *Silicon Valley* is not shown on basic cable¹⁹ and might not be suitable for all audiences. It is rated

¹⁷ Deborah Jermy, *Labs and Slabs: Television Crime Drama and the Quest for Forensic Realism*, 44 STUD. IN HIST. & PHIL. OF SCI. PART C: STUD. IN HIST. AND PHIL. OF BIO. & BIOMED. SCI. 103, 108 (2013).

¹⁸ Distance Learning exemptions may be more limited under the Digital Millennium Copyright Act of 1998, 17 U.S.C. §101, Pub. L. No. 105-304 T.E.A.C.H. Act (Technology, Education and Copyright Harmonization Act of 2001, *Pub. L. No. 107-273*).

¹⁹ CBS SF Bay Area, *HBO Filming 'Silicon Valley' Pilot in Palo Alto*, CBS San Francisco and Bay City News Service, (March 12, 2013, 6:33 PM), <http://sanfrancisco.cbslocal.com/2013/03/12/hbo-filming-silicon-valley-pilot-in-palo-alto/> [<https://perma.cc/FS6A-XQC3>].

TV-MA.²⁰ As per the Federal Communications Commission, this means that: “This program is specifically designed to be viewed by adults and therefore may be unsuitable for children under 17.”²¹ This program may contain one or more of the following: graphic violence (V), explicit sexual activity (S), or crude indecent language (L).²² *Silicon Valley* contains most of this.

The course could have taken one of many tacks. Students could have been assigned to watch the entirety of the programming on their own and then come to class prepared to discuss the issues raised. Alternatively, scenes from the show could be extracted and watched together in class. And finally, the alternative that was chosen was to watch the programming in its entirety in class together. This third alternative was chosen for a number of practical reasons.

First, not all students might have legal access to the program. The irony of having students watch illegal copies of the show while learning about intellectual property was not lost on the instructor. Secondly, part of the purpose of using video is to draw the students in, by breaking down the show into sometimes-incongruous parts, the students no longer have as much an emotional attachment to the characters, and they lack the necessary investment in the show to pay enough attention. Third, part of the goal of this effort was to incentivize students to actually show up to the lecture, by sweetening the deal with the guarantee of substantial television, students were more likely to actually come to class. Fourth, another goal of the class is to develop issue spotting skills. By showing the program in its entirety,

²⁰ *Silicon Valley*, IMDB, <http://www.imdb.com/title/tt2575988/> [https://perma.cc/P9R2-U4BS].

²¹ FED. COMM. COMM’N, *The V-Chip: Options to Restrict What Your Children Watch on TV* (Oct. 25, 2016), <http://transition.fcc.gov/vchip/> [https://perma.cc/64MA-VYG8].

²² *Id.*

in contrast to excerpted segments, students are not artificially prompted to find the issues, but rather must find them without the added hint. Moreover, another goal of the class is inculcate within the students that everything can be a learning experience, thus, while watching the show together, the program can be paused to highlight important legal issues as they happen. Another concern was whether to watch bridge episodes, i.e., the episodes that provided important plot continuity but provided very little in the way of educational material. It was decided that it was more important to keep the students engaged in the show, and hopefully also the legal material, rather than save the twenty-odd minute investment in the show. In the end, the students and the instructor together watched two seasons of the show. The third season ended June 2016.

Silicon Valley, created by Mike Judge, John Altschuler and Dave Krinsky, is at its heart, a story of a group of young men trying to make it as entrepreneurs in Silicon Valley.²³ Having premiered in 2014, the show just finished its third season and is green lit for a fourth.²⁴ The show centers around the efforts of six young men to develop a groundbreaking data compression technology. Thomas Middleditch plays Richard Hendricks, a young programmer at Hooli, a large fictional internet company who unintentionally develops some of the compression technology in his spare time while working on an otherwise unremarkable website. The show has won significant praise

²³ See, e.g., Esther Breger, *The Boring Sexism of HBO's 'Silicon Valley'*, NEW REPUBLIC (May 31, 2014), <https://newrepublic.com/article/117963/hbos-silicon-valleys-boring-sexism> [<https://perma.cc/BQ9H-42J2>].

²⁴ James Hibberd, *'Game of Thrones' Officially Renewed for Seventh Season*, ENTERTAINMENT WEEKLY, <http://ew.com/article/2016/04/21/game-thrones-5/> [<https://perma.cc/N9CV-7T2D>].

This paper will provide a plot summary of each episode followed by a discussion of just some of the many potential intellectual and/or entrepreneurship topics raised or highlighted in each of the episodes. The goal is to provide the reader and educator with the necessary sparks of ideas as to how to use this very useful show as a jumping off point into an analysis of intellectual property and entrepreneurship legal issues, particularly as they are relevant to technology startups.

I. SILICON VALLEY SEASON 1 EPISODE 1 "MINIMUM VIABLE PRODUCT"²⁸

a. Recap

The show's premiere episode opens with a lavish, over-the-top party for otherwise uninterested nerds hosted by newly minted millionaires. Richard Hendriks, the show's protagonist is in attendance with his friends Dinesh Chughai (Kumail Nanjiani), Nelson "Big Head" Bighetti (Josh Brener), Erlich Bachman (T.J. Miller) and Bertram Gilfoyle (Martin Starr). Richard wonders out loud: "These guys built a mediocre piece of software that might be worth something someday, and now they live here. Money's flying all over Silicon Valley, so how come none of it ever hits us?" Richard and his friends live at Erlich's house that doubles as an after-hours incubator. It is at this incubator that Richard develops an unassuming app, *Pied Piper*. Ehrlich and the "brogrammers" at Hooli, where Richard works, have all discounted the program until the brogrammers realize that Hendriks has actually stumbled across an incredible, data compression algorithm. Meanwhile, Richard has also pitched his idea to Peter Gregory (the late Christopher Evan

<http://www.wsj.com/news/articles/SB10001424052702304549504579316913982034286> [https://perma.cc/Z8FU-NTFB].

²⁸ *Silicon Valley: Minimum Viable Product* (HBO television broadcast April 6, 2014).

Welch) who is a Peter Thiel-like venture capitalist. The remainder of the episode includes a bidding war between Gregory and Gavin Belson (Matt Ross), CEO of Hooli for a stake in Richard’s algorithm. Richard has to decide between different valuations and percentage buyouts that seem to befuddle him and increase his anxiety.

*b. Learning Opportunities &
Classroom Discussion*

The first episode provides two very important learning opportunities for students: The first lesson relates to entrepreneurship, and the second lesson relates to intellectual property. Over the course of the bidding war described above, both Peter Gregory and Gavin Belson attempt to value the nascent company. This provides a useful introduction into company valuation and how that valuation works within the concept of ownership. The class is presented with the varied levels of typical startup funding and its sources—from angels to venture capitalists (VCs). Different rounds of funding can be presented that also discuss the sometimes-unintuitive issues of ownership dilatation. Students can also be presented with standard founders’ dilemmas and decisions relating to contrasting quick exits with longer-term interests in company growth.

On the IP side, the students are introduced to the very integral question: “What is Richard selling and what are Gavin and Peter buying?” This provides for very fertile ground for a basic introduction and overview into intellectual property.

II. SILICON VALLEY SEASON 1 EPISODE 2: THE CAP TABLE²⁹

a. Recap

Richard accepts the investment proposal from Peter Gregory, the founder of the Raviga Capital, a fictional VC firm with a real website: <http://raviga.com/>. Expecting to be stewarded through the process by his new backers, Richard instead finds himself unable to keep up with many of the demands of running a startup. Jared "Donald" Dunn (Zach Woods), a former executive at Hooli, enamored with Richard and his startup, Pied Piper, signs on to help Richard with many of the more technical day-to-day aspects of running the company. One of the decisions that Richard has to make is cutting his best friend Big Head from the payroll. However, before actually firing him, Big Head is offered a significant raise at Hooli so that Gavin Belson can reverse-engineer the compression algorithm.

b. Learning Opportunities & Classroom Discussion

During Richard's first meeting at Raviga, he is peppered with financial terminology that is important for any entrepreneurial-minded student to know, including cap tables,³⁰ go to market strategy, P&L,³¹ pitch decks,³² and

²⁹ *Silicon Valley: The Cap Table* (HBO television broadcast April 13, 2014).

³⁰ CAPITALIZATION TABLE DEFINITION, <http://www.investopedia.com/terms/c/capitalization-table.asp> (LAST VISITED NOV. 29, 2016) [<https://perma.cc/S28Y-T6J4>].

³¹ PROFIT AND LOSS STATEMENT (P&L) DEFINITION, <http://www.investopedia.com/terms/p/plstatement.asp> (LAST VISITED NOV. 29, 2016) [<https://perma.cc/R8FU-73NQ>].

³² Chance Barnett, *The Ultimate Pitch Deck to Raise Money for Startups*, FORBES (May 9, 2014), <http://www.forbes.com/sites/chancebarnett/2014/05/09/investor-pitch-deck-to-raise-money-for-startups/#4136b0114863> [<https://perma.cc/HHX8-G3J9>].

business plans. The episode provides an opportunity to not only introduce students to these basic ideas, but to also provide them with the tools to develop some of the tables and plans themselves, especially with the help of online tools and instruction. Another potential relevant lesson from this episode that was also the fodder for some discussion in the blogosphere relates to how realistic is the portrayal of the interaction between Peter Gregory and his clueless founders. Surprisingly, there is no consensus as to what is to be expected of an early stage startup, such as Pied Piper.³³

On the intellectual property side, Hooli's efforts to reverse engineer Richard's algorithms provide a window into the relevant laws associated with reverse engineering intellectual property and the circumvention of digital safeguards. The episode also allows for a specific introduction into trade secrets, non-disclosure agreements (NDAs), and the requirements of employee's vis-a-vis corporate secrets. The episode deals with two particular aspects that can be jumping off points into trade secrets: Richard's inability to adequately protect his innovation through trade secret and the loss of some of Hooli's strategic advantages by Big Head's disclosures to Richard.

The episode also provides a foray into issues relating to the Digital Millennium Copyright Act,³⁴ particularly as the Act provides for some instances of reverse engineering.³⁵ Depending on the goals of the class, efforts can also be made to discuss international statutes that are equally relevant,

³³ Evelyn M. Rusli, *HBO's 'Silicon Valley' Episode 2: Let's Make a Deal*, WALL ST. J. (Apr 13, 2014), <http://blogs.wsj.com/digits/2014/04/13/hbos-silicon-valley-episode-2-lets-make-a-deal/> [https://perma.cc/7MPY-664F].

³⁴ See generally, Digital Millennium Copyright Act of 1998, Pub. L. No. 105–304.

³⁵ See generally, Donna L. Lee, *Reverse Engineering of Computer Programs Under the DMCA: Recognizing a Fair Access Defense*, 10 MARQ. INTEL. PROP. L. REV. 537 (2006).

including for example Article 6 of the European Software Directive.³⁶

Classroom discussion can also lean to the more practical, discussing, for example, what Richard could have done to limit access to his proprietary algorithm.³⁷ This discussion could lean toward contractual issues relating to maintaining secrets, such as non-compete agreements, end user license agreements (EULAs), confidentiality agreements, and employee invention assignments.

Additionally, this discussion could lead into what sorts of intellectual property might be considered by a young startup and what might be the pros and cons of each decision vis-a-vis employing each type of intellectual property.³⁸ Finally, the discussion could lead into the contentious area of intellectual property rights for software, highlighting the distinctions between all the available protections and if desired focusing in on current concerns relating to the patenting of software.

III. SILICON VALLEY SEASON 1 EPISODE 3: ARTICLES OF INCORPORATION³⁹

a. Recap

In the first overt legal issue of the season, Richard and Jared discover that the Pied Piper name is used by another company—an irrigation company based in Gilroy, which is also in California. Richard travels to meet the owner of the irrigation company, Arnold Garris (Casey Sander), in an effort to prove to his coworkers that he can

³⁶ Council Directive 2009/24, 2009 O.J. (L 111) 16 (EC).

³⁷ See generally, Kerry Medd & Antoinette Konski, *Workplace Programs to Protect Trade Secrets*, 21 NATURE BIOTECH 201 (2003).

³⁸ See generally, Stuart J.H. Graham & Ted Sichelman, *Why Do Start-Ups Patent?*, 23 BERKLEY TECH. L. J. 1063 (2008).

³⁹ *Silicon Valley: Articles of Incorporation* (HBO television broadcast April 20, 2014).

effectively negotiate a settlement. Richard's initially successful negotiation falls apart after Arnold infers that Pied Piper is a huge success capable of paying much more.

*b. Learning Opportunities &
Classroom Discussion*

Classroom discussion can begin by introducing the area of trademark law, focusing particularly on the area of trade names and how it might be different than colloquial understanding of trademark. Students can be prompted to suggest what might have been the specific legal concerns regarding the irrigation company and what Richard and Arnold actually might have agreed to. Pushing to more practical learning opportunities, the class is introduced to ideas such as trademark coexistence.

IV. SILICON VALLEY SEASON 1 EPISODE 4: FIDUCIARY DUTIES⁴⁰

a. Recap

Richard's company seems finally off the ground, however, Richard and his crew attend a hedonistic toga party of Peter Gregory. However, the following morning Richard wakes up to find out that he has assigned a Pied Piper board seat to Erlich. Richard's situation where he is perpetually agitated and remains unable to succinctly describe his company's vision to his investors and to his new attorney, Ron LaFlamme (Ben Feldman), is played in contrast to Big Head, who is now effectively useless to Hooli's own compression effort, *Nucleus*, but too expensive to fire, and idles away his time resting and vesting with similarly situated coworkers.

⁴⁰ *Silicon Valley: Fiduciary Duty* (HBO television broadcast April 27, 2014).

*b. Learning Opportunities &
Classroom Discussion*

With Pied Piper specifically being incorporated by Ron LeFlamme in Delaware, it raised an opportunity to discuss the legal process of incorporation, and on even more practical levels, the pros and cons associated with incorporating in varied jurisdictions, both nationally and internationally.

Practical discussions here can also revolve around the roles of attorneys in the development of startups. A tangential legal issue raised by the Ron LeFlamme meeting is whether attorney client privilege was violated when Ron informed Richard that Pied Piper is only one of Raviga's compression investments.

Additionally, students can be introduced to issues in the importance of developing employee guidelines and agreements relating to stock options and vesting,⁴¹ and other issues that were raised during the course of the episode, particularly as they relate to founders, boards, and employees that, like Big Head, cannot be fired.⁴²

V. SILICON VALLEY SEASON 1 EPISODE 5: SIGNALING RISK⁴³

a. Recap

In an effort to make the Pied Piper more appealing, Erlich ventures out to a seemingly dangerous neighborhood

⁴¹ FINANCIAL ACCOUNTING STANDARDS BOARD, COMPENSATION—STOCK COMPENSATION (TOPIC 718) (2014), <https://asc.fasb.org/imageRoot/85/51831185.pdf> [<https://perma.cc/YTJ8-A7U3>].

⁴² See, e.g., Kevin Roost, *Twitter Is Making Some Employees Rich Today*, NEW YORK MAGAZINE (March 14, 2014), <http://nymag.com/daily/intelligencer/2014/05/twitter-is-making-some-employees-rich-today.html> [<https://perma.cc/E5CD-S9YN>].

⁴³ *Silicon Valley: Signaling Risk* (HBO television broadcast May 4, 2014).

to meet Chuy Ramirez (Anthony “Citric” Campos), a graffiti artist, but ends up producing a sexually explicit image on Erlich’s garage door. Meanwhile, Pied Piper gains a spot on TechCrunch’s startup battlefield, a turn of events that initially upsets Peter Gregory who eventually changes his mind when he finds out that his former friend and now long-time rival Gavin Belson intends to announce the release of Nucleus at the same event. As a result of this seemingly petty rivalry between billionaires, Pied Piper is now forced to produce a usable tool within eight weeks, just in time to show up Gavin Belson.

*b. Learning Opportunities &
Classroom Discussion*

With copyright issues introduced earlier in the class, this is an opportune time to discuss work for hire rules,⁴⁴ corporate authorship, and other intellectual property aspects of the employee–employer relationship. Additionally, students can be introduced to the European idea of Moral Rights,⁴⁵ and compare them to U.S. federal attempts to provide some—albeit very limited—statutes relating to moral rights,⁴⁶ including, for example, the Visual Artists Rights Act of 1990 (VARA)⁴⁷ and Family Entertainment and Copyright Act (2005).⁴⁸ As the show takes place in California, students could be introduced to state efforts to

⁴⁴ 17 U.S.C. § 201 (2012).

⁴⁵ Berne Convention for the Protection of Literary and Artistic Works (1971) Art. 6bis; European Union, Resale Right Directive, 2001/84/EC, September 27, 2001.

⁴⁶ See generally, Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*. 28 BULL. COPYRIGHT SOC'Y USA 1 (1980).

⁴⁷ 17 U.S.C. § 106A (stating rights of certain authors to attribution and integrity); see Lanham Act § 43(a), 15 U.S.C. § 1125 (2012); Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14 (2d Cir. 1976).

⁴⁸ 17 U.S.C. § 110 (stating limitations on exclusive rights: exemption of certain performances and displays).

protect artists' rights, including, for example, the California Art Preservation Act,⁴⁹ and whether or not Chuy's efforts even fall under the statute's definition of art. Moreover, since Chuy is a graffiti artist, students might be interested in recent cases associated with graffiti artists and their intellectual property rights.⁵⁰

VI. SILICON VALLEY SEASON 1 EPISODE 6: THIRD PARTY INSOURCING⁵¹

a. Recap

With Pied Piper having trouble making their new enforced deadline, Richard hires an Adderall-addicted teenager, Kevin "the Carver" (Justin Uretz) to help out. With Jared stranded on Peter Gregory's island as a result of a mix-up involving an autonomous vehicle, the remainder of the team deals with the mess that Kevin creates when he inadvertently destroys much of Pied Piper's code.

b. Learning Opportunities & Classroom Discussion

Along the lines of the previous episode, this episode also provides the recapping of issues relating to the work for hire doctrine. With little else in this episode related to intellectual property, this class can focus on some of Jared's productivity and management tools that have been popping up throughout the season and are potentially very useful for innovate entrepreneurial companies that have otherwise little practical business experience and need to be able to usefully visualize the process of their product's

⁴⁹ Cal. Civ. Code § 987 (Deering 2016).

⁵⁰ See generally, *English v. BFC&R E. 11th St. LLC*, 97 Civ. 7446 (HB), 1997 U.S. Dist. LEXIS 19137 (S.D.N.Y. Dec. 2, 1997); Timothy Marks, *The Saga of 5POINTZ: VARA's Deficiency in Protecting Notable Collections of Street Art*, 35 LOY. OF L.A. ENT. L. REV. 281 (2015).

⁵¹ *Silicon Valley: Third Party Insourcing* (HBO television broadcast May 11, 2014).

development, for example, Scrum.⁵² Throughout the season, there are many rookie mistakes made by Richard and his company: for example, confusing the company and the product, hiring and firing friends and family, and lacking any intellectual property strategy. The show can be used to highlight these mistakes and serve as a springboard for other discussions as to how best start and run an early stage company.

VII. SILICON VALLEY SEASON 1 EPISODE 7: PROOF OF CONCEPT⁵³

a. Recap

At TechCrunch Disrupt, the team is not ready to beat Nucleus, but a confluence of events has them pushed off to the final event the following day, giving them a twenty-four-hour reprieve. Jared, still recuperating from his time on Peter Gregory’s island, is effectively useless; whereas Monica, one of only a handful of women at the conference, has provided each of the members of Pied Piper with a facial recognition app that allows to them to identify all the relevant people at the conference.

b. Learning Opportunities & Classroom Discussion

As set out above, not every episode provided optimal learning opportunities for the students. However, even in instances such as episode seven where there is little in the way of intellectual property, important class discussions can still be had vis-a-vis entrepreneurship. In particular, two concepts in this episode stand out. The mantra, “making the world a better place,” inexplicably attached to every

⁵² See generally, KEN SCHWABER, *AGILE PROJECT MANAGEMENT WITH SCRUM* (1st ed. 2004).

⁵³ *Silicon Valley: Proof of Concept* (HBO television broadcast May 18, 2014).

software development, no matter the level of esotericism. This highlights the need for entrepreneurs to have a message that resonates. This is particularly important given trends towards social justice in venture funding.⁵⁴ If a number of potential investments are fungible, what makes your effort more enticing to the funders?

Another issue that can be raised in the classroom setting is that of gender imbalances in Silicon Valley—a growing issue in Silicon Valley.⁵⁵ “[T]he tech market is usually just 2% women, but at TechCrunch Disrupt, it’s 15% women—a veritable meat market.”⁵⁶

⁵⁴ Greg DePersio, *How Social Venture Capital Is Changing the World*, INVESTOPEDIA (Sept. 9, 2015), <http://www.investopedia.com/articles/personal-finance/090915/how-social-venture-capital-changing-world.asp#ixzz4DzPevHuD> [https://perma.cc/B3HZ-47JT]; Amy Rees Anderson, *Making Money While Making The World A Better Place*, FORBES (Mar. 11, 2014), <http://www.forbes.com/sites/amyanderson/2014/03/11/making-money-while-making-the-world-a-better-place/#4a9a6fc3999a> [https://perma.cc/V797-RE6L]; PITANGO – VENTURE CAPITAL, <http://www.pitango.com/about/about-pitango/> [https://perma.cc/M39R-N24X] (“Our team sees innovation, technology, and entrepreneurship as a way to enable people to make the world a better place”).

⁵⁵ Megan Rose Dickey, *Silicon Valley Could Gain \$25 Billion By Narrowing Gender Gap*, TECHCRUNCH (Apr. 7, 2015), <https://techcrunch.com/2016/04/07/silicon-valley-could-gain-25-billion-by-narrowing-gender-gap/> [https://perma.cc/3TT4-2247]; Clare O'Connor, *Gender Equality In Silicon Valley Will Take A Generation, Say Women Founders And Funders*, FORBES (May 13, 2016), <http://www.forbes.com/sites/clareoconnor/2016/05/13/gender-equality-in-silicon-valley-will-take-a-generation-say-women-founders-and-funders/#5cf414782af1> [https://perma.cc/K923-HNB5]; Hannah Levintova, *Meet the Engineer Who Forced Silicon Valley's Gender Problem Into the Open*, MOTHER JONES (Aug. 2015), <http://www.motherjones.com/politics/2015/05/silicon-valley-gender-sexism-women-engineers-tracy-chou> [https://perma.cc/72S6-NL53].

⁵⁶ Eliana Dockterman, *Silicon Valley Needs to Address the Industry's 'Woman Problem' in Season 2*, TIME (Apr. 9, 2015), <http://time.com/3773154/silicon-valley-needs-to-address-the-industrys-woman-problem-in-season-2/> [https://perma.cc/JB49-E3TJ].

VIII. SILICON VALLEY SEASON 1 EPISODE 8: OPTIMAL TIP-TO-TIP EFFICIENCY⁵⁷

a. Recap

The season finale revolves around lewd situational humor that provides Richard with the necessary insight and inspiration to revamp the software, developing an unprecedented compression algorithm that allows him to beat Gavin Belson and win TechCrunch Disrupt. Monica reminds him in the closing minutes that his newfound success will likely bring with it more problems and heartache.

b. Learning Opportunities & Classroom Discussion

In the final episode of the season, as things finally start looking up for Pied Piper, Monica, in an offhand comment, foreshadows the upcoming season by suggesting that the success of Pied Piper may bring out lawsuits claiming that Richard misappropriated someone else's intellectual property. While there is ample material from the next season to discuss these issues head on, it is possible at this stage to introduce the students to patent trolls, *i.e.*, patent aggregators that seek to extract rents from innovators by threatening costly lawsuits, based on tenuous infringement arguments. The troll issue is of particular importance in many efforts to change or modify patent law as it relates to software, with much of the efforts being pushed by corporations that have seen too many threatening letters from trolls.⁵⁸

⁵⁷ *Silicon Valley: Optimal Tip-to-Tip Efficiency* (HBO television broadcast June 1, 2014).

⁵⁸ See generally James E. Bessen, Michael J. Meurer & Jennifer Laurissa Ford, *The private and social costs of patent trolls* 2 (BOSTON UNIV. SCH. OF L., WORKING PAPER NO. 11-45, 2011), <http://www.bu.edu/law/workingpapers-archive/documents/bessen-ford-meurer-no-11-45rev.pdf>

Finally, at TechCrunch Disrupt, Richard presents some of the relevant ideas behind his new and improved compression algorithm. Although the show ignores patenting, issues relating to provisional applications and grace periods—both U.S.⁵⁹ and international⁶⁰—can be broached. Moreover, the students can be introduced to patentable subject matter, and the evolving issue of patenting software and algorithms in light of recent case law,⁶¹ and whether Richard should have or should not have applied for a patent on his technology.

IX. SILICON VALLEY SEASON 2 EPISODE 1: SAND HILL SHUFFLE⁶²

a. Recap

As things are, finally, just starting to look up for Pied Piper after their win at TechCrunch Disrupt in the season finale, we are informed of Peter Gregory's death. This wasn't unexpected as Christopher Even Walch had passed away during the previous season. Peter Gregory is replaced with an even less personable Laurie Bream (Suzanne Cryer). Concerned about the implementation of a "key man" clause,

[<https://perma.cc/HF45-GRV7>]; Robert P. Merges, *The Trouble with Trolls: Innovation, Rent-Seeking, and Patent Law Reform*, 24 BERKELEY TECH. L. J. 1583 (2010); Prachi Agarwal, *Patent Troll: The Brewing Storm of Patent Reform in the United States of America*, 15 J. MARSHALL REV. INTELL. PROP. L. 63 (2015).

⁵⁹ See generally Jordan S. Joachim, *Is the AIA the End of Grace: Examining the Effect of the America Invents Act on the Patent Grace Period*, 90 N.Y.U. L. REV. 1293 (2015).

⁶⁰ See generally Chiara Franzoni & Giuseppe Scellato, *The grace period in international patent law and its effect on the timing of disclosure*, 39 RES. POL'Y 200 (2010).

⁶¹ See generally *Alice Corp. Pty. Ltd. v. CLS Bank Intern.*, 134 S. Ct. 2347 (2014).

⁶² *Silicon Valley: Sand Hill Shuffle* (HBO television broadcast April 12, 2015).

the Pied Piper team takes their road show across the valley to various funders, who, seemingly due to manipulation on the part of Richard and Erlich, continue to raise their funding and valuations. Eventually, Richard settles on Raviga. And again, just as things are looking up for Pied Piper, Hooli announces that they are suing Pied Piper for intellectual property infringement.

*b. Learning Opportunities &
Classroom Discussion*

A number of terms are introduced in this episode that might be relevant for a small entrepreneurial start-up seeking outside funding. We are introduced to runaway valuations,⁶³ down rounds,⁶⁴ and the idea that even the founder can seemingly easily be fired by the venture capitalists with controlling stakes.⁶⁵ Key man clauses are not just a plot tool, but are real contractual clauses that “if a specified number of key named principals cease to devote a specified amount of time to the partnership, then the “key man clause” provides that the manager of the fund is prohibited from making any further new investments until such a time that new replacement key executives are appointed, with the

⁶³ See generally Ronald Barba, *This Real-Life Startup Story Sounds Like Last Night’s ‘Silicon Valley’ Plot*, TECH.CO (Apr. 13, 2015, 3:30 PM), <http://tech.co/startup-story-like-silicon-valley-plot-2015-04> [<https://perma.cc/8W3Q-VJ8G>].

⁶⁴ See *Down Round*, INVESTOPEDIA, <http://www.investopedia.com/terms/d/downround.asp> [<https://perma.cc/UM3E-QQQL>] (last visited Jan. 7, 2017); *The Downround Tracker*, CB INSIGHTS, <https://www.cbinsights.com/research-downround-tracker> [<https://perma.cc/SYA2-MALW>] (last visited Jan. 7, 2017); see also Jessi Hempel, *The Dreaded Down Round Won’t Necessarily Kill a Unicorn*, WIRED (Mar. 23, 2016), <http://www.wired.com/2016/03/dreaded-round-wont-necessarily-kill-unicorn/> [<https://perma.cc/ZL8M-T8KT>].

⁶⁵ Eric Markowitz, *Why Founders Get Fired*, INC. (Sep. 8, 2011), <http://www.inc.com/articles/201109/why-founders-get-fired.html> [<https://perma.cc/U677-YDPG>].

exception of investments that have been agreed to before the key man clause takes effect.”⁶⁶

Students can also be introduced to the real costs of intellectual property litigation. Until now, this idea has only been foreshadowed in the show, but as the plot progresses, the real cost, not just monetary—although that is significant⁶⁷—comes to the fore. This is also an excellent opportunity to review issues relating to employee and employer relationships, vis-a-vis intellectual property rights. At this point, it is not clear what the basis of Hooli’s lawsuit is, but students can participate in an excellent issue spotting exercise to find out what the lawsuit might claim.

X. SILICON VALLEY SEASON 2 EPISODE 2: RUNAWAY DEVALUATION⁶⁸

a. Recap

The second episode of the season shows the effect of the Hooli lawsuit from the previous episode. One of the most legal-heavy episodes to date, the viewer watches as Pied Piper returns to each of the VCs that they earlier spurned looking for a new source of funding. This becomes particularly pertinent as Richard discovers how much the Hooli lawsuit will cost him. A secondary plot revolves around Dinesh’s funding of his cousin’s, seemingly inane, app. Finally, the episode leaves us with a cliffhanger as Gavin tries to persuade Richard to join forces with Hooli.

⁶⁶ *Key Man Clause*, VCExperts, <https://www.vcexperts.com/definition/key-man-clause> [<https://perma.cc/Q4GC-SST4>].

⁶⁷ See generally AIPLA, *2015 Report of the Economic Survey* (2015), <http://www.aipla.org/learningcenter/library/books/econsurvey/2015EconomicSurvey/Pages/default.aspx> [<https://perma.cc/3ES4-LMPF>].

⁶⁸ *Silicon Valley: Runaway Devaluation* (HBO television broadcast April 19, 2015).

*b. Learning Opportunities &
Classroom Discussion*

This episode highlights some of the shadier areas of the entrepreneurial underbelly, including Gavin’s obviously unsubstantiated claims in his lawsuit, designed, as everyone seems to know, simply to put Pied Piper out of business.

The Pied Piper team is also exposed to what they refer to as “brain raping,” a business model that had been used successfully in the early days of Silicon Valley⁶⁹ and even currently by some.⁷⁰ The episode also highlights other areas of funding, including crowdsourcing via sites like Kickstarter.⁷¹

The episode also provides an opportunity for a practical lesson in the aspects of intellectual property litigation, how it might hurt innovation,⁷² and why it might cost Richard more than \$2,000,000 to defend himself.⁷³ Ron LeFlamme also provides a succinct lesson on the elements of a copyright case relating to ownership of the copyright in an employee–employer relationship.

⁶⁹ See generally Dov Greenbaum & Mark Gerstein, *The Computer Connection*, 347 *SCIENCE* 956 (2015).

⁷⁰ Mark Scott, Copycat Business Model Generates Genuine Global Success for Start-Up Incubator, *N.Y. TIMES* (Feb. 27, 2014), <http://www.nytimes.com/2014/02/28/technology/copycat-business-model-generates-genuine-global-success-for-start-up-incubator.html> [<https://perma.cc/M6UJ-UBNX>].

⁷¹ KICKSTARTER, <https://www.kickstarter.com/>.

⁷² See generally JAMES BESSEN & MICHAEL JAMES MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* (2008).

⁷³ See *IP Litigation Costs, Special Edition*, *WIPO MAGAZINE*, Feb. 2010, at 2 (“Do high litigation costs fuel a perception, more generally, that the IP system only benefits wealthy or large companies equipped with expensive legal expertise?”).

XI. SILICON VALLEY SEASON 2 EPISODE 3: BAD MONEY⁷⁴

a. Recap

Without any possibility of funding, Richard has tentatively agreed to sell the company to Gavin Belson. On the way to Hooli, he meets Russ Hanneman (Chris Diamantopoulos), a Sean Parker/Mark Cuban caricature,⁷⁵ who offers Richard a \$5,000,000 loan to help the company. Russ turns out to be universally reviled, and his offensive antics are much of the humor of the episode. In a nod to real-life events, Gavin gets himself in hot water by inexplicably comparing billionaires to Jews under the Nazis. A similar comment was made by Tom Perkins, the co-founder of the VC firm Kleiner Perkins.⁷⁶ Gavin is also seen in consultation with his attorneys, plotting how to win the lawsuit against Pied Piper.

b. Learning Opportunities & Classroom Discussion

The episode provides the students with the opportunity to understand that VC funding can be fraught with risk. Viewers have already seen what happened to the founder of Goolybib, but Russ promises to be much worse. There is no shortage of information online that can be used

⁷⁴ *Silicon Valley: Bad Money* (HBO television broadcast April 26, 2015).

⁷⁵ David Holmes, *Sean Parker? Marc Cuban? Chris Sacca? Who is "Silicon Valley"'s Russ Hanneman, really?*, PANDO (APR. 28, 2015), <https://pando.com/2015/04/28/sean-parker-marc-cuban-chris-sacca-who-is-silicon-valleys-russ-hanneman-really/> [https://perma.cc/38SL-S5K7].

⁷⁶ Tom Perkins, *supra* note 27; *Tom Perkins's Unhinged Nazi Rant*, BLOOMBERG (Jan. 27, 2014), <https://www.bloomberg.com/view/articles/2014-01-27/tom-perkins-s-unhinged-nazi-rant> [https://perma.cc/575J-BWZN].

to describe the numerous, VC horror stories.⁷⁷ Putative student entrepreneurs should be forewarned, among other things: They need to understand term sheet fundamentals, obtain a good business advisor, and have a good understanding of valuation and dilution.

The discussions between Gavin and his team of lawyers provides an excellent foray into some of the ethical concerns with intellectual property litigation, where the team of lawyers is actually suggesting to Gavin, albeit very carefully, how to manufacture a set of facts that would support their suit, despite the fact that the evidence currently supporting the lawsuit is thin at best. Moreover, Gavin expressly notes to his team that the point of the suit was initially a holding action. Under Rule 11(b) of the Federal Rules of Civil Procedure, the attorney must represent to the court that the filing “is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation . . . [and that] the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”⁷⁸ A class discussion can be had as to whether this seemingly common practice, as Russ lays out the seemingly standard practice of being sued, only to be offered a buyout by the plaintiff, is a violation of Rule 11(b) or not.

⁷⁷ See, e.g., Maria Bustillos, *How VCs Turned My Startup in to a Nightmare*, BUZZFEED (July 11, 2012), https://www.buzzfeed.com/mariabustillos/confessions-of-a-dot-com-entrepreneur?utm_term=.goGo9LNvL#.ijd41zWdz [<https://perma.cc/JJ3V-W7V8>]; Bernard Lunn, *How Not to Get Screwed by VCs*, READWRITE (June 18, 2009), <http://readwrite.com/2009/06/18/how-not-to-get-screwed-by-vc/> [<https://perma.cc/3NS6-WRR9>]; Michael Litt, *The Importance of Choosing the Right VC*, TECHCRUNCH (May 18, 2015), <https://techcrunch.com/2015/05/18/the-importance-of-choosing-the-right-vc/> [<https://perma.cc/JJ3V-W7V8>].

⁷⁸ Fed. R. Civ. P. § 11(b).

XII. SILICON VALLEY SEASON 2 EPISODE 4: THE LADY⁷⁹

a. Recap

In their aim for expansion of the company, Pied Piper considers the hiring of a woman programmer, Carla Walton (Alice Wetterlund). The heretofore boys-club stumbles a bit in interacting with her, while she does her best to make their lives difficult through a series of teases. In a board meeting at Russ Hanneman's house, Russ gives his girlfriend a board seat, and the board approves more of Russ's spending. Meanwhile, Big Head has been promoted to co-head Hooli XYZ. The goal of the promotion is, as described the previous episode, to create facts favorable to Hooli's claim that Pied Piper's technology was stolen.

b. Learning Opportunities & Classroom Discussion

The episode provides the students with an opportunity to learn about aspects of the board of directors vis-a-vis start-ups. Students can be introduced to the duties of the board members, as well as legal defenses board members may have when making seemingly poor choices on behalf of their company. The show presents many, useful fact patterns of problematic board members, from Peter Gregory, whose goals are primarily to beat Gavin Belson, independent of the particular needs of Pied Piper, to Richard, whose managerial ineptitude eventually leads him to be fired (spoiler), to Russ Hanneman who misuses the firms funds to help his other companies and demands that Richard change his business model solely so that he can regain his billion-dollar net worth.

In the real Silicon Valley there are numerous instances where boards have not acted with the best interests

⁷⁹ *Silicon Valley: The Lady* (HBO television broadcast May 3, 2015).

of their company, particularly when entrepreneurs have seen their companies suffer when poor board choices translate into poor financial outcomes. Entrepreneurs should be cognizant of the power of their boards to both help and harm their nascent firms, and should be shown how to negotiate appropriately to limit the destructive nature of their board.

XIII. SILICON VALLEY SEASON 2 EPISODE 5: SERVER SPACE⁸⁰

a. Recap

The Pied Piper team is thinking about moving their workplace to a more professional environment. The episode introduces the class to a number of areas where personal grudges take over in the entrepreneurial business. Hooli has blacklisted Pied Piper so that no server company is willing to work with them. Further, Gavin lets his recent hire for Hooli XYZ quit in an effort to keep Big Head involved in the program—a necessary commitment to create facts for the Hooli lawsuit. Finally, Gavin commits Nucleus to an impossible time-table in an effort to beat Pied Piper’s rollout of their technology. Pied Piper also learns that while many startups had their origins in the garages of Silicon Valley, there are legal concerns in light of zoning limitations.

b. Learning Opportunities & Classroom Discussion

This is an opportunity to discuss issues of inventorship and assignment in patent law. The episode highlights how personal grudges can lead to millions of dollars in legal fees and litigation. One more common example of personal grudges and patent law deals with issues in the area of inventorship. Under U.S. patent law, inventorship is sacrosanct, and misleading the patent office

⁸⁰ *Silicon Valley: Server Space* (HBO television broadcast May 10, 2015).

in this area can result in grave consequences.⁸¹ However, in the multi-year process to obtaining patents, inventors often move on, or more problematically become estranged from other inventors or their original company, making obtaining an oath and other documentation somewhat difficult. In other instances, co-inventors who have a falling out can both equally license or practice the patent, making it problematic for companies with disgruntled inventors. Here, students should appreciate the benefits of assignment of patents to the company, as well as new rules under the Leahy–Smith America Invents Act that provide for instances of hard to obtain oaths and signatures.⁸²

XIV. SILICON VALLEY SEASON 2 EPISODE 6: HOMICIDE⁸³

a. Recap

When Hooli’s effort to live-stream a UFC fight fail miserably, Gavin realizes that he has surrounded himself with sycophants. Taking advantage of Hooli’s failure, Pied Piper attempts to set up a collaboration with an energy drink company, Homicide, to livestream a daredevil’s (DUSTIN MILLIGAN) stunt, but the collaboration fails when Pied Piper realizes that they will not be getting the necessary credit to highlight their technology. In the end, the energy drink live-streams the event through End Frame, the company that tricked Pied Piper into revealing their technology in Episode Two. One of the best jokes of the episode has Dinesh and Gilfoyle appropriating another management technique taught to them by Jared: “S.W.O.T.,” a structured analysis

⁸¹ See 35 U.S.C. § 256 (2012).

⁸² 37 C.F.R. § 1.64 (2013); Changes To Implement the Inventor's Oath or Declaration Provisions of the Leahy-Smith America Invents Act, 77 Fed. Reg. 48776 (Aug. 14, 2012) (to be codified at 37 C.F.R.).

⁸³ *Silicon Valley: Homicide* (HBO television broadcast May 17, 2015).

that is an acronym for strengths, weaknesses, opportunities, and threats.⁸⁴

*b. Learning Opportunities &
Classroom Discussion*

End Frame, the company that eventually live streamed Homicide’s daredevil stunt, had, earlier in the season, tricked Pied Piper into disclosing much of their algorithm by insinuating that they were a VC firm doing their due diligence. The facts are similar to a Pennsylvania case, *Nicolo v. Patterson Belknap Webb & Tyler, LLP*,⁸⁵ where Nicolo, a retired surgeon, disclosed trade secret information to someone who he thought was his attorney, when in reality the attorney worked for a direct competitor.⁸⁶ In his lawsuit, Nicolo argued that the attorney had contrived a meeting to obtain confidential information for their client. Not only did Nicolo argue trade secret misappropriation, but also unjust enrichment.⁸⁷ Here, Nicolo specifically argued that under Pennsylvania’s Uniform Trade Secrets Act (PUTSA),⁸⁸ which makes it illegal to acquire trade secrets through “improper means” or gained by authorized access and disclosed in breach of that individual’s (here the attorney’s) duty to maintain its secrecy.⁸⁹ Similarly, under Uniform Trade Secrets Act (UTSA), obtaining trade secrets by subterfuge is also illegal.⁹⁰ Student discussion can include ethical issues regarding the claimed deception by the attorney in *Nicolo*. Student discussion can also be used to determine if Pied Piper had a trade secret and whether End

⁸⁴ Doug Leigh, *SWOT analysis*, in THE HANDBOOK OF HUMAN PERFORMANCE TECH. 1089 (James A. Pershing ed., 3d ed. 2006).

⁸⁵ 110 U.S.P.Q.2d (BNA) 2041 (W.D. Penn. 2014).

⁸⁶ *Id.* at 2043–2044.

⁸⁷ *Id.* at 2042, 2044.

⁸⁸ 12 Pa. C. S. §§ 5301–5308 (2016); *Nicolo*, 110 U.S.P.Q.2D (BNA) at 2044.

⁸⁹ 12 Pa. C. S. § 5302.

⁹⁰ UNIF. TRADE SECRETS ACT § 1, 14 U.L.A. 541 (1980).

Frame gained that secret illegally under UTSA or the relevant California code.⁹¹

XV. SILICON VALLEY SEASON 2 EPISODE 7: ADULT CONTENT⁹²

a. Recap

The Pied Piper team marches into End Frame's offices to confront them following their use of Pied Piper's technology. However, End Frame notes that the issue is moot given their huge sales team devoted to selling the technology. Meanwhile Gavin has to report his failures to his board and learns the true effect of having Big Head lead his team of engineers. Russ Hanneman, having formally advised Pied Piper to try not to have revenue, now, in light of his bad investments and his demotion from billionaire status, suggests that Pied Piper try and make some money. Finally, Gilfoyle gains access to End Frame's contracts and, finding out about a large contract with a pornography company, Intersite, suggests that Pied Piper try and beat the offer and steal the business. After approaching the pornography company, End Frame and Pied Piper vie in a bakeoff to see who will get Intersite's business.

b. Learning Opportunities & Classroom Discussion

In misappropriating the trade secrets of End Frame, Gilfoyle likely violated the Computer Fraud and Abuse Act,⁹³ in addition to his unjust enrichment.⁹⁴ A recent ruling

⁹¹ Cal. Civ. Code § 3426 (Deering 2016).

⁹² *Silicon Valley: Adult Content* (HBO television broadcast May 24, 2015).

⁹³ 18 U.S.C. § 1030 (2012).

⁹⁴ Gilfoyle may have also violated a slew of other federal laws including, the Electronic Communications Privacy Act of 1986; Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.); the Foreign Intelligence Surveillance Act of 1978; Pub. L.

by the Ninth Circuit supports this, where the court found that even sharing passwords to gain unauthorized access is a violation of the Computer Fraud and Abuse Act, Title 18.⁹⁵ Under this act, unauthorized access, “an unambiguous, non-technical term that, given its plain and ordinary meaning, means accessing a protected computer without permission,”⁹⁶ could be construed to include Gilfoyle’s actions. Even guessing End Frame’s password is actionable.⁹⁷ The former director of Baseball for the St. Louis Cardinals was sentenced to nearly four years in jail and a \$250,000 fine after guessing the password of the Houston Astros’ databases.⁹⁸

An additional intellectual property issue relates to the user-created nature of the pornography on Intersite’s website. For example, under the Communications Decency Act (CDA) of 1996, which would seem to be designed to limit free speech, particularly in the space where Intersite

No.95-511, 92 Stat. 1783 (codified as amended in scattered sections of 18 U.S.C. and 50 U.S.C. §§ 1801 et seq.); and the Communications Assistance for Law Enforcement Act of 1994; Pub. L. No. 103-414, 108 Stat. 4279 (codified as amended in scattered sections of 18 U.S.C. and 47 U.S.C.).

⁹⁵ *US v. Nosal*, 828 F.3d 865, 880 (9th Cir. 2016).

⁹⁶ *Id.* at 868.

⁹⁷ *See id.* at 891 (Reinhardt, J., dissenting).

⁹⁸ U.S. Attorney’s Office for Southern District of Texas, U.S. Dep’t of Justice, *Former Cardinals Official Sentenced to Prison for Astros Computer Intrusions* (July 18, 2016), <https://www.justice.gov/usao-sdtx/pr/former-cardinals-official-sentenced-prison-astros-computer-intrusions> [https://perma.cc/4WAG-484Z] (“In one instance, Correa was able to obtain an Astros employee’s password because that employee has previously been employed by the Cardinals. When he left the Cardinals organization, the employee had to turn over his Cardinals-owned laptop to Correa – along with the laptop’s password. Having that information, Correa was able to access the now-Astros employee’s Ground Control and e-mail accounts using a variation of the password he used while with the Cardinals.”).

operates, the statute carves out a safe harbor for internet providers:

“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁹⁹ Notably, however, it would not provide any defense against the violation of copyright laws, for example in cases of revenge porn.¹⁰⁰

XVI. SILICON VALLEY SEASON 2 EPISODE 8: WHITE HAT/BLACK HAT¹⁰¹

a. Recap

Gavin is realizing that Nucleus is a mess, and he is caught in a web of misinformation as his board attempts to find a scapegoat for Nucleus, however even that attempt fails. Meanwhile, Richard, feeling guilty for hacking into End Frame, twice, attempts and fails to reconcile with the End Frame’s now former security engineer. In the end, Pied Piper loses the bakeoff with Intersite, due to the ineptitude of Russ, who places his tequila bottle on the delete key and wipes out 9,000 hours of content.

b. Learning Opportunities & Classroom Discussion

As discussed with regard to previous episodes, this episode further raises relevant issues regarding the duties

⁹⁹ 47 U.S.C. § 230 (2012).

¹⁰⁰ See generally Kaitlan M. Folderauer, *Comment: Not All Is Fair (Use) in Love and War: Copyright Law and Revenge Porn.*, 44 U. BALT. L. REV. 321 (2015); Amanda Levendowski, *Using Copyright to Combat Revenge Porn.* 3 N.Y.U.NYU J. INTELL. PROP. & ENT. L. 422 (2014).

¹⁰¹ *Silicon Valley: White Hat/Black Hat* (HBO television broadcast May 31, 2015).

and responsibilities of the executives with regard to their companies. In general, there are a number of bodies that have provided recommendations regarding the duties associated with corporate governance, including, The American Law Institute’s Principles of Corporate Governance: Analysis and Recommendations” (adopted in May 1992); The Business Roundtable (BRT)’s Principles of Corporate Governance” (adopted in May 2002); The Report of the National Association of Corporate Directors (NACD) Commission on Director Professionalism (issued in 1996); The Conference Board Commission on Public Trust and Private Enterprise issued Findings and Recommendations, Part 2: Corporate Governance (issued January 2003); and, The Organisation for Economic Cooperation and Development (OECD) Principles of Corporate Governance (1999 and 2004).¹⁰² These bodies provide some consistency with regard to the nature of the duties that the board (and the chief executive, who sits on the board) has to the corporation.

Students can discuss how Gavin misrepresenting of the status of Nucleus both to the board, could be seen a violation of the fiduciary duties he shares with other board members, including the duties of care, loyalty and disclosure.¹⁰³ Similarly, students could determine if Richard’s attempts to reconcile with EndFrame’s engineer may similarly be a violation of the duty of care, as his efforts could have caused the disgruntled EndFrame engineer to

¹⁰² Holly Gregory & Rebecca Grapsas, *Comparison of Corporate Governance Principles & Guidelines: United States 2012*, http://corpgov.law.harvard.edu/wp-content/uploads/2012/02/Weil_Comparison-of-Corp-Gov-Practices.pdf [https://perma.cc/T7M8-BNDJ].

¹⁰³ Bernard S. Black, *The Principal Fiduciary Duties of Boards of Directors, Presentation at Third Asian Roundtable on Corporate Governance Singapore* (Apr. 4, 2001), <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/1872746.pdf> [https://perma.cc/3FA8-GPS9].

retaliate against Pied Piper. Notably, students might find that Richard could likely use the Business Judgement Rule described herein to support his decision to have a face to face meeting with the EndFrame engineer, it is unlikely, given what the viewer knows about Nucleus, that Gavin would not be liable to any damages his failed disclosure caused to the company. Richard, may arguably have also violated his duty of loyalty to the company (if that duty can be expanded beyond financial transactions). In this case, his efforts to ameliorate his conscious were in conflict to the best interests of the company.

XVII. SILICON VALLEY SEASON 2 EPISODE 9: BINDING ARBITRATION¹⁰⁴

a. Recap

In art parodying life, Big Head finds a Hooli prototype phone in a bar. Richard, leveraging the fact that a tech blogger could see just how bad Nucleus is, gets Gavin to agree to binding arbitration to solve their IP issues. Pied Piper gains from this by being able to wrap up their legal issues within a week. In a twist, the Pied Piper team hires a disbarred attorney, Pete Monahan (Matt McCoy), to represent them, on spec. Hooli meanwhile dumps 132 banker-boxes of printed out emails on Pied Piper's doorstep in an effort to drown them with documents. Meanwhile, Pete discovers through Richard's emails that Richard ran a single test of his algorithm on a Hooli computer, potentially giving Hooli the right to Pied Piper's IP. Erlich inadvertently discloses this in arbitration, giving Hooli the opportunity to determine that Richard used a Hooli computer to minimally alter his algorithm. Meanwhile, Jared's call results in Pied Piper's live-streaming of a condor nest to be taken down.

¹⁰⁴ *Silicon Valley: Binding Arbitration* (HBO television broadcast June 7, 2015).

However, the efforts to remove the camera result in the museum’s employee’s fall off a cliff.

*b. Learning Opportunities &
Classroom Discussion*

In another parody of reality, the show took a real sequence of events regarding a discovered iPhone prototype in a bar.¹⁰⁵ The real story was that in 2010, Gizmodo, a technology blog, paid \$5000 to obtain the phone from the guy who found it in a bar in Redwood City, California.¹⁰⁶ This sequence of events provides an opportunity to discuss various levels of trade secret law; for example, contrasting the Economic Espionage Act’s¹⁰⁷ definition of trade secret with that of the Uniform Trade Secrets Act,¹⁰⁸ to determine which law would better protect the trade secrets within the discovered Hooli phone. Classroom discussion can also be used to discuss the difference between the trade secrets within the Hooli phone—a device that would eventually be released—and the trade secrets associated with a secret recipe, which are intended to never be released. Further, discussion could be lead to differences, if any, had the Hooli phone been stolen rather than lost. Another interesting issue is whether First Amendment protections for journalists would apply in this case: If Richard were to pass the phone to tech bloggers, would they be allowed to disclose the trade secrets within the Hooli phone? Notably, in the real life case with the iPhone, the only people charged with a crime were Sage Wallower and Brian Hogan—the two who sold the phone to Gizmodo.¹⁰⁹ Gizmodo, which published an

¹⁰⁵ Dan Nosowitz, *The iPhone 4 Leak Saga From Start to Finish*, FAST COMPANY (Apr. 20, 2010), <http://www.fastcompany.com/1621516/iphone-4-leak-saga-start-finish> [<https://perma.cc/65QR-8BK5>].

¹⁰⁶ *Id.*

¹⁰⁷ 18 U.S.C. §§ 1831 et seq.

¹⁰⁸ 14 U.L.A. 541 (1980) (amended 1985).

¹⁰⁹ Dustin Gaines, *Abuse of the Journalist's Shield: A State-by-State Survey of Blogger Liability for Trade Secret Misappropriation and*

intensive tear-down of the prototype phone, was not charged.¹¹⁰ Further, students can be tasked with determining if there would be a difference had the phone's secrets been misappropriated under today's new Defend Trade Secrets Act.¹¹¹

Further classroom discussion can include practical guidance with regard to the onerous and costly nature of discovery and the multitude of issues associated with e-discovery, particularly in the areas of high-stakes intellectual property litigation.¹¹²

This episode also introduces the students to alternative dispute resolution (ADR) in the area of intellectual property. Intellectual property litigation, particularly patent litigation, is onerous, time consuming and costly,¹¹³ and is rarely used, with most filed cases never making it to trial.¹¹⁴ Moreover, as discussed many times in the season, the Hooli lawsuit is an albatross around Pied Piper's neck, preventing them from finding funding and making them a pariah in Silicon Valley. ADR, in contrast,

Texas's Shield Statutes as a Model for Federal Preemption, 7 LIBERTY U. L. REV. 87, 87–88 (2013) (noting Hogan and Wallower were charged with misappropriation of lost property and possession of stolen property).

¹¹⁰ *Id.*

¹¹¹ See generally the Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (2016).

¹¹² See, e.g., Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1 (2004) (prefacing a special issue devoted to E-discovery).

¹¹³ See generally PRICE WATERHOUSE COOPERS, 2015 PATENT LITIGATION STUDY A CHANGE IN PATENTEE FORTUNES (May 2015), <http://www.pwc.com/us/en/forensic-services/publications/assets/2015-pwc-patent-litigation-study.pdf> [<https://perma.cc/LW72-UGGT>].

¹¹⁴ Gene Quinn, *Patent Litigation Statistics: 1980–2010*, IPWATCHDOG (Aug. 2, 2011). <http://www.ipwatchdog.com/2011/08/02/patent-litigation-statistics-1980-2010/id=17995/>.

can be cheaper, faster, less formal than standard litigation, and entails less discovery.¹¹⁵

With regard to the case at hand, there are a number of learning opportunities. Hooli can legally be the owner of Richard’s intellectual property, either under California law, Federal Copyright law, or due to invention assignment agreements in Hooli contracts. Under Federal Copyright law, a work for hire is one that is “a work prepared by an employee within the scope of his or her employment.”¹¹⁶ Under California law, independent contractors, such as programmers, may sign a work-for-hire clause in their contract that stipulates that the company is the owner of any commissioned work.¹¹⁷ This would be relevant here, as even though Richard’s job at Hooli had a narrow scope that did not include his efforts at Pied Piper, a work-for-hire clause might still capture those efforts. And in fact, in light of case law, many employers might include such a clause to capture the fruits of their workers’ efforts.¹¹⁸ Under U.S. Supreme Court precedent, Restatement (Second) of Agency¹¹⁹

¹¹⁵ Anthony Ciolli, *Lowering the Stakes: Toward a Model of Effective Copyright Dispute Resolution*, 110 W. VA. L. REV. 999 (2007); Kevin M Lemley, *I’ll Make Him an Offer He Can’t Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes*, 37 AKRON L. REV. 287 (2004).

¹¹⁶ 17 U.S.C. § 101 (2012).

¹¹⁷ E.g., Cal.Labor Code § 3351.5(c) (Deering 2016).

¹¹⁸ See *Quinn v. City of Detroit*, 988 F. Supp. 1044 (E.D. Mich. 1997) (holding the city’s staff attorney’s software, written to manage his work and on his own time, was not a work for hire as it was outside the scope of his job description); *Genzmer v. Public Health Trust of Miami–Dade*, 219 F. Supp. 2d 1275, 1282 (S.D. Fla. 2002) (finding that this was within the scope of his employment even though “Genzmer has testified that, although he wrote the computer program in his home, he tested it by conducting the beta phase in the Department. As a result of the observations he made during this phase of the software design, he performed some alterations to the program.”).

¹¹⁹ See RESTATEMENT (SECOND) OF AGENCY § 228 (1958) (noting conduct of a servant is within the scope of employment if, but only if:

governs the determination as to whether work is within the scope of the employee's employment.¹²⁰ An important caveat in this situation is that had Richard obtained copyright, Hooli might have had a greater burden in proving ownership.¹²¹ Two outstanding concerns relate to the fact that Richard's use seems to be *de minimis*, and Richard's algorithm seems to have evolved substantially past his time at Hooli. In fact, at Tech Crunch Disrupt, Hooli matches Richard's old performance based on his old algorithm.¹²²

XVIII. SILICON VALLEY SEASON 2 EPISODE 10: TWO DAYS OF THE CONDOR¹²³

a. Recap

In the Season Two finale, while Richard braces for the worst as he is taunted by Gavin, the Pied Piper team is busy trying to keep up with the enormous demand to keep their live feed of the fallen museum employee. Much of the comedy in this episode tracks both the voyeurism of the viewers, as well as the efforts of the Pied Piper team to keep their platform from failing. In the end, Richard wins the lawsuit based on the unenforceability of his employment

(a) it is within the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master.)

¹²⁰ Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989).

¹²¹ Roeslin v. District of Columbia, 921 F. Supp. 793, 797 (D.D.C. 1995) (noting that if the plaintiff received copyright registration then "the presumption is that plaintiff owns the copyright. 17 U.S.C. § 410(c). The burden is thus on the defendant to establish that the system is a work made for hire.").

¹²² See, e.g., Tenaya Rodewald, *Rogue Witnesses (Silicon Valley, Episode 17)*, LAW OF THE LEVEL (June 12, 2015), <http://www.lawofthelevel.com/2015/06/articles/other/rogue-witnesses-silicon-valley-episode-17/> [<https://perma.cc/DZ8T-RBGY>].

¹²³ *Silicon Valley: Two Days of the Condor* (HBO television broadcast June 14, 2015).

contract. His success is short lived, however, when Raviga purchases Russ Hanneman’s interest in Pied Piper and his board seats, giving them sufficient control to vote Richard out as CEO.

*b. Learning Opportunities &
Classroom Discussion*

This episode highlights a number of learning opportunities for entrepreneurs, including the importance of well written contracts for their hires. Further, the unenforceability of many non-compete clauses in California would seem to be at odds with intellectual property laws. Nevertheless, it is likely the unenforceability of these clauses that makes Silicon Valley so successful,¹²⁴ as it allows for substantial cross-pollination of ideas, technical knowhow, and likely a lot of intellectual property.

CONCLUSIONS

Silicon Valley, which has been nominated for ten Emmy Awards this past year,¹²⁵ only recently completed its third successful season on HBO and the fourth season is currently being written. The show provides an excellent opportunity to learn many areas of the law relating to intellectual property and entrepreneurship, particularly for jaded law students that are otherwise typically distracted in class. And, it’s not only law students that can benefit from the legal issues raised in the show; recently the law firm

¹²⁴ Matt Marx, Jasjit Singh & Lee Fleming. *Regional disadvantage? Employee non-compete agreements and brain drain*, 44 RES. POL’Y 394 (2015).

¹²⁵ Variety Staff, *2016 Emmy Nominations Breakdown by Studio: HBO, 20th Century Fox TV, FX Productions Dominate*, VARIETY (July 14, 2016), <http://variety.com/2016/tv/awards/2016-emmy-nominations-studio-breakdown-hbo-fox-fx-1201814641/> [<https://web.archive.org/web/20161205021930/http://variety.com/2016/tv/awards/2016-emmy-nominations-studio-breakdown-hbo-fox-fx-1201814641/>].

Morgan Lewis & Bockius hosted an event to discuss legal issues raised in the Third Season.¹²⁶

¹²⁶ Kia Kokalitcheva, *Here's What Happens When Lawyers Discuss HBO's 'Silicon Valley'*, FORTUNE (July 23, 2016), <http://fortune.com/2016/07/23/lawyers-hbo-silicon-valley/> [<https://perma.cc/2F3T-72ZY>].