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# Connecting Law and Creativity: The Role of Lawyers in Supporting Creative and Innovative Economic Development

*Amanda M. Spratley\**

## I. INTRODUCTION

Lawyers in the current economic climate of recession and financial uncertainty may question their position within the larger economic picture and wonder how they can best position themselves for a rewarding legal career, both monetarily and in terms of personal satisfaction. The economic climate is shifting across all professions. The economy's most recent Information Age focused on professions capitalizing on analysis and critical thinking. This was an economic climate in which the legal profession prospered and legal jobs were generally plentiful for qualified lawyers. Multiple economic scholars have identified a shift in the focus of the economy from the Information Age to a new age in which the most valued quality for stimulating the economy is creativity. Creativity is a

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broad term that can include many activities and its definition is subject to multiple interpretations.

What is clear is that the shift to a creative economy will impact not only the legal profession, but all other professions as well. Lawyers may feel this shift intuitively as they yearn to experience more creativity in their personal and professional lives. Regardless of their personal feelings, lawyers will likely experience the shift to a creative economy through external market pressures which force them to reorient their legal services in a way that better responds to their clients and the new dynamics of the economy. This relates to understanding the nature of the creative economy and its effect on how lawyers must conduct their legal careers to survive.

This article begins by introducing the creative economy. For the sake of simplification, this article focuses on the creative subset of artists and examines the challenges and considerations they face in the current economy. This is significant for lawyers to recognize because the shift toward a creative economy will likely mean an increase in the number of creative professionals as clients. Next follows an examination of the link between the creative economy and strengthening regional and local U.S. economies. This article identifies that an important, though often overlooked, means of building the economic strength of a region is through community economic development strategies focusing on the development of microenterprises. Microenterprise development will likely be a significant avenue for new and low-resourced businesses to enter the creative industry and is an area where lawyers can help.

The heart of this article examines specific ways in which lawyers can provide legal assistance to artists and arts-based businesses in the new creativity-dominated economy, focusing on lawyers' use of direct representation and advocacy efforts to help artists with legal issues regarding: funding, operations and regulatory compliance, international considerations, and intellectual property rights. Afterward follows an examination of the different vehicles through which the legal community can assist artists and arts-based businesses. Included among these vehicles is a special focus on the important role law school clinical programs can play in supporting the creative economy, with a special highlight on the Small Business & Community Economic Development Clinic at The George Washington University Law School.

This article explores multiple ways in which lawyers and the legal community can connect with arts-oriented and other creative businesses to both invigorate the experience of the lawyers offering assistance and highlight ways for the legal community to position itself as relevant and helpful in the new creative economy.

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This article's discussion is directed to lawyers who wish to know more about the creative economy and their position within it, but may also be informative to artists and professionals in creative enterprises by highlighting some of the legal considerations that may affect them and examining ways that seeking legal assistance maybe helpful. The aim of this article is not to provide legal solutions or policy directives, but rather to illuminate some of the many legal considerations and opportunities for advocacy that intersect with the creative community.<sup>1</sup>

## II. CREATIVE ECONOMY

The creative sector of the economy has been receiving increased attention within the last several years, as policy makers and community leaders recognize that the creative sector of the economy, as opposed to other industries, is the key to future economic growth.<sup>2</sup> This section provides an introduction to the creative economy starting with an analysis of the economic shift toward creative and innovative enterprise, followed by recognition of this phenomenon's international reach, closer examination of the concept of creativity, and discussion on how these changes will impact lawyers.

### A. ECONOMIC SHIFT TOWARD CREATIVITY AND INNOVATION

Economic scholars increasingly recognize a shift in the focus of the global economy from industrial and information-focused jobs to creative jobs, and also recognize that this trend will likely continue.<sup>3</sup> These scholars

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1. Lawyers specialize in a variety of different areas of law. Therefore, not all lawyers necessarily have the skill and ability to assist creative clients in each of the ways that are illustrated in this article. It is more noteworthy to recognize that within the greater legal community there are large numbers of individuals who have honed and refined the particular skill sets necessary for the assistance highlighted herein.

2. Economic scholar John Howkins provides that "[i]n 2005 the creative economy was worth about \$2.7 trillion, which is 6.1% of the global economy." JOHN HOWKINS, *THE CREATIVE ECONOMY: HOW PEOPLE MAKE MONEY FROM IDEAS* 124 (2d ed. 2007). He also describes the creative economy going forward:

[s]ome industries will grow faster than others, with the fastest growth coming in businesses where more people are creative or where technology enables each product to attract more revenues . . . the size of the creative economy depends as much on how products are managed and distributed as on what is produced.

*Id.*

3. Beyond Howkins, Richard Florida is another prominent scholar on the creative economy. Both have built much of the foundational commentary upon which this article's analysis of the creative economy is based. Howkins is among the first scholars to speak on the topic and in *The Creative Economy*, originally published in 2001, he observes:

[i]n the last few decades, many more creative people have put a higher priority on the

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argue that for a country or region's economy to remain strong into the future, it must cultivate creative jobs.<sup>4</sup> Because rote and standardized jobs have greatly reduced or have been simplified through technology, a

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monetary value of their output; many businesses that were ignorant of intellectual property have begun to value it highly; and there is a worldwide trend towards the extension of private property rights to matters that had been regarded as part of the public commons . . . .

HOWKINS, *supra* note 2, at 32. He has since published additional books, including *Creative Ecologies: Where Thinking is a Proper Job*, has spoken at numerous conferences around the world, and is particularly noteworthy for his discussions linking the creative economy with intellectual property considerations. For more information about John Howkins and his work, see also *THE CREATIVE ECONOMY*, <http://www.creativeeconomy.com/index.htm> (last visited June 23, 2010). Richard Florida is an economic scholar particularly recognized in the United States for his extensive publications and speaking engagements concerning the creative economy. The publication of his book *The Rise of the Creative Class...And How It's Transforming Work, Leisure, Community, and Everyday Life* in 2002 set the stage for U.S. discussions about the creative economy. He soon followed this book with the publication of *The Flight of the Creative Class: The New Global Competition for Talent* in 2005; *Who's Your City?: How the Creative Economy is Making Where to Live the Most Important Decision of Your Life* in 2008; and *The Great Reset: How New Ways of Living and Working Drive Post-Crash Prosperity* in 2010 (as well as the paperback version, *The Great Reset: How the Post-Crash Economy Will Change the Way We Live and Work* in 2011). For more information about Richard Florida and his work, see *CREATIVE CLASS GROUP*, <http://www.creativeclass.com> (last visited June 23, 2010).

Florida's assertions have garnered a lot of interest, both popular and critical. His insights as to the increased role of creative jobs in driving global economies have inspired scholars and policymakers to further examine the role of creativity in economic growth. However, critics have challenged some of Florida's assertions and argue that his theories address only an elite subsection of society, discard disadvantaged and struggling communities as irrelevant, and provide false hope to cities eagerly implementing steps to attract creative workers in their revitalization efforts. See Alec Macgillis, *The Rise of the Creative Class*, *THE AMN. PROSPECT*, Dec. 18, 2009, available at [http://prospect.org/cs/articles?article=the\\_rise\\_of\\_the\\_creative\\_class](http://prospect.org/cs/articles?article=the_rise_of_the_creative_class); Steven Malanga, *Who's Your Economist?*, *CITY J.*, Mar. 28, 2008, available at <http://www.city-journal.org/2008/bc0328sm.html>. One of the most thorough and frequently cited critiques of Richard Florida's thesis is that by academic Jamie Peck, penned in response to the release of Florida's first book, *The Rise of the Creative Class*. See Jamie Peck, *Struggling With the Creative Class*, 29 *INT'L J. OF URBAN AND REG'L RESEARCH* 4, 740-70 (2005).

Florida is recognized in this article for his early investigations and assertions about the increased importance of nurturing creativity for spurring economic growth. Whereas Florida may focus in his writings on the importance of attracting creative types to a given geographic area for economic growth, this article instead promotes capitalizing on the creative potential already present in communities and advocates the importance of nurturing and supporting the potential for creative enterprise so that the overall creative and economic strengths of a community may grow in tandem. This article does not assert creative enterprise as a panacea for solving economic woes, but highlights it as an important part of an overall strategy for achieving economic growth and stability through economic development, due in part to its alignment with a societal shift desiring greater creative output and creative consumption and increased accessibility to monetizing such activities.

4. John Howkins expands upon our interpretation of how creativity increasingly impacts the economy not only in terms of an increase in jobs within creative industries but also by highlighting that there is an increased emphasis on implementing creative practices in traditional industries. He provides: "[p]erhaps the greatest impact of the creative economy is not only within the traditional creative industries but in the way their skills and business models are being used to create value in other areas of life." HOWKINS, *supra* note 3, at xvi. This recognition shows that the creativity phenomenon extends much farther than simply a shift in focus on job types but fundamentally permeates practices across all industries. See also *id.* at xvi-xvii (further discussing how creativity and business practices are increasingly influencing one another to generate greater profits).

country's expertise in these areas will not make it competitive. Having obtained a minimum level of sophistication, each nation's continued success and competitiveness will turn on added value and novel thinking. Indeed, the vigor of creative employment sectors will determine a region's overall economic success.<sup>5</sup>

In his book *A Whole New Mind*, Daniel Pink further elaborates on the new shift to creative economic activity by observing that the U.S. economy is shifting away from an information-driven economy and toward a concept-driven economy. Pink explains that the shift from the Information Age to the Conceptual Age rests on three modern occurrences: (1) Abundance, or the easy availability of a wide variety of quality products at a low cost; (2) Outsourcing of jobs to Asia; and (3) Automation, allowing many analytical tasks to be done more easily and effectively by computers rather than humans.<sup>6</sup> He asserts that these factors create an emerging Conceptual Age which moves away from the analytic approach of the Information Age to a new approach emphasizing big picture creative thinking and human interaction.<sup>7</sup> Pink names these new qualities "high

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5. Some may question the assertion that creative sector industries will be the key to future economic success by pointing to an example such as the recent difficulties experienced by the music industry in light of decreased music sales reported by music industry organizations such as the Recording Industry of America, the rise of music file sharing and piracy in light of technological advancements, and increased questions over the economic viability of sustaining a music career within existing music industry business models. John Howkins is one of multiple commentators noting that it is not the case that the music sector is doing poorly, in reality music consumption worldwide is doing quite well; rather, the problem is that existing music industry business models are unable to effectively capture maximum economic value due to rapid advances in technology and changing consumer preferences. HOWKINS, *supra* note 3, at 61–65, 124. Howkins provides that "[i]ndustries do not collapse because their existing business models are threatened but because they fail to find new ones. This is true of all industries, but is especially true of industries based on the technologies of copying, like music and film. I expect to see, over the next few decades, a continual outpouring of new and improved devices for exploiting the Internet's instinctive capacities for copying and delivering copyright material." *Id.* at 65.

6. DANIEL H. PINK, *A WHOLE NEW MIND: MOVING FROM THE INFORMATION AGE TO THE CONCEPTUAL AGE* 28–47 (2005). John Howkins also discusses the effect of automation shifting the U.S. economy toward one emphasizing jobs in the creative industries. He provides:

[o]n the supply side, automation in the manufacturing industries and, to a smaller extent, in the service industries has cut the demand for manual labour, so young people are looking elsewhere for work. Many turn to the creative industries, which may offer an attractive lifestyle and above-average economic rewards.

HOWKINS, *supra* note 3, at xv. Additionally, Howkins identified increased disposable income and spending on leisure activities to further account for an increased demand for products and services generated by the creative industries. *Id.* at xv–xvi.

7. Pink provides that "[h]igh concept involves the capacity to detect patterns and opportunities, to create artistic and emotional beauty, to craft a satisfying narrative, and to combine seemingly unrelated ideas into something new." PINK, *supra* note 6, at 2–3. He further explains, "[h]igh touch involves the ability to empathize with others, to understand the subtleties of human interaction, to find joy in one's self and to elicit it in others, and to stretch beyond the quotidian in pursuit of purpose and meaning." *Id.* at 3.

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concept” and “high touch.”<sup>8</sup>

Pink’s analysis creates a narrower scope of the new economy than the broader categories of Creativity and Innovation. Many of the professionals, such as lawyers and technicians, who are included within the definition of the creative class by economic scholars such as Richard Florida, are excluded from Pink’s more discerning Conceptual classification.<sup>9</sup> Furthermore, Pink includes “high touch” professionals within the Conceptual group, a class not explicitly identified in Richard Florida’s definitions of the creative class.<sup>10</sup>

Despite fine distinctions, these discussions of Creativity, Innovation, and movement toward a Conceptual Age significantly overlap and make clear that there is an increasing emphasis on creativity as the driving force behind economic success, and an expectation that this trend will continue into the future. This trend is noted not just regionally or within the United States, but to varying degrees on a global level.<sup>11</sup> Many industry leaders have already implemented steps to take advantage of this new economic focus. As highlighted in the following section, these leaders are currently evaluating the results of their initial efforts and refining their approaches to capitalize on the new economic emphasis on creativity.

#### B. THE CREATIVITY PHENOMENON EXTENDS INTERNATIONALLY

The United States is not the only country to recognize the important economic benefit of harnessing creative potential. Many countries around the world, particularly those in Europe, have already recognized this potential and are moving more proactively than the United States to mobilize resources to capitalize on the creative potential of their residents

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8. PINK, *supra* note 6, at 2.

9. See RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS . . . AND HOW IT’S TRANSFORMING WORK, LEISURE, COMMUNITY, AND EVERYDAY LIFE* 44–82 (2004). See also PINK, *supra* note 6, at 48, 61.

10. Pink’s description of an unfolding economic age in which conceptual abilities are highlighted does not explicitly associate itself with the creative economy, but does implicitly recognize the importance of abilities emphasizing creativity. Within his Conceptual Age, Pink identifies two types of professionals who will dominate the economy: “high concept” professionals and “high touch” professionals. PINK, *supra* note 6, at 48–61. The conceptual abilities demonstrated by these types of professionals overlap in many ways with the creative qualities of workers in the creative economy. This overlap reinforces the importance of these shared creative qualities to the economy moving forward. Pink’s altered definition of the specific types of professionals included within the new economy from that provided by Richard Florida—in eliminating analytically focused professionals and adding “high concept” and “high touch” professionals—does not dilute the significance of these scholars’ collective recognition of the importance of creativity in the new economy. Indeed, as this article identifies, there are multiple definitions of the creative economy, and the professionals it includes, held by scholars. See generally FLORIDA, *supra* note 9. See also PINK, *supra* note 6.

11. PINK, *supra* note 6, at 1–2.

and domestic businesses.<sup>12</sup> In his books *The Flight of the Creative Class* and *Who's Your City?* U.S. economic scholar Richard Florida cautions that the slower the United States is to capture and encourage the creative potential within its borders, the greater risk it may face of losing its creative talent to other countries and regions where conditions nurture creative professions.<sup>13</sup>

Multiple regions, including the United Kingdom, Scandinavia, and the European Union—both in their entirety as well as within specific countries, such as Austria and Germany in the European Union—have focused for some time on growing the creative sectors of their respective economies. In its 2005/2006 work plan, The European Council identified this objective as a priority,<sup>14</sup> highlighting the attention that has already been paid to this phenomenon. Multiple conferences on the topic have taken place around the world, such as the *Creative Economy and Beyond (CEB) Conference* held in Finland,<sup>15</sup> *The Creative Industries and Intellectual Property Conference* held in the United Kingdom,<sup>16</sup> and the twelfth ministerial conference of the *United Nations Conference on Trade and Development* held in Ghana,<sup>17</sup> among many others. These conferences

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12. See generally RICHARD FLORIDA, *THE FLIGHT OF THE CREATIVE CLASS: THE NEW GLOBAL COMPETITION FOR TALENT* (Harper Paperbacks ed., 2007).

13. FLORIDA, *supra* note 12. See also RICHARD FLORIDA, *WHO'S YOUR CITY?: HOW THE CREATIVE ECONOMY IS MAKING WHERE TO LIVE THE MOST IMPORTANT DECISION OF YOUR LIFE* (2009). It is significant to recognize that the United States emerged as a leader in carving the path toward the development of intellectual property laws and capitalizing on its creative and innovative products as primary drivers of national economic strength. As John Howkins notes, "America, springboard of globalization, was the first country to realise how greatly its exports, and therefore its entire economy, depend upon its trade in intellectual property." HOWKINS, *supra* note 3, at 74. The new challenge for the United States is that other countries are now focusing more resources toward and developing at a faster rate their creative economies, which poises the United States to fall behind its neighbor countries if it does not similarly direct its attention and energies. In emphasizing this importance, Howkins offers that "[i]ntellectual property has become a factor in the global battle for competitive advantage. The effect is seen in almost every industry; not merely the traditional copyright and patent industries (which are expanding) but in all industries that depend upon trademarks, brands and designs, from food to sport." *Id.* at 79.

14. The work plan was agreed upon at a meeting of the Council of the European Union in November 2004, which included participants representing individual member states of the European Union and the European Commission. See Raimund Minichbauer, *Chanting the Creative Mantra: The Accelerating Economisation of EU Cultural Policy*, EIPCP (Nov. 2006), <http://eipcp.net/policies/cci/minichbauer/en>.

15. The *Creative Economy and Beyond (CEB) Conference* was held from September 9-10, 2009 in Helsinki, Finland. For additional information about the conference, see *CEB - Creative Economy and Beyond*, CREATIVEINDUSTRIESFINLAND, <http://creativeindustries.fi/index.php/events/cebcongress> (last visited Sept. 16, 2011).

16. *The Creative Industries and Intellectual Property Conference* was held May 22-23, 2008 in London, England. For additional information about the conference, see *DIME - Creative Industries Observatory (CIO) Birkbeck*, DYNAMICS OF INSTITUTIONS AND MARKETS EUROPE, <http://dime-eu.org/wp14/conferences/creative-industries> (last visited Sept. 16, 2011).

17. The twelfth ministerial conference of the *United Nations Conference on Trade and*



generally identified intellectual property law as a primary area requiring further analysis and understanding related to harnessing its capacity to facilitate creative economy agendas.<sup>18</sup>

Foreign governments have begun mobilizing their resources to take advantage of the creative potential of their respective economies and are already analyzing the results of measures previously implemented. An example is the Dance Plan Germany (*Tanzplan Deutschland*) project, launched by The German Federal Cultural Foundation (*Kulturstiftung des Bundes*) in Germany in 2005 and concluded in 2010, which was created to support dance training and dance performance initiatives within Germany.<sup>19</sup> This highlights one of various possible models for supporting creative professions that the United States can learn from in its search for ways to nurture creative work rather than suppress talent or lose it to other countries.<sup>20</sup>

The far-reaching impact of the creativity phenomenon around the globe and implementation of programs to leverage its economic potential demonstrate the importance for industry leaders within the United States, and elsewhere of understanding the increasing importance of creativity and innovation and its impact on the economy.

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*Development* was held April 20-25, 2008 in Accra, Ghana. In addition to addressing multiple issues concerning economic development, the conference highlighted the “Creative Africa” initiative aimed at bolstering creative industries in Africa as an economic development tool. For additional information about the conference, see *The Conference*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, <http://www.unctadxi.org/en/The-Conference> (last visited Sept. 9, 2011). For additional information on the “Creative Africa” initiative, see *Creative Africa*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, <http://www.unctadxi.org/en/Programme/Other-Events/Creative-Africa> (last visited Sept. 9, 2011). Preceding the conference in Ghana was a pre-Conference event on the creative economy and industries for development, held in Geneva, Switzerland January 14-15, 2008. For additional information about this pre-Conference event panel, see *High-level Panel on the Creative Economy and Industries for Development*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, <http://www.unctadxi.org/en/Programme/Pre-Conference-events/High-level-panel-on-the-creative-economy-and-industries-for-development-UNCTAD-XII-pre-event> (last visited Sept. 9, 2011).

18. Minichbauer, *supra* note 14.

19. More information about the *Tanzplan Deutschland* dance project is available on The German Federal Cultural Foundation’s website. See *Dance Plan Germany*, KULTURSTIFTUNG DES BUNDES, [http://www.kulturstiftung-desbundes.de/cms/en/programme/kunst\\_der\\_vermittlung/archiv/dance\\_plan\\_germany\\_tanzplan\\_deutschland\\_3348\\_13.html](http://www.kulturstiftung-desbundes.de/cms/en/programme/kunst_der_vermittlung/archiv/dance_plan_germany_tanzplan_deutschland_3348_13.html) (last visited Sept. 8, 2011); see also TANZPLAN DEUTSCHLAND, <http://www.tanzplan-deutschland.de> (last visited Sept. 8, 2011).

20. Richard Florida argues that the United States is failing to adequately support and encourage creative growth compared to other countries, and that if the nation does not increase its efforts to nurture creative growth, foreign countries will increasingly lure talented workers toward their shores and profit from the products of such talent rather than the United States. See generally FLORIDA, *WHO’S YOUR CITY?*, *supra* note 13.

### C. EXAMINING CREATIVITY

Jobs related to innovation such as technology, medicine, and science have been the first to latch onto the creativity and innovation wave, as many countries and regions have begun to capitalize on these fields in recognition of their potential for profit and competitive advantage through leveraging intellectual property rights. These science-oriented job types are frequently lumped together with arts-oriented jobs under the label “creative,” though many creative jobs emphasizing art rather than science receive minimal attention because they are viewed as lacking the same dynamic potential for profitability.

The creative sector is generally defined broadly to include a wide variety of jobs employing some degree of creativity. Industries commonly recognized within the creative sector include: visual arts, performing arts, music, film, and design.<sup>21</sup> Although some narrowly view the creative sector as encompassing only visual and performing arts, more commonly the creative industry is viewed more expansively. For example, science and technology are often understood as included within the creative industry for their emphasis on using creative problem solving to craft new solutions and uses. Depending on the definitions used, however, some may describe this not as creative activity but as “innovation.” Some extend the definition of creativity to include fields such as law due to lawyers’ use of creative thinking to solve legal problems.<sup>22</sup>

This article adopts an inclusive view of what it means to fall within the creative economy, and employs a broad definition of the creative industries to encompass any job in which a worker primarily employs creativity in accomplishing the position’s duties.<sup>23</sup> Although it is important

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21. Howkins identifies fifteen key industry areas that he associates with the creative economy, which he terms the “core creative industries.” He describes these industries to be “where creativity is the most important raw resource and the most valuable economic product.” HOWKINS, *supra* note 3, at 84. He includes the following industries: advertising, architecture, art, crafts, design, fashion, film, music, performing arts (theatre/opera/dance/ballet), publishing, research and development, software, television and radio, toys and games, and video games. *Id.* at 89–123. Howkins further provides an extended analysis of the market share, industry earnings and characteristics of each of these industries. *Id.* Here, this article likewise acknowledges inclusion of these fifteen industries within its definition of the creative economy, while emphasizing that it by no means considers this an exclusive list of the industries and jobs comprising the creative economy.

22. Florida defines the creative class broadly to include lawyers and scientists, such as engineers. FLORIDA, *supra* note 9, at 69.

23. This definition is most similar in its breadth to Florida’s broad characterization of members of the creative class as those who “engage in work whose function is to ‘create meaningful new forms’” and encompassing two groups, the “Super-Creative Core” and “creative professionals.” FLORIDA, *supra* note 9, at 68–69. Within the “Super-Creative Core” he includes “scientists and engineers, university professors, poets and novelists, artists, entertainers, actors, designers and architects . . . nonfiction writers, editors, cultural figures, think-tank researchers, analysts and other opinion-makers.” *Id.*

to recognize that the definition of creative economy and the industries it comprises is far broader, this article focuses specifically on the subset of creative industries encompassing artists and arts-based organizations. Specifically, this article focuses on ways in which lawyers can facilitate entrepreneurship and business in the arts. This focus in no way suggests that creativity is limited to the arts. Instead, the message of this article carries through to all areas of the creative economy, encouraging lawyers to get involved in assisting all creative genres.<sup>24</sup>

Despite growing recognition of the importance of supporting creative jobs, which includes jobs related to the arts, this sector is still fledging and facing increased challenges due to the recent U.S. and worldwide recessions. Support of creative industries, particularly the arts sector, is often identified as positive for social issues but less attention focuses on its potential to generate and support economies, both directly and indirectly. The idea that creative industries can and will play an important role in economic development is slowly gaining momentum but still lacks full recognition and application.

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Additionally, he includes “creative professionals” within his definition of the creative class, comprised of people “who engage in creative problem solving, drawing on complex bodies of knowledge to solve specific problems” and “who work in a wide range of knowledge-intensive industries such as high-tech sectors, financial services, the legal and health care professions, and business management.” FLORIDA, *supra* note 9, at 68–69. While both definitions of creatives provided in this article and provided by Richard Florida are similarly broad, note the differences in that the definition offered by this article conceptualizes the label “creative” to be self-applied, rather than assigned, and adopts a definition which may not necessarily encompass all of the work activities included by Florida in all situations. The impact of an increased focus on creativity in the new creative economy is not limited to highlighting growth in industries producing creative products and services, but also relates to changes in the dominate way business is conducted and economic value is maximized. Howkins notes that the standard business model of selling “ownership” over creative output as the primary mechanism for generating economic value is gradually being replaced by a model emphasizing the selling of “access” to creative output in the new creative economy. HOWKINS, *supra* note 3, at 60. A modern-day example of the popularity of the access model is the increased profitability of and negotiation over licensing rights. “Ownership is being replaced by access. The critical question is not who owns something but who has access to it, who can use it.” HOWKINS, *supra* note 3, at 60.

24. Howkins provides a delightfully rich exploration of the general definition of “creativity” by drawing upon philosophical and psychological analyses, as well as identifying key characteristics and possible processes of creativity. HOWKINS, *supra* note 3, at 4–17. He further discusses the unique challenges attending the effort to economize the ephemeral and slippery concept of creativity and provides several concise definitions related to creativity and the economy which prove useful in grounding our efforts to analyze these concepts, including definitions for “creativity,” “economy,” “creative product,” “creative industries,” and “creative economy.” *Id.* at viii–xiv. His respective definitions are as follows: “*Creativity* is the ability to generate something new.” *Id.* at ix. “An *economy* is conventionally defined as a system for the production, exchange and consumption of goods and services.” *Id.* A *creative product* is defined as “an economic good or service that results from creativity and has economic value.” *Id.* at x. Howkins contends that there is less international consensus for the next two definitions he provides for *creative industries* and *creative economy*. *Id.* at xiii. He explains that industries whose primary production benefits from copyright, patent, trademark or design protection together comprise the *creative industries*, and that “[t]he *creative economy* consists of the transactions in these creative products.” *Id.* at xiii–xiv.

#### D. THE IMPACT ON LAWYERS OF BROAD ECONOMIC CHANGES

American lawyers should care about the creative economy phenomenon because it is one that affects the employment options and general quality of life for all Americans. Furthermore, a changing economic climate will affect how communities function and how business is conducted, influencing the nature of the legal assistance clients will require from their lawyers.

The shift toward a creative economy does not indicate that the lawyer's role and the roles of others who predominated in the Information Age will become irrelevant. Rather, the services provided by lawyers and other Information Age professionals will continue to be necessary and important in our society.<sup>25</sup> The lawyers and other professionals who will remain successful are those who can recognize the broad economic forces changing and reshaping our society and are able to figure out how to be helpful and relevant in the new landscape. This means that it is important for lawyers to proactively think about how their expertise can be of service and provide benefit to their current and future clients. Lawyers who develop the ability to articulate and demonstrate their relevance and helpfulness to clients are those who will be able to succeed, while non-proactive lawyers may miss valuable business opportunities if existing and potential clients believe there is nothing of value that they can provide. This consideration is especially important in transactional law, where increasing do-it-yourself resources are available to business owners and entrepreneurs, creating a misleading perception that they can handle legal matters on their own without the assistance of legal professionals.<sup>26</sup> Additionally, some entrepreneurs may be unaware of the benefit that preventative legal work can provide their businesses.

Given lawyers' unique strengths and the legal challenges often facing entrepreneurs and organizations<sup>27</sup> wishing to enter creative fields, lawyers can play a vital role in facilitating economic development by supporting the creative sectors of the economy. With lawyers' help, and greater support for the creative sector generally, local regions can build happier and more

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25. Pink concedes that Information workers will not become irrelevant, but rather that the focus for greatest economic growth will shift away from an emphasis on Information-oriented industries to Conceptually oriented industries. PINK, *supra* note 6, at 51.

26. Examples of such do-it-yourself legal resources available to the public include website resource LegalZoom.com and Nolo legal publications. See LEGALZOOM, <http://www.legalzoom.com> (last visited Sept. 3, 2011); NOLO, <http://www.nolo.com> (last visited Sept. 3, 2011).

27. The terms "business" and "organization" are used interchangeably throughout this article to reference an enterprise involved in either for-profit or nonprofit activities.

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economically prosperous communities by supporting creative pursuits.

### III. ECONOMIC DEVELOPMENT TOOLS FOR STRENGTHENING CREATIVE SECTORS WITHIN U.S. REGIONAL AND LOCAL ECONOMIES

The recent U.S. recession beginning in 2007, worldwide recession, and persistent slow economic recovery highlight salient questions about what can be done to strengthen economies. Most relevant here are questions concerning what average citizens can do to secure personal financial stability and how lawyers can aid in this effort while securing the relevance and success of their own law practices. Despite the enormity presented by national economic woes, much more can be accomplished on a local level to combat economic difficulties. Indeed, focusing on local and regional economic solutions is a key element of strengthening the U.S. economy.

The necessary approach to strengthening the economy unites both the broad shift occurring toward creativity and innovation with economic development initiatives aimed at strengthening local communities. In this bottom-up type approach, resources and economic wealth are immediately directed at small businesses and entrepreneurs whose profits are likely to more quickly reinvest in local communities. This local economic success will form the building blocks for wealth to grow upward and create economically stronger regions, a stronger United States, and a stronger global economy. The emphasis on creativity and innovation in promoting community economic development allows for a maximization of growth efforts by aligning with an already growing trend favoring creative and innovative economic growth.

#### A. STRENGTHENING THE U.S. ECONOMY BY STRENGTHENING REGIONAL AND LOCAL ECONOMIES

The steady growth of international economies is eroding many of the competitive advantages that U.S. regions have traditionally enjoyed.<sup>28</sup> The weakening of the U.S. economy is largely symptomatic of the weakening of individual, local, and regional economies within the United States. The key to strengthening the overall U.S. economy, therefore, lies in strengthening regional and local U.S. economies.<sup>29</sup> The collective

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28. FLORIDA, WHO'S YOUR CITY?, *supra* note 13, at 3–19.

29. DAVID THROSBY, THE ECONOMICS OF CULTURAL POLICY 198 (2010). These philosophies in many ways align with a “bottom-up” economic theory of building collective wealth and prosperity in a

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prosperity of multiple strong local and regional economies will flow throughout the United States to create a more prosperous nation.

Failing to understand the nature of regional and local U.S. economies and how best to leverage local resources undermines American economic strength and quality of life. Previously successful business models for strengthening local economies are not necessarily the best models for the present. The skills and creativity of people are increasingly recognized as the most valuable assets in building strong local economies. Increased globalization and technology make Americans more mobile, putting communities at greater risk of losing the valuable assets of their residents unless they actively seek ways to attract, retain and maximize talent.<sup>30</sup>

The need to strengthen regional and local U.S. economies is important and immediate. No longer can the United States take for granted its relative competitive advantage and economic prosperity or rely on a plan of doing business as usual to maintain its economic strength.<sup>31</sup> Multiple economic scholars have recognized that the U.S. economy, and much of the world economy, is shifting toward a new emphasis on creativity—the idea that an economy is largely comprised of people making their living through jobs implementing creativity and innovation.<sup>32</sup>

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system, as opposed to a “trickle-down” economic theory. For more resources related to “bottom-up” and “trickle-down” economic theories, *see generally* Rebecca O. Bagley, *Bottom’s up! Tavern Speak or Mechanism for Economic Recovery?*, FORBES (2011), <http://www.forbes.com/sites/rebeccabagley/2011/07/01/bottoms-up-tavern-speak-or-mechanism-for-economic-recovery>; JOHN R. TALBOTT, OBAMANOMICS: HOW BOTTOM-UP ECONOMIC PROSPERITY WILL REPLACE TRICKLE-DOWN ECONOMICS (2008) (advocating a bottom-up economic approach to adopting national policies due to its alignment with principles of economic justice); C.K. PRAHALAD, THE FORTUNE AT THE BOTTOM OF THE PYRAMID: ERADICATING POVERTY THROUGH PROFITS (2009) (discussing the potential for businesses to profit by serving the world’s poorest populations); LYLE ESTILL, SMALL IS POSSIBLE: LIFE IN A LOCAL ECONOMY (2008) (though critical of government organizations and formal economic development initiatives, champions the utility and potential for local grassroots efforts to build healthy and economically self-sustaining local communities).

30. FLORIDA, WHO’S YOUR CITY?, *supra* note 13, at 3–19.

31. *Id.*

32. Florida and Hawkins are the two primary scholars identified herein as highlighting this economic shift toward an emphasis on creativity. They have built much of their analysis upon the work of such noted economic scholars as Joseph Schumpeter and Jane Jacobs. Schumpeter is particularly recognized for promoting the concept of “creative destruction” and for his ideas on innovation and the role of the entrepreneur in economic development. For a sampling of his many works, *see generally* JOSEPH A. SCHUMPETER, THE THEORY OF ECONOMIC DEVELOPMENT: AN INQUIRY INTO PROFITS, CAPITAL, CREDIT, INTEREST, AND THE BUSINESS CYCLE (1982); JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (2010). Jane Jacobs is recognized for her contributions to urban planning and her promotion of local city-focused economic development. For a sampling of her works, *see generally* JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (2011); JANE JACOBS, THE ECONOMY OF CITIES (1970); JANE JACOBS, CITIES AND THE WEALTH OF NATIONS (1985); JANE JACOBS, THE NATURE OF ECONOMIES (2001); JANE JACOBS, DARK AGE AHEAD (2004). Additional relevant economic scholars include Ann Markusen and Robert Putnam.

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This economic shift is driven by the evolving values and preferences of the people at large, not by an overarching system or master plan. Therefore, this momentum will continue to gain force regardless of whether American workplace systems choose to support these evolving industries and ways of conducting business. Supporting creative industries could supercharge the U.S. economy and enhance the creative and innovative potential of American talent, which will likely create more vibrant communities filled with people feeling fulfilled and supported in their chosen professional fields. The United States can capitalize on the economic benefits generated by the creative economy.<sup>33</sup>

Community economic development concepts provide a methodology for generating broad economic strength by leveraging local economies. Whereas the profits accrued by any particular business will not necessarily confer economic benefit to its local environs, community economic development strategies are particularly adept at encouraging a symbiotic relationship between businesses and their immediate communities. Such relationships ensure that local economic development benefits community residents, and in return community businesses develop a loyal local customer base and earn the support of their communities. These community economic development strategies include practices such as focusing on local hiring.

#### B. CREATIVITY-FOCUSED COMMUNITY ECONOMIC DEVELOPMENT

Community economic development focuses on strategies to build economic stability by constructing and supporting local community businesses and providing training and technical assistance to entrepreneurs.<sup>34</sup> Community economic development often involves working with microenterprises, or small businesses, which frequently possess limited resources and, sometimes, limited business experience. While scholarly discussion of community economic development is not new, community-based strategies have yet to be fully implemented. Thus, here we extend the discussion to focus on integrating creativity within community economic development strategies, including encouraging the utilization of creative approaches in implementing such strategies. More significantly, our focus is on supporting the growth of businesses aligned with creative industries or contributing to the expression of and access to

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33. FLORIDA, WHO'S YOUR CITY?, *supra* note 13; see generally HOWKINS, *supra* note 3.

34. Roger A. Clay, Jr. & Susan R. Jones, *What is Community Economic Development?*, in BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS, AND POLICYMAKERS, 3–5, 11–12 (Roger A. Clay, Jr. and Susan R. Jones, eds., 2009).

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creative experiences and products. The focus on creative experiences and products is desirable due to the creative sector increasingly driving economic growth. Therefore, enterprises within the creative sector will have the greatest opportunity for success, continued growth, and ability to contribute to the economic strength of the surrounding communities.

Much like businesses involved in community economic development, local organizations in the creative field are often similarly small in size due to limited financial resources and efforts to keep overhead costs low. In addition, creative businesses are often operated by individuals who are experts in their respective creative work but not in the details and nuances of business management. Therefore, more can be done to support these small businesses and entrepreneurs. Such support will increase the economic strength of these communities,<sup>35</sup> resulting in a cascading effect where greater numbers of communities in the region will realize greater economic strength, ultimately strengthening the entire country.

Many large and small communities across the United States have already begun evaluating and devising strategies for nurturing and encouraging creative enterprises locally, directly recognizing such efforts as part of an overall economic agenda. Washington, D.C. is an example of a large community that has taken these steps. At a conference held on April 2, 2009, in Washington, D.C. called the *Creative Economy Forum*, co-sponsored by the District of Columbia Office of Planning and the Washington, D.C. Economic Partnership, presenters and participants discussed the importance of providing support to the creative economy in Washington, D.C. as well as the means by which this support could be provided.<sup>36</sup> Presentations focused on Washington, D.C.'s creative

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35. See Mark F. Schultz & Alec Van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 KY. L.J. 79, 79 (2008). Schultz and Gelder identify the importance of the creative industries within economic development by recognizing that:

creative industries are a significant, but thus far largely unfulfilled, opportunity for less-developed countries. Where abundant creative talent exists but local circumstances are otherwise trying, creative industries may be one of the best bets for economic development. Creative sectors, particularly music, tend to rely less on sophisticated infrastructure or capital-intensive investment.

*Id.* Although focusing on the potential for creative economic development in foreign emerging and poor countries, this premise is easily applied to communities within the United States that could benefit from a strengthened economy. Indeed, Schultz and Gelder provide a case study analysis of Nashville, Tennessee, as a successful U.S. example of a depressed local economy transformed through creative economic development into a "multi-billion dollar country music industry and a thriving, diversified economy." *Id.* at 80–81, 95–102. They note that the developed music industry served to attract additional related businesses and infrastructure to the area, further bolstering and diversifying the local economy. *Id.*

36. See District of Columbia Office of Planning Commission, Washington D.C. Economic Partnership, & Mt. Auburn Associates, CREATIVE ECONOMY FORUM, Apr. 2, 2009, available at [http://planning.dc.gov/DC/Planning/Planning%20Publication%20Files/creative\\_capital\\_rpt\\_04302010](http://planning.dc.gov/DC/Planning/Planning%20Publication%20Files/creative_capital_rpt_04302010).



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community and featured ongoing research by consultants from Mt. Auburn Associates, a company which performs statistical analyses of creative sectors in cities across the United States. Presenters identified the creative sector as an important segment of the D.C. economy and noted that an increasing number of those working within the creative sector were self-employed.<sup>37</sup>

The neighboring community of Arlington, Virginia, a smaller urbanized suburb of Washington, D.C., similarly engaged in an analysis of the creative industry within its community. The Arlington Commission for the Arts prepared a long-range strategy for supporting the arts over the next twenty years in May 2011, together with the Arlington Arts 2030 Steering Committee. In discussing its motivations, the Commission and Committee cited both the positive economic impact of the arts and benefits to quality of life.<sup>38</sup>

The economic strength of a community influences how an individual might be able to make a living and the nature of the community. Even individuals who profess noninterest in creativity or who are happily employed in a stable, noncreative job experience the effect of these changing economic considerations. Enabling the creative potential in those who do feel such proclivities will help revitalize local communities by providing additional jobs, cultural opportunities for community residents, and sources of revenue in the community generated by visitors coming to patronize area artistic venues. Additionally, the office environment alone is enhanced by a culture promoting creativity and innovation, in that such a culture will encourage workers to conceive of new best practices and alternate models of doing business. Thinking of new ways to approach old problems creates communities that foster greater engagement from residents and businesses.

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pdf. The definition of the creative economy cited at the *Creative Economy Forum* was: businesses and organizations in which “creative content is central to both the cultural and economic values of what they produce. These include businesses, individuals, and organizations involved in all stages of the creative process—conception, production and initial presentation of the product.” District of Columbia Office of Planning Commission, *supra* note 36. This is a more precise and specifically tailored definition than other definitions of creativity cited previously, yet at the same time it allows broad inclusion of not only creativity originators, but also producers and distributors of creative content. This article provides that whether a person is a “creative” working within a creative industry may be self-defined. If persons or organizations are engaged in pursuits that they personally understand as having creativity at its core and contributing to the economy, that may be enough for inclusion within the definition of the creative economy.

37. District of Columbia Office of Planning Commission, *supra* note 36.

38. Draft Report, *Arlington Arts 2030: A Long-Range Strategy for Supporting The Arts Over the Next 20 Years*, prepared by the Arlington Commission for the Arts in consultation with the Arlington Arts 2030 Steering Committee, May 25, 2011, page 1.

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In the research conducted by Mt. Auburn Associates for the D.C. *Creative Economy Forum*, artists cited challenges including lack of access to resources and lack of knowledge about existing resources.<sup>39</sup> Lawyers can serve these needs by connecting artists to legal, general business, and industry-specific resources relevant to their particular needs and activities. Transactional lawyers in particular are in a unique position to know about available resources because of their frequent contact with area businesses. Lawyers need not possess specific artistic know-how to act as liaisons between artists and business resources, as they possess both the skills and connections to research the primary organizations which can help artists build sustaining arts-related careers.

Generally, it is local governments who implement plans for capitalizing on local creativity, as demonstrated by the D.C. and Arlington County examples. Indeed, it appears that communities, rather than higher-level government bodies or large institutions, are most adept and attune to how to best implement creative economic development in order to highlight local advantages and unique resources and address local challenges. General community economic development strategies stress the importance of building economic wealth from a local, community-centered locus. Given the advantages of this model it is appropriate that established community economic development strategies assist in efforts to implement strategic plans encouraging growth in the creative economy.

### C. MICROENTERPRISE DEVELOPMENT WITHIN CREATIVE AND INNOVATIVE INDUSTRIES

One strategy for strengthening regional and local economies lies in facilitating microenterprise development in creative and innovative industries. Microenterprise development is one of multiple community economic development strategies, which encourages community revitalization, provides jobs through self-employment and new job creation, and attracts money to communities.<sup>40</sup> Of the many strategies that can be utilized under the umbrella of accomplishing community economic development, microenterprise development is where the legal community may be able to provide the greatest support.

Microenterprise development is the support and encouragement of entrepreneurial and very small community businesses, generally with no more than \$35,000 in start-up capital and five or fewer employees.<sup>41</sup>

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39. Arlington Comm'n for the Arts, *supra* note 38.

40. See Jones & Spratley, *supra* note 34, at 389–90.

41. Association for Enterprise Opportunity, *Microenterprise Development in the United States: An*

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Through microenterprise development programs, business owners are provided with training and resources to help their businesses succeed. Community economic development initiatives encourage business owners to establish their businesses within their own communities, recognizing that community residents are often in the best position to identify the unique resources and strengths of their communities and leverage local competitive advantages.<sup>42</sup>

Facilitating microenterprise development within creative and innovative industries is a key to strengthening regional and local economies because, given modern economic shifts toward an emphasis on the creative economy, it is within the creative and innovative industries that the greatest economic potential can be found. Entrepreneurs and microenterprises constitute an untapped source of creative talent that may not have the resources and support necessary to realize full creative potential and economic success without the assistance of development programs and pro-bono legal services.<sup>43</sup> In the United States and globally, the greatest predicted economic growth now and in the future is in the creative economy.<sup>44</sup>

Microenterprise development overlaps greatly with the concept of entrepreneurship, the latter historically constituting a pillar of United States identity and encapsulating the spirit of creative and innovative thinking exhibited by many Americans. Increasingly, entrepreneurship and microenterprise creation will play a primary role in the United States, and globally, as evermore it is recognized as the choice mechanism for

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*Overview, MICROENTERPRISE (2005), available at [http://aeoworks.org/images/uploads/pages/Fact\\_sheet\\_Overview%20of%20US%20micro.pdf](http://aeoworks.org/images/uploads/pages/Fact_sheet_Overview%20of%20US%20micro.pdf).*

42. See Jones & Spratley, *supra* note 40, at 379–99.

43. See PRAHALAD, *supra* note 29, at 6–11. Business scholar C.K. Prahalad similarly recognizes the untapped profit potential of business services provided at what he refers to as “the bottom of the pyramid”—which is a demographic segment comprised of the poor and very low-income populations. However, Prahalad’s discussion differs from that provided in this article in that he promotes the utility of businesses serving the poor as an untapped market, whereas this article focuses on the profit-potential for creatives at multiple income levels (though particularly those of low-income) to become entrepreneurs and conduct the profit-making themselves. Incidentally, it is likely that within communities undergoing revitalization many resident consumers of local creative products and services will also constitute members of low-income populations (thus corresponding to Prahalad’s characterization of low-income persons as consumers), though the focus here is on entrepreneurship and empowerment among low-income populations. Additionally, the Small Business Administration’s Office of Advocacy advised in its 2005 Report to the President that small businesses have played, and will continue to play, a crucial role in generating innovation in the economy. Although large corporations routinely play a prominent role in contributing to innovation, small businesses are better equipped to accept risk, move quickly, and produce the most innovative products driving the leading edge of innovation. For an extended analysis of small business’ contribution to innovation see SMALL BUSINESS ADMINISTRATION, THE SMALL BUSINESS ECONOMY: A REPORT TO THE PRESIDENT 183–206 (2005), [http://www.sba.gov/advo/research/sb\\_econ2005.pdf](http://www.sba.gov/advo/research/sb_econ2005.pdf).

44. See FLORIDA, *supra* note 9. See also HOWKINS, *supra* note 3.

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generating wealth in the changing creative economy by serving as a nimble mode of business for navigating the new landscape of profit making.<sup>45</sup>

Microenterprise development's embodiment of both entrepreneurship and community economic development principles makes it a key tool for building creative and innovative economic potential within communities. Furthermore, microenterprise development is a particularly appropriate mechanism through which lawyers can assist in supporting creative and innovative economic development because of the significant number of legal considerations microenterprise development initiatives generally invoke and the inability for this information to be obtained outside the legal community. Whereas other participants in microenterprise development programs—such as activists, social workers, business persons, and so forth—may often be able to provide a wide range of services promoting community building and business expertise, the legal component of starting a business can quickly become complex. The legal profession is singularly qualified to provide this necessary guidance.

#### D. ARTS-CENTERED COMMUNITY ECONOMIC DEVELOPMENT

The discussion so far has centered on community economic development; however, community economic development strategies are an outgrowth of and frequently overlap with broader discussions on community development strategies.<sup>46</sup> Community development strategies tend to focus more on the enhancement of social services and quality of life to revitalize communities than on economic development as a means to rebuild communities, though economic initiatives and benefits are not

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45. Multiple criticisms of microenterprise development programs exist, including that: they are too expensive to maintain, they redirect resources that should go to traditional welfare programs, their success abroad is unique and cannot be replicated in the heavily regulated United States, and that low-income and poverty level persons generally do not possess the necessary entrepreneurial skills. Jones & Spratley, *supra* note 40, at 383. Microenterprise may not be the right solution for everyone, but it has many positives outweighing these perceived criticisms and has proven successful for many individuals and disadvantaged groups in the United States. *Id.* at 383–89. A more recent criticism of microenterprise in an international context provided by Abhijit V. Banerjee and Esther Duflo is that among low-income and poverty-level groups, microenterprise businesses tend to be very small and unprofitable due to the inability for these owners to distinguish their products from competitors through large capital investments. ABHIJIT BANERJEE & ESTHER DUFLO, POOR ECONOMICS: A RADICAL RETHINKING OF THE WAY TO FIGHT GLOBAL POVERTY 205–34 (2011). Fortunately, focusing microenterprise within creativity and innovation avoids this problem of fungibility due to the unique nature of individual creativity and an emphasis on promoting local, existing artistic and cultural resources and capabilities in creative economic development.

46. See CLAY & JONES, *supra* note 35, at 4–11 (discussing how modern community economic development principles are traditionally characterized as an outgrowth of the Civil Rights movement and social activism of the 1960s, heralding an increased emphasis on community-level initiatives to alleviate poverty and revitalize neighborhoods; though, it is possible that community economic development initiatives in the United States may have evolved as early as the 1900s).

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excluded. Therefore, one can also look to general community development strategies to find techniques that may be applied in promoting creative and innovative economic development. One area of community development that is of particular use here is arts-centered community development.<sup>47</sup>

Currently, increased attention is paid to developing the arts sector within a community as a tool of economic development. These efforts highlight the increasing importance of integrating the arts into community economic development plans for both the social benefits a culture of creativity engenders and the economic benefits, direct and indirect, that arts-related investments bring.<sup>48</sup> Some proponents of supporting the arts within communities focus more on the social benefits which accrue to a community that celebrates its culturally diverse art resources. Others focus more on the economic benefits that supporting the arts can bring to a community. Although this article focuses on the economic benefits of supporting the arts to a community, in reality both sets of benefits are highly integrated and their mutual realization important to a healthy arts community. Next follows a deeper examination of efforts to measure the economic contribution of arts and culture to communities, followed by a review of socially and economically oriented arts-based community development strategies.

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47. The term “arts-based community development” is frequently used interchangeably with similar terms such as “community-based arts” and “community cultural development” to describe various forms of socially-responsive community building initiatives utilizing artistic and cultural mediums. See ARLENE GOLDBARD & DON ADAMS, *NEW CREATIVE COMMUNITY: THE ART OF CULTURAL DEVELOPMENT* (2006). One definition provides that “‘community cultural development’ describes the work of artist-organizers and other community members collaborating to express identity, concerns and aspirations through the arts and communications media. It is a process that simultaneously builds individual mastery and collective cultural capacity while contributing to positive social change.” *Id.* at 20. Another definition provided for “community-based arts” describes it as “any form or work of art that emerges from a community and consciously seeks to increase the social, economic and political power of that community.” *Id.* at 21 (*citing* MAT SCHWARZMAN & KEITH KNIGHT, *BEGINNER’S GUIDE TO COMMUNITY-BASED ARTS* (2005)). “Community-based arts” has also been described as “[l]ed by professional artists or amateur practitioners, community-based arts include community members in the creation and/or interpretation of theater, dance, music, visual arts, crafts, or other artistic forms.” THOMAS C. BORRUP, *CREATIVE COMMUNITY BUILDER’S HANDBOOK: HOW TO TRANSFORM COMMUNITIES USING LOCAL ASSETS, ARTS, AND CULTURE* 239 (2006). For the purposes of this article we use these varied terms interchangeably to similarly describe arts-based community development.

48. MARIA ROSARIO JACKSON, *ANIMATING DEMOCRACY – A PROGRAM OF AMERICANS FOR THE ARTS, SHIFTING EXPECTATIONS: AN URBAN PLANNER’S REFLECTIONS ON EVALUATION OF COMMUNITY-BASED ARTS* 10 (2009), *available at* [http://www.artsusa.org/animatingdemocracy/pdf/reading\\_room/shifting\\_expectations.pdf](http://www.artsusa.org/animatingdemocracy/pdf/reading_room/shifting_expectations.pdf) (noting that the indirect impacts resulting from support of the arts within communities should not be discounted in favor of focusing on economic impacts alone; that the indirect beneficial impacts accruing to a community are just as important).

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### 1. *Challenges in Quantifying the Economic Contribution of the Arts*

Some argue that it is difficult if not impossible to accurately measure the social and economic impact that arts organizations have in their communities; however, efforts are increasingly made to document, measure, and evaluate the outcomes of these organizations' work. While these quantitative measurement efforts can help to effectively channel the work of a community arts organization, sometimes there is a danger that they may develop into attempts to justify the value to funders and other stakeholders and make it more difficult for arts organizations to remain focused on the quality of their artistic work.<sup>49</sup>

One frequent characteristic of community arts organizations is that “[t]hey often work at the intersection of arts and other fields and may feel or be accountable to multiple paradigms of success and possibly competing or conflicting expectations.”<sup>50</sup> This can further complicate efforts to adequately measure the economic impact of an arts organization's activities.

Attempts to quantify the benefits to the economy of supporting the arts are often undertaken, yet there are multiple reasons why this is a difficult enterprise. Nonetheless, there is a body of literature dedicated to examining the degree and nature of the economic impact of the arts. These studies have identified broad categories of types of economic impacts<sup>51</sup> and methodologies<sup>52</sup> for trying to quantify and evaluate these types of economic impacts.<sup>53</sup> Of the three methodologies used in measuring economic impact specific to the arts, the Conventional Economic Impact Methodology

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49. Jackson, *supra* note 48, at 3–4.

50. *Id.*

51. Three broad categories of types of economic impact resulting from the introduction of a cultural asset into the economy have been identified. These are: (1) Consumption value, (2) Long-run increase in productivity and economic development linked to the cultural asset, and (3) short-run increases in direct activity related to new spending in a region as a direct consequence of the cultural asset. These three categories add up to the total impact of a cultural asset. BRUCE A. SEAMAN, *Economic Impact of the Arts*, in A HANDBOOK OF CULTURAL ECONOMICS 224–25 (2003).

52. The three main methodologies that have been identified in trying to quantify and evaluate types of economic impacts are: (1) the Conventional methodology evaluating Economic Impact Studies (“EIM”), (2) the Non-survey Indirect Willingness to Pay Methodology, and (3) the Contingent Value Methodology (“CVM”). Each methodology tends to focus on measuring a single type of economic impact, though there is overlap. *Id.* at 225–27.

53. *Id.* Knowing the definitions of “long-run” and “short-run” in describing the nature of different types of economic impacts is helpful in achieving an understanding of what the accompanying methodologies are attempting to capture. “Long-run” may be defined as “[t]hat period of time for which there are no fixed factors of production. Firms can increase or decrease scale of operation, and new firms can enter and existing firms can exit the industry.” KARL E. CASE AND RAY C. FAIR, *PRINCIPLES OF MACROECONOMICS* G-10 (5th ed., 1999). In contrast, “short-run” may be defined as “[t]he period of time for which two conditions hold: the firm is operating under a fixed scale (fixed factor) of production, and firms can neither enter nor exit an industry.” *Id.* at G-17.

(“EIM”) has been the most influential.<sup>54</sup>

Despite considerable study of how to measure the economic impact of the arts, there are still strengths and weaknesses associated with all methodologies. Modern uses of these methodologies, particularly professional use of the EIM method, have attempted to protect against errors<sup>55</sup> commonly reoccurring in their use and to greatly enhance the opportunity for obtaining accurate analysis.<sup>56</sup> These errors do highlight, however, the inherent difficulty of relying solely on the results of this data. It is difficult to ascertain a truly accurate picture, without understatement or overstatement, of the economic impact of the arts in a given region.<sup>57</sup>

Methods of measuring the economic contribution of the arts to communities, and of the broader creative and innovative industries, are improving and providing compelling evidence of the economic significance of these sectors.<sup>58</sup> Lawyers can assist artists and community arts and culture organizations with efforts to value their services as well as document and measure performance outcomes. They can offer guidance in the grant application process, helping these organizations to identify realistic expectations of performance rather than overly optimistic or difficult-to-quantify promises offered to satisfy funding requirements or continued funding opportunities.<sup>59</sup> Lawyers can support arts organizations and the community work they undertake by responding to the needs of artists and arts organizations and articulating the value of supporting them.

## 2. Arts-Based Community Development

Arts-based community development initiatives are generally directed at increasing opportunities for community members to engage in artistic and cultural experiences as a means of addressing current social needs and promoting quality of life. As explained by arts and culture expert Claudine K. Brown:

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54. EIM focuses on short-run effects and generally strives to answer the question “[h]ow much would short-run economic activity decline in a specific region if X were no longer to exist?” SEAMAN, *supra* note 51, at 226. The X variable refers to any particular cultural asset. *Id.*

55. Six broad types of errors which often occur in connection with the use of these methodologies have been identified as: (1) Direct Base Error, (2) Induced Base Error, (3) Multiplier Error, (4) Supply Constraint Error, (5) Ex-Post Verification Error, and (6) Policy Interpretation Error. *Id.* at 228–30.

56. *Id.*

57. SEAMAN, *supra* note 51, at 228–30.

58. CRAIG DREESZEN, AMERICANS FOR THE ARTS & THE NATIONAL ENDOWMENT FOR THE ARTS, MONOGRAPH: SPECIAL REPORT, BUILDING CREATIVE ECONOMIES: THE ARTS, ENTREPRENEURSHIP, AND SUSTAINABLE DEVELOPMENT 4 (Mar. 2003), available at <http://www.arc.gov/images/programs/entrep/BuildingCreativeEconomiesReport.pdf>.

59. JACKSON, *supra* note 48, at 4.

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These citizen-artists bring communities beauty and joy along with opportunities for reflection and growth . . . . They help communities know themselves more fully, and can be surprisingly successful effecting profound change, such as reconciliation, where other methods have failed.<sup>60</sup>

Arts-based community development initiatives can vary widely in approach and implementation, though are generally aimed at highly localized, ground-level efforts.<sup>61</sup> These efforts commonly focus on highlighting the artistic and cultural resources already existing within an area rather than imposing artistic or cultural agendas unnatural to the community.<sup>62</sup> Common social development strategies utilizing arts and culture include: (1) promoting interaction in public spaces among community members; (2) increasing civic participation through cultural celebrations; (3) engaging the youth within the community; (4) promoting stewardship of place; and (5) broadening participation in the civic agenda among community members.<sup>63</sup> These strategies are generally associated with enhancing the social quality of a community rather than focusing on economic benefit.

Community arts organizations contribute significantly to social aspects of the community through artistic and cultural enrichment and collaboration with community social organizations.<sup>64</sup> Artists and arts organizations continually assume roles not only of providing art to the public, but also of creating other social benefits needed by their communities.<sup>65</sup> In the words of urban planner Maria Rosario Jackson:

Artists and arts organizations working in communities often seek to and are charged by their funders to affect the development of social capital, civic engagement, political mobilization, and even build bridges across divided groups. Moreover, they frequently operate at the intersection of art and other fields, such as economic development, health, environment, housing, public safety, and education.<sup>66</sup>

This highlights the highly interdisciplinary and uniting function played by arts and culture in accomplishing community development and strengthening local communities.

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60. GOLDBARD & ADAMS, *supra* note 47, at 11 (foreword by Claudine K. Brown). Claudine K. Brown is the current Assistant Secretary for Education and Access at the Smithsonian Institution in Washington, D.C., and the former Director of the Arts and Culture program at the Nathan Cummings Foundation in New York.

61. GOLDBARD & ADAMS, *supra* note 47, at 19–22.

62. BORRUP, *supra* note 47, at xvii.

63. BORRUP, *supra* note 47, at 73–122.

64. JACKSON, *supra* note 48, at 2.

65. *Id.*

66. *Id.*



The breadth and varied nature of arts-based community development approaches allows for it to include many economically oriented principles and initiatives. These principles and initiatives particularly lend themselves to the economically focused inquiry at hand. Some commonly identified economic development strategies utilizing arts and culture within arts-based community development include: (1) creating jobs; (2) stimulating local trade through tourism; (3) attracting investment in the community by creating live/work zones for artists; (4) diversifying the local economy; and (5) improving and enhancing the value of property.<sup>67</sup> These strategies highlight ways in which the establishment of community arts organizations and businesses can contribute economically to communities by generating revenue directly and indirectly, such as by attracting related and supporting businesses to the area.

At a conference titled *Building Creative Economies: The Arts, Entrepreneurship, and Sustainable Development in Appalachia* held in Asheville, North Carolina in April 2002, a gathering of artists and representatives from arts and culture organizations, economic development and tourism agencies, art agencies, and foundations identified recommendations for the development of creative economies and creative entrepreneurship.<sup>68</sup> These recommendations reiterated the popularity of traditional arts-based community development initiatives by incorporating several familiar themes such as: the importance of capitalizing upon existing community cultural resources, the importance of integrating the arts into community economic development plans, and the utility of promoting arts-based business incubators, stimulating cultural heritage tourism, and providing technical assistance to community members.<sup>69</sup>

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67. BORRUP, *supra* note 47, at 21–72.

68. See generally DREESZEN, *supra* note 58. The *Building Creative Economies: The Arts, Entrepreneurship, and Sustainable Development in Appalachia* conference was held from April 28–30, 2002 and its participants included “more than 300 individual artists and representatives from arts, humanities, historical, and heritage organizations; state and local arts agencies; federal, state, and local economic development and tourism agencies; and foundations . . .” *Id.* at 3. The federal co-sponsors of the event were The National Endowment for the Arts (NEA) and the Appalachian Regional Commission (ARC), joined by numerous additional organizations, including Americans for the Arts. DREESZEN, *supra* note 58, at 3.

69. *Id.* at 5. The complete list of recommendations identified at the *Building Creative Economies: The Arts, Entrepreneurship, and Sustainable Development in Appalachia* conference are as follows:

1. Identify and conserve cultural traditions through folk and traditional arts fieldwork,
2. Conduct asset-based community planning,
3. Engage artists in planning,
4. Build coalitions,
5. Plan appropriate scale to fit rural lifestyles,
6. Provide technical assistance,
7. Market effectively,
8. Build local leadership and community capacity,
9. Integrate the arts into community economic development plans,
10. Assemble funding,
11. Create arts-based business incubators,
12. Stimulate cultural heritage tourism.

*Id.*

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Next follows a greater examination of the tools for arts-based community development, similarly recognized within the recommendations generated at the conference in Asheville, North Carolina, that can be implemented in community economic development initiatives supporting creative industries.

### 3. *Tools Implemented in Arts-Based Community Development*

Four common program types employed in arts-based community development are (1) arts business incubators; (2) arts cooperatives; (3) tourist venues; and (4) comprehensive approaches. Business incubator initiatives are often sponsored by government or non-profit organizations and consist of “shared administrative and other services, centralized space and business development assistance provided in a facility where new or young small businesses co-exist.”<sup>70</sup> These programs provide business training to business owners.<sup>71</sup>

Business incubators are commonly used in community economic development efforts for a variety of different types of businesses. Within the arts-specific context, business incubators can create a concentration of artists facing similar business considerations unique to the arts industry, providing artists the added benefit of learning from each other.

Cooperatives are another tool generally used in community economic development efforts. In an arts cooperative arrangement “[t]ypically, a group of local or regional artisans form a non-profit organization to market and promote their works. A portion of the revenues from cooperative sales pay shared marketing expenses.”<sup>72</sup> Successful cooperatives can often become important tools that may attract buyers and therefore generate economic development in an area.<sup>73</sup>

The tourist venue type of program arises when a community elects to explicitly market itself as a tourist destination through its art.<sup>74</sup> Examples include painting murals on building walls or major large scale incorporation of public art within the community.<sup>75</sup> Potential dangers with the tourist venue approach are overcommercialization of the community or otherwise detracting from the ambience and personality of the community.<sup>76</sup>

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70. RHONDA PHILLIPS, *Artful Business: Using the Arts for Community Economic Development*, 39 CMTY. DEV. J. 112, 114 (2004).

71. PHILLIPS, *supra* note 70, at 114–15.

72. *Id.* at 116.

73. *Id.*

74. *Id.* at 117.

75. *Id.*

76. *Id.*

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The bottom line in discussing tools for accomplishing arts-based community development is that there is no one-size-fits-all answer. The arts can be integrated into community economic development efforts in different ways and to differing degrees. The important point is to think critically and creatively about what will work best for a particular community, and perhaps to recognize that following a gradual progression of arts integration may be more feasible in some circumstances than trying to implement all ideas at once. As scholar Rhonda Phillips has commented: “[t]he ability of a community to respond to the particular needs and opportunities inherent in its arts resources will influence the outcomes of a development approach . . . .”<sup>77</sup> Phillips continues to explain that “[a]ny arts-based development approach must have the support of the community. By recognizing the unique and positive aspects of the arts, a community can effectively capture its benefits.”<sup>78</sup>

If regions wish to encourage, support and ultimately leverage the growth of the creative and innovative capital within their communities, they must start by creating environments hospitable to the growth of creative and innovative businesses. This section’s review shows that there already exist a variety of tools and strategies for accomplishing economic development utilized by the legal and business communities, which can be expanded and adapted to use with efforts to support the growth of creative and innovative businesses. The implementation of such efforts to stimulate creative businesses on local and regional levels through microenterprise development can unleash and facilitate significant levels of untapped creative ability and aspirations held by new and low-resourced entrants who might otherwise not receive the support to be successful in their creative businesses. Introducing increased numbers of strong creative businesses into the U.S. economy will allow the United States to more effectively leverage its creative talent, therefore strengthening the United States’ overall economy in this new economic age emphasizing creativity.

In an effort to help lawyers recognize the contribution that their expertise can make in this changing economic environment, this article next examines some of the most pressing considerations a subset of the creative industries—artists—face and identifies how lawyers can help.

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77. PHILLIPS, *supra* note 70, at 120.

78. *Id.* at 121.

#### IV. THE ROLE OF THE LAWYER AND OPPORTUNITIES TO PROVIDE ASSISTANCE

In the previous section we recognized the importance strengthening the economic base of local communities has on improving larger regional and national economic strength through community economic development strategies. We further identified that development efforts focused on promoting creative and innovative experiences and products may have the greatest impact moving into the future due to a global shift toward an economy emphasizing creativity as the driving force behind profit-making and competitive advantage. Additionally, we recognized that microenterprise development is one community economic development strategy, which promotes the start-up and support of entrepreneurial and very small (micro-sized) businesses, where lawyers can be of particular benefit in providing much needed business legal assistance and guidance, as well as ancillary legal services. Lawyers can also provide broad support by engaging in advocacy efforts supporting creative and small businesses and connecting creative clients to related additional resources and referrals when outside the lawyer's area of expertise.

One element of the creative economy is an increased focus on the profit potential of businesses and activities classified within the creative industries. This next section considers some of the many legal considerations that may arise for entrepreneurs and businesses operating within the creative industries with which lawyers can provide assistance. While recognizing the breadth of the creative and innovative industries, our query here primarily examines arts-focused entrepreneurs and organizations. Examples of some professions typically categorized within the arts field include: dancers, writers, visual and fine artists, actors, fashion designers, singers and musicians, photographers, filmmakers, and graphic designers. These potential clients are referred to collectively as "artists" or "creatives," while recognizing that their specific creative activities likely differ widely. Firstly, we examine the lawyer's role within the creative economy.

##### A. LAWYERS CAN PLAY AN IMPORTANT ROLE IN ASSISTING ARTISTS

Because of the unique legal expertise they bring, lawyers can play an important role in strengthening regional and local economies through actively providing assistance and guidance on microenterprise development and community economic development initiatives that emerge from the creative and innovative industries. More specifically, lawyers can encourage and support people and businesses operating and wishing to

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launch new businesses within the creative and innovative industries.

Transactional lawyers are positioned to offer assistance regarding the legal aspects of running or operating an arts-related business or nonprofit organization and litigation lawyers can help creatives resolve problems arising in their business operations. In addition, lawyers often possess specialized experience in policy and legislative issues and, at a more personalized and community-focused level, can serve as sources of information and connectors to outside resources for clients. At a time of financial and economic fragility, such as that presented by the recent recession, lawyers should proactively assume the role of providing critically needed legal services to the arts community.

Lawyers interested in promoting issues of social justice may feel further attracted to notions of strengthening local and regional creative economies due to the economic justice aims promoted through its implementation of community economic development strategies. Social and economic justice efforts serve to empower community residents and small businesses to improve the quality of life for all inhabitants and visitors. Such improvements take economic form, through promoting increased employment, as well as emotional form, through providing cultural and artistic opportunities to community residents. These objectives may ring close to the idealism and spirit of justice often attracting aspiring lawyers to attend law school.

Many lawyers and other professionals hold an affinity for the arts or other creative pursuits and may practice these pursuits in the form of a hobby or secondary avocation. These professionals may feel particularly energized in their primary work by integrating efforts to support positive changes in the creative economy.

By revealing the similarities between many lawyers and artists, artists may become more interested in the legal aspects of their businesses and realize that legal assistance can benefit their artistic work and their business. At the same time, lawyers may feel more inclined to offer legal assistance to artists and become more aware of how they can do so. Such partnerships will lead to stronger and more stable arts communities. The next step is to identify specifically how lawyers can most effectively leverage their unique expertise to provide assistance to artist entrepreneurs and small arts-based organizations.

#### B. FORMS OF ASSISTANCE LAWYERS CAN PROVIDE TO ARTISTS

The two primary ways that lawyers and the greater legal community can offer assistance to artists and arts organizations are through direct legal representation and advocacy efforts. Thirdly, lawyers can serve an important need by practicing holistic lawyering and connecting artist

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clients to information and resources.

### *1. Direct Representation*

Lawyers can provide direct legal representation to artists and arts organizations both for litigation and transactional matters. Here, the focus is on ways in which lawyers can provide transactional legal assistance, particularly with respect to the start-up or early stages of developing an arts business. Direct legal representation of artists and arts-based organizations on transactional matters may include: entity formation and governance, employee classification issues, contract drafting/review/negotiation, and intellectual property considerations.

Lawyers can provide the necessary legal knowledge to help business owners, specifically arts entrepreneurs and organizations, navigate the regulatory and governance requirements associated with their businesses. Many artists are not familiar with legal considerations related to their work. Often, artists are faced with the desire or necessity of becoming self-employed in their craft and starting their own business. Although these artists may be very good at their artistic discipline, they may not know about the practicalities of running a business or complying with regulations associated with self-employment. Furthermore, creative endeavors tend to trigger a host of more complex legal considerations related to intellectual property rights, employment issues, or immigration requirements. The failure to take necessary steps in these areas can result in the crippling of an artistic career.<sup>79</sup>

If overwhelmed or unaware, some artists may ignore the business and legal sides of their work. As a result, they may run afoul of regulations or cheat themselves out of certain advantages that they should enjoy, such as intellectual property rights or competent contract negotiation. While many artists do recognize the benefits of obtaining legal assistance, they sometimes nonetheless forego these benefits because of the frequently high cost of legal assistance.

Transactional lawyers are uniquely positioned to offer guidance to artists about the many aspects of conducting a business as an arts entrepreneur. Lawyers can help artists understand how they might insulate themselves from liability through forming appropriate entities or acquiring necessary insurance. Lawyers can also preview contracts related to an artist's work, help artists draft contracts for use in their own business

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79. Indeed, the importance of taking necessary legal steps related to intellectual property rights, employment issues, or immigration considerations is not limited to artistic careers, but crucial when relevant to any type of organization.

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enterprises, and assist artists in navigating the negotiation process during contract formation to help them secure available legal rights to the greatest extent possible.

Lawyers can help artists understand their intellectual property rights and the repercussions of signing away various rights. Often, emerging artists are so eager to launch their careers and businesses, to catch their big break and gain media exposure, that they are not attuned to the extent to which they give away valuable rights in the process. Artists with few resources are likely in a weak bargaining position at the start of their careers, especially relative to outside parties with whom they may enter contractual agreements. Artists who are negotiating without the assistance of a lawyer may not understand the nature of their rights and may be disadvantaged in dealings with more sophisticated institutions or organizations.

## 2. *Advocacy*

In addition to providing legal assistance in the form of direct legal representation, lawyers can provide powerful and much needed assistance benefiting artists and arts organizations by advocating for legislative and policy changes on behalf of, and for the benefit of, the arts community, the small business community, and, more specifically, arts businesses.<sup>80</sup>

Lawyers are uniquely positioned to offer advocacy assistance on behalf of the arts community and on issues affecting arts-based businesses generally. Within the legal community are the knowledge, skills, and resources to understand high-level policy issues and strategies for influencing policy changes. Lawyers have the ability honed by their legal training to analyze the specific changes to an existing policy that may make a difference in the lives of small business owners and the arts community; they are well-equipped to assess where best to focus energies for strategic advocacy.

Through their work, lawyers have occasion to become more familiar with current policy and to interact more frequently with high level policy-influencing institutions than do many other professionals. Due to lack of resources or time, artist entrepreneurs and small arts business owners may be unable to attend industry events, making it difficult for them to identify what legislative issues exist and how various policy choices may affect their businesses. Therefore, lawyers are best suited to provide this

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80. A beneficial resource identifying current legislative and policy issues for which lawyers and the greater community can advocate on behalf of the arts is the Americans for the Arts organization. See AMERICANS FOR THE ARTS, <http://www.artsusa.org> (last visited June 28, 2010).

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particular value-added service to the arts community.

### *3. Holistic Lawyering and Connecting Clients to Resources*

Complementing traditional direct representation and broader advocacy efforts, lawyers are also in a unique position to act as connectors. Lawyers' work often exposes them to available resources in the community. Individual entrepreneurs and small business owners may not be aware of the existence of these resources due to relative isolation, busy schedules which keep them focused on day-to-day issues within their respective industries, or general unfamiliarity with the importance of networking and other business development activities. Lawyers can help connect artists and arts-based organizations to existing resources of which they may not have been aware.

Legal services can address a broad range of ancillary legal matters that can affect an arts organization. These may include areas such as immigration and visa restrictions.<sup>81</sup> Transactional lawyers who approach their representation from a holistic lawyering perspective, who passionately and thoroughly assume the role of counsel and advisor for their clients even if for a limited time period, are likely to bring the greatest benefit to arts clients.<sup>82</sup> From a holistic approach to lawyering, lawyers can enthusiastically serve as educational resources to their clients, provide business-related assistance, and serve as connectors to other resources within the community that can assist artist entrepreneurs and arts-based organizations.

Next follows an exploration of some of the most pressing and challenging issues that artists and arts organizations face where lawyers can help by providing legal assistance. Often, both direct legal representation and advocacy assistance can be provided regarding any particular issue area.

#### C. THE MOST PRESSING ISSUES FOR ARTISTS WHERE LAWYERS CAN HELP

Most artists and arts organizations operating on a small scale face the same types of challenges as would any entrepreneur, for-profit business, or nonprofit organization in any industry. For that reason, many of the issues discussed below apply equally to non-arts businesses. Nonetheless, some

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81. This article further discusses potential immigration law and visa considerations in section IV(C)(3) regarding International Assistance.

82. Nontransactional lawyers specializing in immigration law, in addition to transactional lawyers, can provide important assistance to arts clients and arts organizations regarding immigration law and visa restrictions by providing guidance on relevant laws and immigration hearing procedures to clients.



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considerations are particularly relevant to arts businesses, including: funding, operational and regulatory assistance, international considerations, and intellectual property rights.

### 1. *Funding*

One of the greatest challenges facing artists and arts-based organizations across the country is the issue of funding. In light of the recent recession, many artists and arts groups are facing greater difficulties in meeting their operating costs. They are receiving fewer donations, grant opportunities, and other forms of public support to assist in the development of their creative activities. Arts organizations have been hit particularly hard, as they have traditionally relied heavily upon financial support from private organizations and the public at large. Among the ways that lawyers can assist arts clients with funding shortfalls are by providing information about grant opportunities to arts businesses, advocating for greater support for the arts from federal and local governments, assisting artists in taking advantage of initiatives such as tax credits and Arts Districts that can alleviate financial burdens borne by arts organizations, and advocating for legislative reforms that can encourage such programs.

#### a. Assisting With the Grant Application Process

Creative and artistic businesses largely fund their efforts by acquiring grants from a variety of governmental and private organizations. The successful application for and acquisition of grants can seem very daunting to many time-starved creatives; this indicates that creatives may especially welcome assistance in this area. A plethora of national-level grants are available, as well as many state and local grant opportunities which are sometimes overlooked.

For example, on November 17, 2009, the city of Philadelphia, Pennsylvania unveiled a grant program providing money for creative businesses that generate jobs, including the award of about ten grants ranging in amounts from \$20,000 to \$100,000 each. The program was funded through money from the Community Development Block program of the American Recovery & Reinvestment Act, and represented a collaboration of the Office of Arts, Culture & the Creative Economy and the Department of Commerce of Philadelphia.<sup>83</sup>

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83. Athena D. Merritt, *Stimulus Funding Phila. Grants to Creative Businesses*, PHILA. BUS. J. (Nov. 17, 2009), available at <http://philadelphia.bizjournals.com/philadelphia/stories/2009/11/16/daily24.html>.

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Lawyers can provide an important resource to their arts clients by helping them identify and connect to grant opportunities. While such a service may not be considered a traditional legal service, assuming a general advisory role for clients in providing this assistance may be appropriate in adopting a holistic approach to lawyering through it conferring a critical benefit to low-resourced clients regarding their businesses.

b. Advocacy for Greater Government Support for the Arts

Many foreign countries with successful arts communities, particularly within Europe, derive their subsistence from substantial government support.<sup>84</sup> Although the arts in America have not received the same high levels of broad-based government support and guidance as they do in other countries, the U.S. government has traditionally provided substantial support for the arts in America. Many commentators have argued that, as with our European counterparts, the arts in America should receive greater support from the U.S. government, primarily at the federal level but also locally. Indeed, in recent times of increased economic hardship, the government is often viewed by American artists and arts-based organizations as a likely source of support and grant programs.

These discussions about funding for arts organizations raise many questions. What is the degree to which the U.S. government should be involved in supporting the arts and is it properly within its province to do so? Is the focus on government as the source for support of the arts appropriate or even realistic? Could increased reliance on government support for the arts create a negative consequence of increased regulation and control over what constitutes appropriate art in America? Could such programs result indirectly in favoritism toward certain art genres or projects at the expense of small scale projects which may effectively be shut out from a new bureaucratic arts funding process?

Despite the high involvement of corporations and the relative low involvement of the government in supporting the arts in the United States compared to foreign nations, the U.S. government does play an important role in supporting the arts. Either directly or indirectly, U.S. government policies can have very real impacts on arts-based businesses. It is, therefore, important that artists maintain a voice in legislative discussions

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84. Countries commonly recognized as possessing strong government support of the arts relative to the United States include: the Scandinavian countries, the United Kingdom, Germany, and Canada. See Marc Hogan, *What's the Matter with Sweden?*, PITCHFORK (Mar. 29, 2010), <http://pitchfork.com/features/articles/7776-whats-the-matter-with-sweden>.

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which may impact the arts and that they continue to vigorously advocate for the needs of their field. Lawyers can assist artists in these efforts. Regardless of whether one endorses greater or lesser levels of funding from the federal government, lawyers can advocate in a variety of ways for government support of the arts, especially at the state and local levels. For example, lawyers can serve as advocates for the adoption of tax credits for arts businesses and the establishment of Arts Districts.

c. Tax Credits

Lawyers can encourage the implementation of federal, state, and local tax credits benefiting artist entrepreneurs and arts businesses. In an effort to attract and encourage creative work within particular creative genres and in specific geographic areas, many states have implemented tax credit programs. By enabling artists to take advantage of tax credits, local and state governments promote the creative economy by lessening the financial burden borne by creative businesses in the area.

Sometimes the tax credit provided by a state will cover the state's entire geographic area. Other times, the tax credit supports artistic and creative work in a particular geographic area within a state. For example, in circumstances where states wish to create a highly concentrated arts area, often referred to as an Arts District, they may create tax credits for artists and creatives who locate their businesses within a specified geographic area and who meet specified qualifications. Lawyers can assist artists and arts businesses by advocating for the creation of tax credit options by local and state legislatures, helping to craft such legislation, and helping artists and arts businesses understand and connect to these opportunities.

The implementation of tax credit incentives for arts businesses have in some instances lured artists away from the more traditionally concentrated art centers, such as Hollywood, California, to more cost-friendly areas previously unassociated with the arts. The use of tax credits for this purpose has become increasingly popular in states and cities across the country.

Michigan is an example of a state not traditionally known for its creative industry, but which has recently succeeded in attracting artistic talent through the use of tax credits. Michigan undertook an aggressive effort to attract film and television production to the state by offering a film production tax credit. The Michigan Film Office describes that the tax credit functions as a "refundable, assignable tax credit of up to forty-two percent of the amount of a production company's expenditures (depending upon type) that are incurred in producing a film or other media

entertainment project in Michigan.”<sup>85</sup> Through enacting this tax credit, the State encouraged the development of creative industry by offering more affordable operating conditions. Supporters of the Michigan tax credit have pointed to a film industry business boom, and a boom in Detroit’s hotel and hospitality industry. They claim that without ongoing legislative attempts to cap the tax credits, these revenues to the city’s businesses could have been even higher.<sup>86</sup>

The State of Kentucky provides film, television and stage production tax incentives, which the state implemented into law on July 7, 2009.<sup>87</sup> Also, the Massachusetts film tax credit is estimated to have created thousands of jobs.<sup>88</sup> Indeed, in its October 2009 review of the state budget, in light of a \$600 million budget deficit, Massachusetts officials guaranteed that the tax credit would not be eliminated.<sup>89</sup>

The success of these and other tax credit program initiatives have prompted cities already enjoying strong economic returns from their local creative industries to similarly strengthen their own economic incentives to local creative businesses. The purpose of these efforts is to bolster the attractiveness for creative businesses to remain within their present locations and to prevent attrition to other low-cost locations. One such example is California’s tax credit program. As the *Los Angeles Times* reported:

In 2009 California began a tax credit incentive program to encourage movie and television within the state in response to the recession-time trend of production companies leaving the state to film in cheaper locations. Although the total production in California did drop during year 2009, the program has shown some success in helping to keep ten feature films in California. A total of about 50 productions qualified for about \$100 million in tax incentives in California last year through the program.<sup>90</sup>

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85. *Incentive FAQs*, MICHIGAN FILM OFFICE, <http://www.michiganfilmoffice.org/For-Producers/Film-Credit-FAQs/Default.aspx> (last visited May 27, 2010).

86. Jonathan Oosting, *Book It: Michigan Film Tax Credit Paying Off for Hotel Industry*, MLIVE.COM (Nov. 23, 2009, 11:12 AM), [http://blog.mlive.com/business/detroit\\_impact/print.html?entry=/2009/11/book\\_it\\_michigan\\_film\\_tax\\_cred.html](http://blog.mlive.com/business/detroit_impact/print.html?entry=/2009/11/book_it_michigan_film_tax_cred.html).

87. Although ceremoniously signed into law on July 7, 2009, the Kentucky film tax credit law actually became effective earlier on June 26, 2009. See Press Release, *Governor Beshear Publicly Signs Film Industry Incentives Bill*, KENTUCKY.GOV (July 7, 2009), <http://migration.kentucky.gov/Newsroom/governor/20090707film.htm>.

88. Jay Fitzgerald, *Gov. Deval Patrick Won’t Cut Films’ Tax Credit*, BOSTON HERALD, Oct. 28, 2009, <http://www.bostonherald.com/business/general/view.bg?articleid=1207786&format=text>.

89. Fitzgerald, *supra* note 88.

90. Richard Verrier, *L.A. Location Filming Declines 19% in 2009 from Previous Year*, L.A. TIMES, Jan. 15, 2010, <http://pqasb.pqarchiver.com/latimes/access/1939710511.html?FMT=ABS&FMTS=ABS:FT&type=current&date=Jan+15%2C+2010&author=Richard+Verrier&pub=Los+Angeles+Times&edition=&startpage=B.3&desc=COMPANY+TOWN%3B+L.A.+location+filming+declines+19%25+in+20>

In some states where tax incentive programs for film production are already operating, assistance is needed to expand these programs to a higher level of functionality. One example is in the city of Providence, Rhode Island. In 2009, the Rhode Island Film Office implemented efforts to remove the existing cap on the amount of film tax credits that the State may award.<sup>91</sup> In requesting the change, Executive Director Steven Feinberg of the Rhode Island State Film & Television Office cited the indirect economic benefits amounting to additional revenues that tax incentive efforts provide to local nonentertainment businesses.<sup>92</sup> Where such changes require legislative action, lawyers are among those with the relevant expertise who can be helpful in promoting change.

Despite the increasing popularity of using tax credits to promote creative industry, the sustainability of such programs is not necessarily assured. In Michigan, some critics of the State's film and television tax credit program have argued that despite the short-term success in gains to the State economy, the tax credits have failed to create and promote lasting infrastructures to sustain the new local industry.<sup>93</sup>

Some jurisdictions have struggled during the recent recessionary times to maintain existing programs. Iowa is a recent example of a state which temporarily ended its film state tax credit program. The Iowa Economic Development Agency first suspended its film tax credit for the remainder of the fiscal year ending June 30, 2010.<sup>94</sup> The Iowa General Assembly further suspended the Iowa Film, Television and Video Project Promotion Program until July 1, 2013,<sup>95</sup> prompted in part by a string of abuses associated with the program.<sup>96</sup> The future of the Iowa film tax credit program is now uncertain,<sup>97</sup> which may risk instability for creative organizations that were induced to move to the region for these benefits and became dependent upon such incentives to complete their planned film projects.

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91. Denise Perreault, *Push on To Drop Cap on Film Credit*, PROVIDENCE BUS. NEWS, (Nov. 30, 2009), <http://www.pbn.com/detail/46430.html>.

92. *Id.*

93. Oosting, *supra* note 87.

94. Donnelle Eller, *IDED Halts Tax Credits for New Film Projects*, THE DES MOINES REGISTER (Dec. 17, 2009), <http://www.desmoinesregister.com/article/20091217/BUSINESS/91217011/1029/IDED-halts-tax-credits-for-new-film-projects>.

95. Iowa Senate File 2380, p. 5 (2010), available at <http://www.iowalifechanging.com/film/downloads/SF2380.pdf>. See IOWA FILM OFFICE, <http://www.iowalifechanging.com/film> (last visited Aug. 11, 2011).

96. Jason Hancock, *Judge Tells State To Pay Tax Credits for Film*, THE IOWA INDEP. (Nov. 18, 2009), <http://iowaindependent.com/22418/judge-tells-state-to-pay-tax-credits-for-film>; Chris Rizo, *Film Companies Sue Iowa Over Tax-Credit Program*, LEGALNEWSLINE.COM (Nov. 3, 2009), <http://www.legalnewsline.com/news/223804-film-companies-sue-iowa-over-tax-credit-program>.

97. See Rizo, *supra* note 96.

Lawyers can help creative and artistic businesses seek the tax credits to which they are legally entitled. Recently, an Iowa court ruled in favor of a Canadian filmmaker and against the Iowa Department of Economic Development in the amount of \$6.5 million in tax credits.<sup>98</sup> Iowa Eye Entertainment, LLC, similarly filed suit against the Iowa Department of Economic Development in November 2009 alleging breach of contract to the initial approval of the issuance of tax credits to help finance the film company's work in the state prior to the tax credit program's suspension.<sup>99</sup> These and other suits involving the Iowa Department of Economic Development, which houses the Iowa Film Office and its film tax credit program, revealed the administration of Iowa's film tax credit system to be riddled with abuse by film directors and inappropriate oversight and inadequate record keeping of the program.<sup>100</sup> These rulings may indicate a possible trend of similar litigation across the country as businesses continue to feel the effects of the recent recession. The problems facing Iowa's film tax credit program highlights an area where lawyers can help by assisting state organizations in implementing and operating tax incentive programs to avoid instances of abuse and helping creatives understand how to benefit from and appropriately utilize tax credits in their businesses.

#### d. Arts Districts

The establishment and expansion of Arts Districts in cities across the country is becoming increasingly popular. Arts Districts are often established within a segment of a city's downtown urban core through the city's local economic development agency or another nonprofit organization with the intent to revitalize and economically invigorate the particular area by enticing new artistic or creative business and organizations to locate in the area.<sup>101</sup> These efforts are sometimes made in connection with larger business improvement district ("BID") initiatives, though all BID programs do not necessarily focus on creative and artistic

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98. Hancock, *supra* note 96.

99. *Id.* See also Rizo, *supra* note 96.

100. Joe Barrett, *Build It with Tax Incentives, and Hollywood Will Come*, WALL ST. J., (Oct. 19, 2009), <http://online.wsj.com/article/SB125590995233693277.html>.

101. Examples of Arts Districts across the country include those in Dallas, Texas; Los Angeles, California; Hyattsville, Maryland; Portland, Maine; and Columbus, Ohio. See THE DALLAS ARTS DISTRICT, <http://www.theDallasArtsDistrict.com> (last visited Aug. 14, 2011); LOS ANGELES ARTS DISTRICT, <http://www.artsdistrictla.com> (last visited Aug. 14, 2011); EYA ARTS DISTRICT HYATTSVILLE, <http://www.hyattsville.org/index.aspx?NID=195> (last visited Aug. 14, 2011); PORTLAND'S DOWNTOWN DISTRICT, <http://www.portlandmaine.com/discover-portland/areas-of-interest> (last visited Aug. 14, 2011); SHORT NORTH ARTS DISTRICT, <http://www.shortnorth.org> (last visited Aug. 14, 2011).

development.<sup>102</sup> An Arts District will generally provide incentives or benefits to creative businesses relocating to the area. These benefits can include marketing and publicity services provided by the city encouraging visitors and patrons to the area and sometimes offering neighborhood maintenance and safety services, tax incentives, and local regulatory and government advocacy assistance.<sup>103</sup> In some instances, locating within an Arts District and benefiting from its services may require that a business pay a periodic fee. Arts Districts often encourage the creation and inhabitation of live/work facilities in the area, providing spaces where owners or renters may simultaneously reside and operate a business open to the public, as a means of fostering continuous creation and artistic energy within the community.<sup>104</sup>

Tax credit programs often play an important role in the creation of formal and informal Arts Districts by offering tax credit opportunities to artists and art-based businesses that locate within the targeted area and meet the identified criteria. These reduced tax burdens also provide additional benefits including proximity to other artists for purposes of collaboration and networking and accessibility to essential supplies and resources.<sup>105</sup> Furthermore, the concentration of arts businesses within a

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102. A BID is “a professionally-managed organization whose purpose is to improve a locale using funds from mandatory special taxes or fees paid by property and or business owners in a designated area. Authorized by state legislation, a local government is normally responsible for establishing a district, collecting the assessments, and then transferring the funds over to the BID to use as it sees fit. The managing agent for a BID is usually a nonprofit organization, although in some cities public agencies and public-private partnerships may be responsible for a BID’s operation.” JERRY MITCHELL, *BUSINESS IMPROVEMENT DISTRICTS AND THE SHAPE OF AMERICAN CITIES* 4 (2008). See also Carol J. Becker, *Self-Determination, Accountability Mechanisms, and Quasi-Governmental Status of Business Improvement Districts in the United States*, 33 *PUB. PERFORMANCE & MGMT. REV.* 3, 413–35, (2010).

103. MITCHELL, *supra* note 102, at 3–6.

104. Artist live/work communities are often developed in geographic areas in need of revitalization as part of a broader community development agenda. Many such developments are connected to affordable housing initiatives, though residents in an artistic live/work unit must generally obtain admission through a selective application process that includes analysis of the applicant’s creative work and motivations. Artspace, Inc. is an example of an organization committed to developing and supporting live/work arts-based communities across the country. See ARTSPACE, <http://www.artspace.org> (last visited Aug. 14, 2011). For additional examples of artistic live/work developments, visit the EYA Development website showcasing the Hyattsville, Maryland Arts District, at <http://eya.com/index.cfm>, and the Milepost 5 development website showcasing a community located in Portland, Oregon, at <http://milepost5.net> (last visited Sep. 8, 2011). Artists may also find similar opportunities in artist residency programs, which offer temporary and long-term opportunities to live and work with other artists in a collective artistic community. Examples include Flux Factory in Queens, New York, <http://www.fluxfactory.org> (last visited Sep. 8, 2011), and MacDowell Colony in Peterborough, New Hampshire, <http://www.macdowellcolony.org> (last visited Sep. 8, 2011). For additional information about artist residency programs, see Res Artis, the Worldwide Network of Artist Residencies website, <http://www.resartis.org/en> (last visited Aug. 15, 2011).

105. Arts Districts may develop informally where, despite the lack of an official unifying plan, multiple similar creative businesses cluster in a concentrated area due to hospitable factors linked to the location such as tax credit programs or otherwise. Economic scholar John Howkins also discusses this

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specified area serves as a tourism generator in attracting arts consumers to a central location, increasing the likelihood of patronage of multiple arts businesses and thus increasing the overall economic revenue to the area. Arts Districts commonly implement the same tools used in community economic development and community arts development efforts to attract arts businesses and arts patrons to the area.

In a 2010 State of the City address, Mayor James Kennedy of Rahway, New Jersey, announced plans to expand the local Arts District in efforts to stimulate the economy by creating a sustainable arts industry in the city.<sup>106</sup> The City of Williamsburg, Virginia, is another location where leaders and constituents recognize the growing importance of the creative economy and identified the implementation of an Arts District as one method to capitalize on and encourage creativity.<sup>107</sup> In 2010, the City Council of Williamsburg, Virginia, announced plans to consider the implementation of an Arts District in its already popular tourist destination location. The goal in part was to encourage the continued presence of artists within the city despite the rising cost of living.<sup>108</sup> Williamsburg Mayor Jeanne Zeidler cited additional motivations for implementing an Art District, including attempts to diversify the economy and create additional tourism.<sup>109</sup> On February 10, 2011, the Williamsburg City Council adopted an ordinance to establish an Arts District which became effective ten days later.<sup>110</sup> These examples highlight a role for lawyers in helping to facilitate the establishment of Arts Districts as a means of economic development

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concept more generally in terms of the benefit of “clusters” in that creative persons clustering together to form mutually beneficial networks serve to boost efficiency through shared resources and ultimately produce superior creative outputs than would result from working in complete isolation. See HOWKINS, *supra* note 3, at 148. Economic scholar Richard Florida similarly speaks about the positive effect of geographic clusters of creative activity, citing economic scholars Robert Lucas and Jane Jacobs in asserting that clustering creative people within close geographic proximity to one another can increase productivity and economic wealth. See FLORIDA, WHO’S YOUR CITY?, *supra* note 13, at 61–75; see also THROSBY, *supra* note 29, at 137–38.

106. *Rahway Is ‘All About the Arts’ in 2010*, NJTODAY.NET, (Jan. 12, 2010), <http://njtoday.net/2010/01/12/rahyway-is-%E2%80%9Ccall-about-the-arts%E2%80%9D-in-2010>. See also Rahway Arts District, <http://artsrahyway.com> (last visited Aug. 11, 2011).

107. For more information about the City Council of Williamsburg, Virginia’s motivations for developing an Arts District, and its connection to the creative economy, see CITY OF WILLIAMSBURG, <http://www.williamsburgva.gov/index.aspx?page=850#Introduction> (last visited Aug. 11, 2011).

108. Dan Parsons, *City Eyes Setting Up Arts District*, DAILY PRESS (Jan. 13, 2010), [http://articles.dailypress.com/2010-01-13/news/1001120072\\_1\\_arts-city-s-economic-development-dire-ctor-new-district](http://articles.dailypress.com/2010-01-13/news/1001120072_1_arts-city-s-economic-development-dire-ctor-new-district). See also Dan Parsons, *Williamsburg Arts District Gets a Green Light*, DAILY PRESS (May 8, 2010), available at [http://www.dailypress.com/news/dp-local\\_wbg-arts-district\\_0508may08,0,7630044.story](http://www.dailypress.com/news/dp-local_wbg-arts-district_0508may08,0,7630044.story).

109. Parsons, *Williamsburg Arts District*, *supra* note 108.

110. The City Council of Williamsburg, Virginia, adopted Ordinance #11-01 establishing an Arts District on Feb. 10, 2011, which became effective on Feb. 20, 2011. See CITY OF WILLIAMSBURG, <http://www.williamsburgva.gov/Index.aspx?page=864> (last visited Aug. 11, 2011).



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within particular regions, and in advising arts clients about opportunities and benefits connected to locating their businesses within existing Arts Districts.

## 2. *Operational and Regulatory Assistance*

Lawyers can assist artists and arts businesses with a variety of operational and regulatory legal issues. Examples of such issues include: providing choice of entity assistance for the operation of the client's business, assisting the client in understanding and complying with governance requirements and implementing sound board management policies, assisting with zoning law considerations such as home-business regulations, and assisting with employment law considerations such as the appropriate classification of workers.

### a. Choice of Entity Assistance and Considering For-Profit Models

Deciding upon the appropriate form of entity within which to start a business can be a challenging undertaking. One of the most significant considerations can be whether to form the business as a for-profit or non-profit entity. Lawyers can prove instrumental in guiding artists and nascent arts businesses through the considerations associated with different options. These considerations will vary with the unique needs and mission of the start-up and with different genres of artistic and creative work.<sup>111</sup>

Many arts organizations form as nonprofit corporations due to their social missions and their otherwise limited ability for financial self-sustainability.<sup>112</sup> Nonetheless, lawyers should enable clients to carefully consider their own needs and circumstances and avoid reflexively selecting the nonprofit form.<sup>113</sup> Lawyers can empower creatives and artists to

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111. A lawyer may advise a client to continue operating its artistic business as a sole proprietorship rather than form it into an entity. This highlights that entity formation may not necessarily be the best option depending on the particular circumstances. In such a situation, the lawyer will be able to advise the client on additional steps he or she may take to facilitate their business operations and minimize exposure to liability. See Ted Striggles & Mara Greenberg, *The Structure of Your Operations*, in POOR DANCER'S ALMANAC: MANAGING LIFE AND WORK IN THE PERFORMING ARTS 75–76 (David R. White, Lise Friedman, and Tia Tibbitts Levinson, eds., 1993).

112. See Dick Netzer, *Non-profit organizations*, in A HANDBOOK OF CULTURAL ECONOMICS 331–41 (2003). See also Striggles & Greenberg, *supra* note 111, at 81.

113. Although the nonprofit corporate form is the dominant nonprofit entity type in the United States, it is possible to form a nonprofit as an alternate entity form. Possible alternatives include an unincorporated association, for which it may be possible to acquire federal tax-exempt status. It is important to note that entity form options differ between U.S. jurisdictions, and that the applicable laws and allowances (including nonprofit status) for entity forms may not be consistent. For more information on permissible entity forms for the purposes of applying for federal tax-exempt status see

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consider alternate for-profit business models to increase the self-sustainability of an organization and the opportunity for profit-making. This involves deliberate consideration of the factors relevant to selecting an organizational form and the careful application of these factors to the particular circumstances.

#### b. Governance Requirements and Board Management

Artists may often be so immersed in the artistic aspects of their businesses that they forget it is indeed a business, requiring adherence to all the same formalities and requirements that are imposed by federal, state, and local governments on all businesses. This is particularly relevant to arts-based nonprofit organizations, as the management of such organizations can be so intently focused on the artistic mission that it ignores important governance and business considerations.

Nonprofit organizations differ from for-profit organizations most notably in the way in which their nonprofit social mission guides their organization's growth.<sup>114</sup> This does not mean, however, that sound business practices ensuring that the nonprofit organization runs smoothly and efficiently can be abandoned. Lawyers can be of great assistance to arts organizations, particularly nonprofits, in helping to ensure that they have an appropriate board of directors in place,<sup>115</sup> that they are observing required corporate formalities, and that they are otherwise complying with legal regulations and requirements for businesses.

In order to offer well-informed legal counsel to directors and managers of arts organizations, lawyers should be aware of the differences between the management of an arts organization versus other types of organizations. Organizations within the arts sector possess certain specific characteristics,<sup>116</sup> such as a discontinuous production mode.<sup>117</sup> Instead of a continuous flow of the same type of production, arts sector production is

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*Organizational Test – Internal Revenue Code Section 501(c)(3)*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/charities/charitable/article/0,,id=175419,00.html> (last visited Mar. 24, 2012).

114. François Colbert, *Management of the Arts*, in A HANDBOOK OF CULTURAL ECONOMICS 289 (2003).

115. What constitutes an appropriate Board of Directors will necessarily differ for organizations dependent on the particular circumstances. While knowledge and skill in business and the particular activities of the organization are generally desirable, more important in creating an appropriate Board is to enlist a complementary group of people demonstrating strong dedication and commitment to the organization's mission. The lawyer's role can be to guide clients' understanding of the considerations related to building an appropriate Board for the purposes of the particular organization, and to help directors understand their responsibilities to the organization. Rather than dictating who should constitute the Board of Directors, the lawyer should allow the client organization to exercise its judgment in ultimately selecting individual Board members.

116. Colbert, *supra* note 114, at 288.

117. *Id.*

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typically continuously different.<sup>118</sup> Another specific characteristic of the arts sector is that arts organizations are generally comprised of a small number of permanent staff, with the frequent use of additional freelance artists.<sup>119</sup> A third characteristic is that arts organizations often use a dual-management system, which separates artistic and administrative directors and splits the power traditionally afforded to a single executive director.<sup>120</sup> This dual-management structure can give rise to conflicts, in which case arts organizations tend to resolve through their board of directors.<sup>121</sup>

Aside from these unique characteristics, the manner in which arts organizations typically function can differ from organizations in other sectors of the economy.<sup>122</sup> The board of directors, together with an artistic director and administrative director, generally defines and develops the mission of the organization; however, responsibility for the execution and operation of individual productions is then generally vested in an external director.<sup>123</sup> This represents a significant loss of control by the central powers of the organization, and demonstrates an inherent elevated risk for organizations operating in the arts sector.<sup>124</sup>

The arts sector further differs from other subsectors within the broader category of “cultural organizations” in that the focus of arts sector organizations is on developed products rather than the market for the product. This means that an organization’s artistic vision takes precedence over the final product’s marketability.<sup>125</sup> As such, there is no guarantee that there will be a market for the product. Rather than developing a product for a given market, generally a market must be found to fit the already developed product.<sup>126</sup> This can present a challenge by increasing the risk that an insufficient market, or no market at all, will be found for the product.<sup>127</sup>

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118. Colbert, *supra* note 114, at 288. Another example of the uniqueness of artistic products is illustrated in the case of the visual arts, particularly the fine arts, for which John Howkins notes: “[w]hereas most industries try to multiply and sell as many new copies as possible, the art dealer’s objective is to emphasize scarcity.” HOWKINS, *supra* note 3, at 94.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 289. Discussions about the arts and creativity often overlap with broader discussions on culture and are frequently included as a component of overarching cultural policies; this categorization is particularly common in countries outside the United States. Within the broad category of “cultural organizations” there are generally three recognized sub-sector categories: the arts, the cultural industries, and the media—each possessing slightly different characteristics. *Id.*

126. *Id.*

127. *Id.*

The United States' recent economic downturn has highlighted the multiple economic problems inherent in the arts industry. Arts organizations have difficulty improving their productivity because as the cost of operation continues to rise, arts businesses are often unable to reduce labor costs.<sup>128</sup> This difficulty is compounded for many performing arts organizations because their ability to obtain revenue through ticket sales is often constrained by the size of the performance venue, thus preventing these organizations from raising demand to meet their costs.<sup>129</sup>

Given the many risks associated with an art sector organization's activities, and the public benefit arts activities often provide, many arts organizations are formed as nonprofits.<sup>130</sup> Forming and functioning as a nonprofit organization allows arts organizations to receive funding support from state and local governments in the form of taxpayer subsidies.<sup>131</sup> Nonprofit organizations are able to avoid paying federal income taxes if they apply for and obtain federal tax-exempt status. Obtaining federal tax-exempt status often attracts possible donors to an organization because tax-exempt status allows donors to make tax-deductible donations to the organization.<sup>132</sup> Although good business sense is necessary to ensure the successful operation of any organization, nonprofit organizations further differ from other organizations in that they must gauge their performance according to the achievement of their organizational mission instead of revenues.<sup>133</sup>

Since the board of directors is the backbone of any corporation, a well-rounded and engaged board, with individual directors possessing complementary skills, is essential to the success of any nonprofit organization.<sup>134</sup> A nonprofit organization is accountable to the public for continually striving to achieve its mission and the board of directors plays a pivotal role in ensuring that the organizational mission is fulfilled.<sup>135</sup> Since they must operate in an environment that consists of high uncertainty and public accountability, boards of directors for nonprofit arts organizations must be especially skilled and dedicated groups in order to ensure

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128. MICHAEL M. KAISER, *THE ART OF THE TURNAROUND: CREATING AND MAINTAINING HEALTHY ARTS ORGANIZATIONS* vi (2008).

129. *Id.*

130. See Striggles & Greenberg, *supra* note 111, at 82–83.

131. *Id.* The extent of local government benefit conferred upon a non-profit organization varies by jurisdiction. Organizations may be able to obtain further benefits and avoid additional taxes on their operations by complying with state and local regulations. For more information, see *Applying for Exemption – Difference Between Nonprofit and Tax-Exempt Status*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/charities/article/0,id=136195,00.html> (last visited Mar. 24, 2012).

132. Striggles & Greenberg, *supra* note 111, at 82–83.

133. Colbert, *supra* note 114, at 289.

134. *Id.* at 289–91.

135. Colbert, *supra* note 114, at 289–91.

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success.<sup>136</sup> Lawyers can help arts clients construct a board of directors, exercise effective Board management, and maintain proper board practices.

In addition to providing assistance to arts clients through direct legal representation on matters of governance and board management, lawyers can advocate on behalf of arts businesses for legislative and regulatory reform. One such example is the Form 990 federal filing requirement for nonprofit organizations. Many small business owners and artists are confused or uninformed about various filing requirements, and inadvertent noncompliance can lead to serious consequences for organizations. Lawyers can seek simplification of these, and other, requirements while simultaneously educating their clients about governance requirements for small businesses and non-profit organizations, including arts businesses.<sup>137</sup>

### c. Zoning Law and Home-Business Regulation

Lawyers can help artists by advocating for greater transparency in local Permit requirements and regulations that affect small businesses and non-profit organizations. One example of a major regulatory issue potentially affecting artists and arts businesses, and small businesses in general, is compliance with local laws for operating a home business. In efforts to minimize overhead costs, many low-resourced artists and small arts organizations do not have an official business location. Instead, they work in multiple locations for free or reduced rent. Artists and small arts businesses may often perform the bulk of administrative duties related to their organization, and sometimes the bulk of their creative work, in their homes. Additionally, artists may perform many administrative activities while in transit, communicating with others through laptops or digital handheld devices. These unconventional circumstances can sometimes make it difficult for artists or small businesses to know when their activities constitute the operation of a home business and trigger the need to comply with local regulatory requirements for home businesses. Such compliance often entails registering the business with the city and obtaining some form of a Home Occupancy Certificate.<sup>138</sup>

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136. Colbert, *supra* note 114, at 289–91.

137. Some simplification of federal tax-exempt filing requirements have already been achieved in light of advocacy efforts, such as the introduction of the simpler 990-N (e-Postcard) option in lieu of the traditional 990 Form for small tax-exempt organizations. See *Annual Electronic Filing Requirement for Small Exempt Organizations – Form 990-N (e-Postcard)*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/charities/article/0,id=169250,00.html> (last visited Mar. 24, 2012).

138. The U.S. Small Business Administration (SBA) instructs that:

[e]very business needs one or more federal, state, or local licenses or permits to operate.... Regulations vary by industry, state, and locality, so it's very important to understand the licensing rules where your business is located. Not complying with

Local land use laws vary across jurisdictions with regard to the types of activities allowed for home businesses and the requirements for registration compliance. Where law permits a specific activity, the registration process generally consists of the submission of a straightforward application, which must be subsequently renewed, and a nominal fee. Some artists and small businesses may in reality already be operating as a home business and not realize that an official process is required for lawful compliance. In some cases, failure of compliance may be of little consequence, but these businesses may be exposing themselves to unknown risks. These risks may include citation by the government if unlawful activity is detected or exposure to liability in the event any injuries are incurred by people visiting the home for business purposes.<sup>139</sup>

Lawyers can guide artists and small arts organizations through these confusing regulatory situations by identifying permissible activities and limitations and, if appropriate, assisting clients in properly registering with their respective jurisdictions and submitting an application in compliance with the local laws. Lawyers can also serve as advocates for artist clients regarding home business registration requirements. In light of a growing preference among many workers, and in many types of businesses, for work to be performed entirely or partially at home, lawyers can argue for loosened restrictions on the type and nature of business activities that can

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licensing and permitting regulations can lead to expensive fines and put your business at serious risk.

*Licenses and Permits*, THE U.S. SMALL BUSINESS ADMINISTRATION, <http://www.sba.gov/licenses-and-permits> (last visited Aug. 15, 2011). These regulations may include a combination of operational and/or zoning-based licensure requirements. The SBA website provides a search mechanism for identifying the probable license requirements for any given business by location. *See id.* Highlighting the requirements in Washington, D.C. as an example, D.C. businesses are generally required to obtain some variation of a Basic Business License, as well as separately comply with zoning requirements by possessing a Certificate of Occupancy. In lieu of a Certificate of Occupancy, home-based businesses in the District of Columbia must generally secure a Home Occupation Permit to allow the business to operate inside the principal residence of an individual. In some cases, a nonprofit organization in the District of Columbia must similarly secure a variation of a Basic Business License and an additional Charitable Solicitation License for soliciting contributions. *Department of Consumer and Regulatory Affairs, For Business, Apply for a Business License, Get Answers to Business Licensing Questions*, THE DISTRICT OF COLUMBIA, <http://dcra.dc.gov/DC/DCRA/For+Business/Apply+for+a+Business+License/Get+Answers+to+Business+Licensing+Questions> (last visited Aug. 16, 2011). For the statute requiring compliance with the Business License requirement in the District of Columbia, *see* D.C. CODE § 47-2851.03d (2001). For more information about the Home Occupation Permit regulations, *see* D.C. MUN. REGS. tit. 11, § 203 (2000).

139. Patrons of a home-based business visiting the home business location for business purposes may be considered “business visitors” or “invitees” under tort common law, which places a greater burden of responsibility on the home-based business owner to protect against injuries occurring to home visitors than if the visitor were at the residence for nonbusiness social reasons (as a “licensee”). VICTOR E. SCHWARTZ, KATHRYN KELLY, AND DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ’S TORTS: CASES AND MATERIALS 494–95 (11th ed. 2005).

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be conducted in, or from, the home.<sup>140</sup>

Artists or small businesses desiring a business address that is not a home address but who cannot afford the high costs of securing separate space can attempt to avail themselves of the services of an executive suite arrangement or a variety of business incubator programs. In an executive suite arrangement small and newly formed businesses can pay a modest fee to rent a cubicle or an office within a larger office building. At graduated fee levels, these small businesses can also obtain the right to use common business equipment and rent conference rooms to have a place to receive clients or conduct company business.

Incubator programs generally provide office space to participating small businesses, as well as business support such as training and mentoring, which is beneficial to many new businesses. Industry-specific incubator programs can also create a convenient forum for small businesses to network with one another. An artist or small arts organization may be drawn to an arts-specific incubator program for the benefit of support, networking, and professional interaction with likeminded entrepreneurs and businesses. Incubator programs generally cater to low-resourced or start-up businesses. Even when formal incubator programs are not available, arts organizations may wish to investigate similar space-sharing options within their community or try to initiate such arrangements on their own. Lawyers can assist small and start-up arts clients by alerting them to space-sharing opportunities and resources.

#### d. Classification of Workers

Erroneously classifying a worker as an independent contractor, when the worker actually functions as an employee, can lead to significant consequences for an organization relating to failure of compliance with employer requirements and increased liability. Businesses with modest resources, as many arts organizations are, may be inclined to treat many of

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140. See Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 WM AND MARY L. REV. 1191, 1191–99, 1210–30 (2001) (advocating for the loosening of zoning laws restricting the operation of home-based businesses, highlighting multiple supporting factors, including: the benefit to many women-owned, microenterprise, and technology businesses and the reality that many home-based businesses operate contrary to existing zoning regulations). Garnett's article highlights an historical preference for approving home businesses that have a minimal impact on their neighborhoods, such as limited visitors to the home for business purposes. See *id.* at 1198–1210. This preference may work in favor of businesses conducting solely administrative tasks or working remotely from a separate primary location, but may disfavor artists or businesses wishing to actively engage in creative work in their homes. The increased incidence of live-and-work residence developments targeting artists, where residents are encouraged to operate businesses open to the public in their homes, may indicate a preference among many artists to be able to live where they work.

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their workers as independent contractors rather than employees to avoid numerous employer obligations owed to employees. Such employer obligations may include: withholding pay for employee taxes such as Social Security and Medicaid; providing workers' compensation insurance; and providing unemployment compensation, health insurance, retirement savings plans, and other job benefits.<sup>141</sup> Additionally, employers must comply with multiple federal laws protecting employee rights, such as: Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), the Federal Family and Medical Leave Act ("FMLA"), the Fair Labor Standards Act ("FLSA"), the Occupational Safety and Health Act ("OSHA"), and the National Labor Relations Act ("NLRA").<sup>142</sup>

Whether a worker is classified as an employee is determined against evaluation criteria relating to the actual amount of control exerted over the worker by the employer, regardless of the employer's labels or intentions for the position.<sup>143</sup> Incorrect designation of workers does not free a business from its employer obligations for the duration of the designation. Such a result can be a huge financial burden to a small business in correcting past noncompliance; perhaps such a sizeable burden that a small business will be forced to cease operations.

Lawyers can provide a great service to their arts clients in alerting them to worker classification considerations. Clients need to be aware, for example, that exerting greater control over the activities of their workers can have the unintended effect of converting Independent Contractors into Employees. Given the common characteristic of arts organizations to have a small, centralized staff and the practice of hiring numerous freelance artists, such considerations may be particularly relevant to arts organizations. Lawyers may also need to caution clients that worker classifications have far-reaching implications for issues such as the proper ownership of intellectual property rights emerging from business activities.<sup>144</sup>

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141. CONSTANCE E. BAGLEY & CRAIG E. DAUCHY, *THE ENTREPRENEUR'S GUIDE TO BUSINESS LAW* 267 (3d. ed. 2008). *See also* Striggles & Greenberg, *supra* note 111, at 84.

142. Bagley & Dauchy, *supra* note 141, at 272-94.

143. *Id.* at 267-72.

144. *Id.* at 268. Businesses and workers can proactively manage their respective intellectual property rights through contractual agreement. It is important to note, however, that in the absence of a contractual agreement, default rules may apply dictating the appropriate rights for each party that perhaps were unintended by the parties. The chances are greater in an employer-employee arrangement that intellectual property rights in work produced by the worker while working within the scope of employment will be owned by the employer business. Whereas, in an employer-independent contractor arrangement there is a greater chance that the independent contractor will retain intellectual property rights in the work produced. *Id.* These are gross generalizations and it is important to recognize that intellectual property laws are complex and may yield different results in a particular situation. The key



### 3. *International Assistance*

Art often transcends language barriers. As a result, art frequently involves transnational collaboration. Complex international transactions, and the legal considerations that accompany them, are often associated with large-scale companies and corporations. However, such complex issues can also arise for small arts businesses and organizations.<sup>145</sup> Many small arts businesses and organizations lack the knowledge and resources to navigate the thorny international legal issues that can arise. Lawyers can alert artists and arts organizations to the potential issues that international collaboration may elicit, so that they can be informed and protected when making business decisions. Lawyers can offer both advocacy and direct legal assistance in many of these areas.

If advocating for greater government funding for the arts, lawyers can specifically advocate for funding to enable U.S.-based companies—such as performing arts companies—to tour abroad or invite foreign visitors. United States based dance organizations often lament the fact they do not receive the same level of governmental support for international work that foreign dance companies receive from their respective governments.<sup>146</sup> The tide may start to turn, however; the U.S. State Department recently began initiatives to support local U.S. dance companies when they are touring abroad. These efforts are still in the pilot stage, but they signal greater support and collaboration to come.<sup>147</sup>

Lawyers can advocate for greater speed and predictability in visa classifications. Increasingly, there have been instances of artists invited to perform in the United States turned away at the U.S. border.<sup>148</sup> Similar instances have occurred in the United Kingdom, where some argue that

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lesson to businesses and workers is to avoid reliance upon the default rules and be proactive in negotiating and understanding their respective intellectual property rights in any given situation.

145. The increased affordability and accessibility of technology (such as the Internet) and air travel are some of the factors which allow small start-up organizations with modest resources, in addition to the traditional highly resourced large organizations, to operate on a global scale.

146. See *Open Space Technology Book of Proceedings*, DANCE/USA WINTER FORUM 2009 (Jan. 31, 2009).

147. See *Exporting Modern Dance: Three companies, with help from the U.S. State Department, pack their bags*, *Dance Magazine* 28 (Jan. 2010).

148. See Laura J. Danielson, *Navigating Difficult Waters: Immigration Laws As They Relate to Foreign Artists, Entertainers and Athletes*, ALLIANCE OF BUSINESS IMMIGRATION LAWYERS (April 2006), available at <http://www.abil.com/articles/Artists,%20Entertainers%20&%20Athletes%20-%2004.06.pdf>; Ben Sisario, *Bridge Over the Visa Moat for Musicians Trying to Enter the U.S.*, N.Y. TIMES, Mar. 17, 2010 (highlighting the work of Tamizdat, a nonprofit group based in New York, which assists foreign musicians comply with U.S. visa requirements allowing them to perform in the United States).

overly stringent immigration and visa laws are hampering the creative community.<sup>149</sup> Artists often invite international guest artists to visit them for collaborative projects. Artists also travel abroad to collaborate with foreign artists and promote their brands internationally. Lawyers can help artists understand the legal rules governing international travel and collaboration, and help them operate effectively within their limits.

Lawyers can assist artists in understanding foreign laws when executing agreements with foreign partners or in foreign jurisdictions. In addition to laws governing the movement of people across borders, lawyers can help artists comply with regulations on moving their products across borders; which can be related to shipping, customs and import-export levies, and general international trade laws.<sup>150</sup> Lawyers can also advocate for legislative modification of restrictive rules. For example, they can seek greater clarity and simplification of the process for tax withholdings for foreign visitors.<sup>151</sup>

#### 4. Intellectual Property Assistance

Understanding and adeptly navigating constantly changing intellectual property laws is of paramount importance to artists who need to successfully manage their intellectual property rights in their creative works. The growing shift toward a global economy driven by creativity makes an understanding of intellectual property laws increasingly

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149. See Joan Bakewell, *Artists aren't terrorists: They rejoice in life*, THE TIMES (London), June 3, 2009, Editorial, at 26; Rosemary Bennett, *Immigration rules threaten to destroy Britain's arts reputation*, THE TIMES ONLINE (London), June 3, 2009, available at <http://www.timesonline.co.uk/tol/news/uk/article6418997.ece?print=yes&randnum=124422>; James McCarthy, *Visa changes leave ballet company short of Russian dancers*, THE WESTERN MAIL, June 4, 2009, at 7, available at <http://www.walesonline.co.uk/news/wales-news/2009/06/04/visa-changes-leave-swanssea-ballet-company-short-of-dancers-91466-23785710/>.

150. For additional discussion on the legal considerations related to work visas and shipping and customs issues for people and businesses in the entertainment field, see X.M. FRASCOGNA, JR., SHAWNASSEY B. HOWELL & H. LEE HETHERINGTON, ENTERTAINMENT LAW FOR THE GENERAL PRACTITIONER 121–25 (American Bar Association 2011). Depending on the particular goals and current structure of a business interested in international or foreign activities, a myriad of additional international law considerations may exist for which the business should obtain the assistance of a lawyer. These issues may include questions of foreign and domestic tax treatment of foreign business operations, hiring and employment obligations in foreign countries, considerations related to the establishment of foreign offices and governance structures, and complex intellectual property asset management implications. See BAGLEY & DAUCHY, *supra* note 141, at 561–94.

151. Assistance with visa classifications and in understanding tax withholdings for foreign visitors were two specific areas identified as challenges facing dance artists during the Dance/USA Winter Forum 2009 Conference on Human Resources & Organizational Performance on Jan. 31, 2009, in New York City. For notes on the proceedings see *Open Space Technology Book of Proceedings*, *supra* note 146.

important.<sup>152</sup> Because intellectual property law largely concerns ownership of the products of creative efforts,<sup>153</sup> understanding and implementing a clear plan for managing intellectual property rights has become essential. Lawyers can directly assist artists and arts businesses with their intellectual property needs, and advocate for the revision and reconciliation of existing intellectual property laws in ways that protect artists and facilitate creativity.<sup>154</sup> Intellectual property law is an area where advocacy can be particularly effective in bringing about change due to rapid modern advances in technology and an increased recognition of the importance and economic value of creative pursuits forcing continuous change and reworking of existing regimes in intellectual property law.<sup>155</sup>

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152. In speaking about advances in technology and the increasing importance of managing intellectual property for businesses across all industries, John Howkins notes that many businesses have failed to fully exploit the value of their intellectual property and cautions that “[i]n the same way as successive generations of managers have needed to learn about computers and the internet, so they now have to learn about intellectual property.” HOWKINS, *supra* note 3, at 22.

153. See John Howkins, *Creativity, innovation and intellectual property: a new approach for the 21<sup>st</sup> century*, in INTELLECTUAL PROPERTY: THE MANY FACES OF THE PUBLIC DOMAIN 118 (Charlotte Waelde & Hector MacQueen, eds., 2007).

154. Howkins highlights areas within different branches of intellectual property laws where he strongly recommends reform. In copyright law, he advises that the laws be reformed to better account for the Internet and similar technological innovations and recommends a redefinition of “private copying.” While recognizing the importance of legal reform in impacting the creative economy he also notes that, “[t]he success of any new regime depends greatly on whether the music, film and publishing industries can devise new business models to exploit the digital technologies.” HOWKINS, *supra* note 3, at 81. Mark F. Schultz and Alec Van Gelder similarly advocate for copyright reform, asserting that there must be a new focus in copyright reform talk on local resources and existing laws to support meaningful progress in creative economic development. Schultz & Gelder, *supra* note 35, at 81. They argue that the conversation on copyright reform, rather than focusing on “high-level, somewhat abstract debates,” must concentrate on removing obstacles at the local level and providing practical ways for poor people working in the creative industries to benefit from copyright law protections. *Id.* Specifically, they advocate for strong copyright protections and provide five specific recommendations for supportive copyright and related rights laws: “[1] Provide for effective injunctive remedies against infringement; [2] Create and employ monetary remedies sufficient to deter infringement; [3] Ensure that trade associations can bring enforcement actions on behalf of members; [4] Institute reasonable criminal penalties for copyright piracy; [5] Make rights and transfers of rights easy to record and track.” *Id.* at 140. Although their discussion relates primarily to foreign emerging economies and the music industry, Schultz and Gelder explain that these tenets extend to “knowledge-intensive industries” generally, without regard to location. *Id.* at 147.

155. While intellectual property laws constitute a younger body of laws compared to more fundamental common laws, intellectual property law is well established in history. Howkins recounts that the first patent was awarded in Italy in 1421 and “America, unusually, included intellectual property in its Constitution” and “instituted its first [patent] registration system in 1790.” HOWKINS, *supra* note 3, at 34–35. Howkins further provides:

[a]ccording to the Whitford Committee’s Report on Copyright in 1977, English case law recognized an author’s rights over his work from the fifteenth century onwards, but only later did Parliament approve a legal code to protect those rights . . . . Queen Anne’s parliament duly passed the world’s first Copyright Act in 1710.

*Id.* at 56. In America, Howkins explains that patent law was often used to protect printed works, until states began implementing copyright laws in the 1780s and “[U.S.] Congress passed the first federal law

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A significant consideration related to the economic viability of pursuing a career in the arts is the ability of artists to realize sufficient income to financially support themselves. A large percentage of an artists' income often derives from the copyright they have in their creative work. A variety of intellectual property law areas relate to work within the arts community; however, copyright law is generally one of the most significant areas of intellectual property law impacting artistic works.<sup>156</sup>

Assisting low-resource artists and arts businesses at the early stages of their operations highlights a tension many artists and arts businesses may encounter under current U.S. copyright law. These artists may desire U.S. copyright law to provide strong protection of their rights in their artistic creations, but also need sufficiently flexible copyright laws that facilitate creative exploration and allow low-cost entry into the creative field for low-resourced entrants.<sup>157</sup>

One hypothetical example of this tension is the potential barrier to entry in the field experienced by an emerging dance choreographer. The choreographer must endure cost and administrative burdens in acquiring the necessary rights to music to be used in a performance. Those interests can be contrasted with both the musician's need to protect and capitalize

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in 1790." HOWKINS, *supra* note 3, at 57. Despite this long history of intellectual property law, intellectual property laws are particularly in need of scrutiny and adjustment compared to other bodies of law at this time because of dramatic changes in the way modern society interacts with and values ideas and expressions. Howkins provides: "[t]he spread of electronic distribution by satellite, cable and the Internet has stimulated a radical reassessment of these rights" due in part to the fact that "[d]igital information] subverts the familiar principles of creation and copying." *Id.* at 58.

156. Howkins illustrates in his case study on Andrew Wylie in *The Creative Economy* that copyright law has generally provided the weakest protection and offered the least opportunity for economic return compared to all forms of intellectual property protection. *Id.* at 20–21. Notwithstanding, some scholars identify the availability of copyright protections as one of the most crucial factors to realizing successful creative economic development. See Schultz & Gelder, *supra* note 35, at 119–22.

157. Howkins also identifies a similar tension existing in modern intellectual property law as negotiating "the balance between private ownership and public access." HOWKINS, *supra* note 3, at 19. He further describes the tensions existing in current intellectual property law on a more theoretical level in terms of a "property contract." He describes that there is a balancing of two principles in this property contract between "the principle that people deserve to be rewarded for their creative efforts, and will only work if they are rewarded, and the principle that society as a whole benefits if the resulting creations and inventions are put into the public domain and made freely available." *Id.* at 28. He continues that "[a]ll laws, in all countries, strike this balance between ownership/control and use/access." *Id.* Howkins further characterizes the "property contract" as "a major theme, and a controversial one, of the creative economy," highlighting a similar observation made by intellectual property law scholars Peter Hayward and Christine Greenhalgh that "[t]he knife edge on which the law tries to balance the system is that of defining enough private property rights to generate adequate incentives for creating knowledge, whilst avoiding the gift of monopoly power which leads to overpricing and complacency." HOWKINS, *supra* note 3, at 29 (citing PETER HAYWARD & CHRISTINE GREENHALGH, *INTELLECTUAL PROPERTY RESEARCH* (Economic and Social Research Council, London, 1994)).

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upon the value of his musical creations as well as the choreographer's desire for strong copyright laws in protection of his own choreographic work. Thus, artists and other creatives often struggle with managing competing goals of deriving full economic and attributed value for their artistic work, as well as reducing the high costs and regulatory burdens imposed by complicated copyright laws.<sup>158</sup>

These tensions are not necessarily unique to the United States, but are experienced by artists and creatives around the world as all nations continue to develop workable intellectual property laws.<sup>159</sup> Lawyers can offer vital assistance to artists as they manage these tensions by remaining attune to domestic changes in intellectual property law, and also by monitoring the impact that international treaties on intellectual property law may have on U.S. intellectual property practices in an increasingly global economy.<sup>160</sup>

Artists often face uncertainty in knowing which forms of intellectual property offer the best protection for different types of creations and how to best translate their artistic work into a medium that allows for intellectual property protection. For example, dance choreographers must determine the best method of documenting and reducing to a tangible form series of movements so that they can acquire copyright protection. Choreographers must evaluate a widening range of options through which to protect their work, including videotaping or utilizing Labanotation recordation methods, a standardized system for recording movement.<sup>161</sup> Additionally, visual

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158. Howkins touches on the tensions existing in current intellectual property laws and the need for continued efforts at reform, particularly with regard to reconciling appropriate business models for the music industry in light of increased interest in and use of file sharing by the public. HOWKINS, *supra* note 3, at 29. In describing the current outmoded condition of copyright law worldwide, Howkins explains: "[t]he technology is leading the race, with the users close behind, and the laws a distant third." *Id.* at 67.

159. Tensions existing in intellectual property laws worldwide are not limited to the pull between strong protection and open access as discussed above, but exist on multiple levels. Additional tensions existing in intellectual property law identified by John Howkins are that between countries desiring strong protection in their capacity as exporters of creative products and those desiring open access as primarily importers of creative products. *Id.* at 30, 66. He also points out that preferences can be influenced based on culture (individual vs. community-based) and religion and morality (certain religions discouraging individual ownership over creative inspiration due to its characterization as an element of spirituality belonging to no one). HOWKINS, *supra* note 3, at 7–8, 23, 30–31.

160. For an example illustrating an international treaty's impact on intellectual property laws, see Howkins, *Creativity, innovation and intellectual property*, *supra* note 153, at 120–21. In this example, John Howkins discusses the potential negative impact to webcasters within the technology sector resulting from provisions in the draft World Intellectual Property Organization ("WIPO") Treaty on webcasting agreed upon at the 2005 WIPO General Assembly.

161. Labanotation is an internationally recognized system using written symbols to describe human movement and is frequently used to record dance steps and choreography. See *Labanotation Basics*, DANCE NOTATION BUREAU, <http://www.dancenotation.org/lnbasics/frame0.html> (last visited June 26, 2010). For a more thorough explanation and analysis of labanotation, see ANN HUTCHINSON GUEST,

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artists and designers may find it difficult to decide which intellectual property protections to pursue given the availability of varying intellectual property options. These include: copyright, trademark and trade dress, and patent design protection; selecting between these options can be particularly challenging where a creation borders on industrial or utilitarian design. Lawyers can assist arts clients in navigating this sometimes dizzying array of options.<sup>162</sup>

#### D. VEHICLES LAWYERS CAN USE TO PROVIDE FORMS OF LEGAL ASSISTANCE TO ARTISTS

There are multiple vehicles through which the legal community can provide direct legal representation to, and advocacy on behalf of, artists and arts organizations. These vehicles include: providing private direct representation for a fee or on a pro bono basis, conducting legal seminars and clinics open to the public, supporting microenterprise development programs, and promoting and facilitating law school clinical programs through university systems.

Different aspects of many of these vehicle types have been explored throughout the discussions of this article; however, one unique vehicle that blends elements of all these vehicle types, upon which this article has not yet touched, are law school clinical programs. Next follows an examination of law school clinical programs and how they help the legal community provide important legal services to the creative economy, most notably in a transactional law context.

##### 1. *Law School Clinical Programs*

Law school clinical programs create an opportunity for upper-level law students to apply learned legal skills by functioning in a real-world

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LABANOTATION: THE SYSTEM OF ANALYZING AND RECORDING MOVEMENT (5th ed. 2005).

162. Intellectual property law considerations for creative businesses can, and frequently do, extend far beyond initial determinations of optimal forms of intellectual property protection. Intellectual property asset management can constitute a complex ongoing obligation, as artists and arts businesses must proactively maintain their existing intellectual property protections, identify and secure future protections, and avoid infringing against intellectual property rights held by other companies. These obligations must be managed within a constantly changing legal landscape where intellectual property laws are frequently amended and new technologies developed allowing for novel modes of rights exploitation. Additionally, artists and other businesses aligned with the entertainment industries must frequently negotiate licensing rights and business agreements impacting intellectual property ownership rights. Licenses may include: Mechanical, Synchronization, and/or a Master Use License; while agreements may include: Songwriting, Publishing, Recording Artist, Producer, Engineer, Mixer, Personal Management, Business Management, Performance, Writer, Director, Talent, Location, and Music Agreements, among others. *See generally* FRASCOGNA ET AL., *supra* note 150.

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environment where they provide legal assistance to real clients from the surrounding community. Student lawyers working in legal clinics typically receive academic credit for their participation in such programs, which are directed and supervised by professors and licensed attorneys. These programs provide a significant benefit to the greater community by offering free pro-bono representation to low-income clients who otherwise would be unable to pay for a lawyer.

Legal clinics vary widely in the nature and subject matter of the services they provide, spanning across different types of law and different types of lawyering such as litigation, transactional practice or policy advocacy. Many legal clinics are also active in the community, collaborating with community organizations in offering seminars to the public on various legal topics. This section highlights the capacity for clinical programs to assist artists and small arts businesses that are seeking to enter the creative economy, particularly focusing on clinics providing transactional business, nonprofit organization, intellectual property law, and/or community economic development legal services to artist and other creative clients. Legal clinics focusing on other areas of the law may also provide beneficial legal services to artists; however, the focus here is on how lawyers can provide assistance in ways that most directly intersect with the creative economy.

Transactional legal clinics provide an important resource in that many pro-bono small business clients may also be artists or organizations catering to artists. These artists and organizations are often in critical need of legal guidance. Primary concerns of artists may include protection of their intellectual property and assistance in drafting and reviewing contracts. Artistic business endeavors are businesses like any other, meaning they will need to attend to a variety of business-related legal matters.

There are several reasons why transactional legal clinics should pay particular attention to assisting artists and arts organizations. First, there are broader social implications beyond deepening students' learning of business lawyering. Such relationships are also beneficial to the revitalization of communities and local and regional economies.<sup>163</sup> Second, the creative sector is receiving increased attention as an important segment of the economy that needs to be supported to facilitate economic growth. Third, the United States has begun to lag behind other countries in

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163. See Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J.L. & POL'Y 249, 255-67, 290 (2004) (discussing the need for legal services in community economic and small business development and how law school transactional clinical programs can serve this need while providing learning opportunities to the law students working in the clinics).

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maximizing this valuable economic resource,<sup>164</sup> and clinical programs can help reduce the disparity to some degree.

Lawyers are uniquely positioned to assist artists and arts organizations in devising the internal structures necessary for stability, sustained growth, and profitability. Furthermore, legal clinics are well positioned to offer the kind of comprehensive guidance that can nurture these small businesses. Examining substantive legal issues arising in the creative industries can become especially engaging to law students when they see that their knowledge has an effect on the community's well-being. Students can also find additional motivations for their own work when they witness the passion demonstrated by the artists and arts organizations in their own creative businesses. Moreover, many students come to law school with artistic interests or past involvement in artistic fields, and assisting artists through legal clinics reengages students with their prior interests and experiences in an integrated fashion. The reality that law does not operate in isolation, but intersects in practice with many facets of daily life, can be an important realization for students who are forging new professional identities and looking for meaning in their work.

## 2. *Spotlight on the GW Small Business and Community Economic Development Clinic in Washington, D.C.*

The Small Business & Community Economic Development Clinic ("Clinic") at The George Washington University ("GW") Law School is an example of a clinical program that routinely represents artists and arts-based organizations.<sup>165</sup> The Clinic provides free pro bono legal assistance to small businesses and entrepreneurs in the Washington, D.C. area through the work of GW law students, who work under the supervision of professors and licensed attorneys. While the Clinic assists a wide variety of for-profit and nonprofit organizations, a large subset of the Clinic's clients have historically consisted of artists and arts-based organizations. This stream of arts-related clients has perpetuated itself through word-of-mouth and through the maintenance of community partnerships with

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164. See FLORIDA, WHO'S YOUR CITY?, *supra* note 13.

165. The Small Business & Community Economic Development Clinic ("SBCED Clinic" or "Clinic") is one of multiple clinics that constitute the Jacob Burns Community Legal Clinics, housed at The George Washington University Law School ("GW") in Washington, D.C. For more information about the GW clinical program see *The Jacob Burns Community Legal Clinic*, GW LAW, <http://www.law.gwu.edu/ACADEMICS/EL/CLINICS/Pages/Overview.aspx> (last visited Sep. 4, 2011). For more information about the SBCED Clinic, visit the GW SBCED Clinic website. See *Overview*, GW LAW, <http://www.law.gwu.edu/Academics/EL/clinics/SBCED/Pages/Overview.aspx> (last visited Sep. 4, 2011). For further background information on the GW SBCED Clinic (formerly referred to as the "Small Business Clinic") and to learn about its past projects see Jones, *supra* note 163, at 267–89.



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organizations that consistently refer arts-related clients to the Clinic.

The Clinic has served a wide range of arts organizations, each with unique needs. However, over the years certain core needs of arts clients have consistently resurfaced. Among the primary needs are general assistance in forming a business entity and maintaining corporate formalities. Additionally, many of the Clinic's arts clients require considerable assistance in understanding and complying with D.C.'s complex regulatory requirements for businesses. For those operating as nonprofit organizations, arts clients often require assistance achieving tax-exempt status both locally and federally. Managing and protecting intellectual property rights, particularly copyright and trademark, is also a frequent concern of artist clients served by the Clinic.<sup>166</sup>

Some of the arts-related clients that the Clinic has assisted over the past several years have included: groups in the performing arts such as theatre, dance, and music; for-profit businesses selling products ranging from clothing to greeting cards; literary groups aimed at promoting the literary arts as well as using literary activities to further social missions; and nonprofit organizations promoting arts domestically and internationally for specialized demographic or immigrant communities. The Clinic has also worked with clients whose activities are not easily classifiable within an artistic discipline but fall within the broader context of creative activity. These have included organizations emphasizing spiritual healing through art and alternative methods.

Although the Clinic attempts to accept as many arts-related clients as possible, in many instances the Clinic must decline acceptance of new clients due to a robust case docket and limited resources. Declined clients have included some arts-related businesses. In the event that the Clinic must decline representation of a potential client, the Clinic nonetheless provides preliminary consultation and helpful resources to try to assist the client despite the fact that formal representation cannot be offered.

In the spring of 2009, the Clinic undertook a legislative and policy project focusing on support for arts-based organizations, including Volunteer Lawyers for the Arts programs.<sup>167</sup> As a law and policy research

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166. Many of the considerations faced by arts clients are not unique to the arts field, but rather are issues common to all varieties of clients that the Clinic assists. This highlights that artist entrepreneurs and arts-based organizations, despite their arts focus, must still understand and comply with all the normal requirements for operating a business. Such a realization may be daunting to many artists starting a business, but this is an area where law school clinical programs and lawyers can generally offer assistance.

167. Volunteer Lawyers for the Arts ("VLA") organizations exist in major cities throughout the United States and in Canada and Australia. These organizations typically provide pro bono legal services to arts clients through a network of affiliated lawyers and law firms that choose to dedicate their services on a volunteer basis. These organizations frequently provide seminars to artists and arts

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initiative, this project departed from the traditional model of individual client representation and highlights an alternate approach that students in law school clinical programs can pursue to assist clients. Through this initiative, the Clinic researched and addressed broad questions related to how nonprofit organizations can better operate within an uncertain economy, regional supports for artists, and the identification of ways in which lawyers can assist artists and arts organizations.<sup>168</sup>

Business consultants and professionals often conduct market study and feasibility analyses with regard to their clients' actual or proposed businesses or business strategies. This research project conducted by the Clinic was different, as it highlighted the uniquely legal aspects of the business climate. The analysis focused on the possibilities for improvement in existing legislation and policy, and highlighted areas where legal doctrine could provide solutions. Moving beyond examination of a single client's situation, this project extended to an analysis of the legal regime affecting the entire arts community, and identified the areas in which lawyerly expertise could provide the greatest benefit.

By employing a multifaceted, holistic approach to lawyering, the Clinic utilized multiple methods to tailor the legal assistance provided to each client, whether it consisted of direct representation on a specific matter, general legal guidance and advice, or research-based advocacy efforts. This broad view of the role and capabilities of a lawyer also allowed students to experience multiple methods through which they could provide meaningful legal assistance to their clients.

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organizations on a variety of arts-related legal topics. Identifying the nearest VLA and becoming involved in the organization can be a great way for lawyers to get more involved in the arts community. Law school clinical programs can also benefit from working with local VLAs through collaborative projects or as a mutually beneficial client referral source. To find the nearest VLA to your location, visit the New York VLA website's National VLA Directory. See VOLUNTEER LAWYERS FOR THE ARTS, <http://www.vlany.org/resources/vladirectory.php> (last visited Sep. 8, 2011).

168. During this project, the Clinic worked with a Volunteer Lawyers for the Arts organization in exploring and analyzing the climate for arts-based organizations in the Washington, D.C. area. Clinic students conducted research on various matters of importance in the artistic community, looking for successful models of nonprofit organizations, particularly arts-based nonprofit organizations and volunteer lawyers associations affiliated with the arts. The goal was to identify the features possessed by organizations that had managed to survive and remain competitive during increasingly tough economic times. Students looked at models across the country and compiled their findings in a report, which it delivered to the partnering Volunteer Lawyers for the Arts organization at the end of the semester.

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## V. CONSIDERATIONS AND BENEFITS FOR LAWYERS AND THE LEGAL PROFESSION

### A. ETHICAL CONSIDERATIONS FOR LAWYERS

Within the context of transactional legal practice two ethical issues commonly arise and, therefore, are pertinent to lawyers assisting arts clients with transactional legal issues. These two reoccurring ethical issues are: 1) distinguishing between offering business advice and legal advice, and 2) resolving complications that arise in the multijurisdictional practice of law.

#### 1. *Distinguishing Between Business Advice and Legal Advice*

Distinguishing between what constitutes legal advice and what constitutes business advice can be a potential ethical challenge for lawyers serving artists and other clients with their businesses. While this is a potential conflict in all types of representation by transactional lawyers of business clients, it arises with special frequency for lawyers working with clients at the start-up stages of their business activities,<sup>169</sup> a category which includes many arts clients. Start-up and low-resourced business clients require considerable assistance related to both law and business.

Many lawyers are reluctant to counsel on issues aligning too closely to business matters, preferring to stay safely within their legal expertise.<sup>170</sup>

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169. While the potential conflict regarding business advice and legal advice may arise more frequently for lawyers in connection with serving their low-resourced clients who are unable to afford both separate legal counsel and business consultation, this potential conflict can also arise in connection with serving more highly resourced clients. The key difficulty arises in the nature of the close intersection between business considerations and business law—sometimes making it difficult to parse out the separate realms of each.

170. The ABA Model Rules of Professional Conduct do not specifically state that lawyers cannot provide business advice to their clients. Rather, lawyers erring on the side of extreme caution in avoiding the provision of business advice usually do so by virtue of their conservative interpretation of two specific Model Rules: Rule 1.1 concerning Competence and Rule 1.2(a) concerning Scope of Representation and Allocation of Authority Between Client and Lawyer. ABA Model Rule 1.1 states: “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” MODEL RULES OF PROF’L CONDUCT R. 1.1 (2002). ABA Model Rule 1.2(a) states:

(a) subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to the plea to be entered, whether to waive jury trial and whether the client will testify.

Unfortunately, many legal issues related to the start-up of a business are inextricably intertwined with business issues, and low-resourced clients may not have adequate resources to separately seek out the advice of a business professional on matters that the business lawyer may be competent to offer basic guidance.<sup>171</sup> This tension prevents some transactional lawyers from openly welcoming this type of clientele, as these clients frequently need assistance beyond clear-cut and discrete legal tasks. To provide significant and relevant advice to artists, transactional lawyers need the willingness and comfort level to confidently counsel clients on matters balancing on the line between the legal and business worlds.<sup>172</sup>

## 2. *Complications Related to Multijurisdictional Practice*

A second ethical issue relates to the unsettled area of multijurisdictional practice.<sup>173</sup> There has been a recent push among many transactional lawyers, particularly those working in the capacity of corporate counsel, to clarify and broaden the ethical rules related to when, where, with regard to what, and in which circumstances a transactional

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MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002). Rule 1.2(a) may be interpreted within transactional practice as deference to the client regarding business decisions.

171. See Jones, *supra* note 163, at 303–07. Susan R. Jones advocates the utility of “multidisciplinary practice” centers—which provide access to accounting, consulting, and legal services at a single location—to serve as a type of “one-stop shopping” for small business clients, noting the particular benefit to economically disadvantaged small business owners and community-based organizations who may otherwise forego such services due to an inability to find affordable, quality services or because they doubt the need for or helpfulness of such services. Jones also notes the benefits of undertaking an interdisciplinary approach to providing transactional legal services. *Id.* Anthony J. Luppino further advocates the benefit of undertaking an interdisciplinary approach in providing transactional legal services, particularly within the contexts of business law and academic learning environments. See Anthony J. Luppino, *Minding More Than Our Own Business: Educating Entrepreneurial Lawyers Through Law School-Business School Collaborations*, 30 W. NEW ENG. L. REV. 151 (2007).

172. Although this article does not necessarily assert that a mandate is in order for lawyers to provide business advice to their business clients, the following article resonates with many of the assertions of this section in providing a strong argument for the importance of business lawyers to adopt a broad approach in assisting their business clients and providing counsel on business as well as legal matters. The article similarly highlights the interconnectedness of business law and business advice, particularly with the present shift in the economy from a goods market to a financial and intellectual property dominated market. See Martin B. Robins, *Recipe For An Overdue Change: Why Corporate Lawyers Sometimes Need to Give Business Advice*, A.B.A. L. TODAY, Vol. 12 no. 6 (July/Aug. 2003), noted in DWIGHT DRAKE, BUSINESS PLANNING: CLOSELY HELD ENTERPRISES 650–56 (3d ed. 2011). This article in no way asserts that it is desirable or appropriate for lawyers to provide business advice on matters in which they are not competent. Rather, this article argues that business lawyers who are competent on particular business matters should feel comfortable providing such particular business advice in situations involving mixed issues of business and law.

173. For additional background information on the issue of multijurisdictional practice within the context of transactional law practice see Jones, *supra* note 163, at 307–09.

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lawyer may practice law.<sup>174</sup> This is particularly relevant in the representation of artists and creatives, who may feel less bound to operate within geographical boundary lines and may instead wish to collaborate with partners in multiple locations and otherwise operate across multiple jurisdictions. This is further augmented by the powerful effect of the Internet and its prominent use in the businesses of many creatives.<sup>175</sup> It is common among creatives, even those with small, low-resourced businesses, to seek collaborations not only across the United States, but also with businesses and individuals in other countries. This activity brings into play more complex international considerations in conducting business.

Throughout their operations involving collaborative efforts in different locations, artists may need the efficiency and continuity of working with a single lawyer or legal team throughout the process, as these lawyers are already familiar with their business, their objectives, and their personal work styles. Furthermore, many creative businesses are not financially capable of hiring separate counsel in multiple jurisdictions, nor do they have the time to manage multiple legal advisors. This problem highlights the need for continued efforts to broaden and clarify ethical rules to allow transactional lawyers to confidently proceed in providing efficient and optimal legal assistance to artists and other clients.

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174. The American Bar Association's amendment in 2002 to Model Rule of Professional Conduct 5.5 regarding the Unauthorized Practice of Law demonstrates a shift toward allowing lawyers to more easily and more clearly legitimately engage in the multijurisdictional practice of law. See MODEL RULES OF PROF'L CONDUCT R. 5.5 (2002) (amended Aug. 12, 2002). See also Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5 – An Interim Assessment*, 43 AKRON L. REV. 729 (2010) (providing background on the issue of multijurisdictional practice in transactional law, paying particular attention to the impact of ABA Model Rule 5.5 and the notable variation which still exists among state laws). Ultimately, Arthur F. Greenbaum views the passage of Model Rule 5.5 to be a success and he predicts continued broadening of the rule and a likelihood that states will increasingly adopt more permissive multijurisdictional practice rules. *Id.* at 766–68.

175. Lawyer and author Stephanie L. Kimbro also notes the negative impact constrained multijurisdictional practice rules can have on a virtual law practice, making this issue particularly relevant in modern times due not only to a greater incidence of client involvement in multiple jurisdictions, but also due to evolving technology allowing lawyers to provide more services remotely. See Stephanie L. Kimbro, *Practicing Law Without an Office Address: How the Bona Fide Office Requirement Affects Virtual Law Practice*, 36 U. DAYTON L. REV. 1, 20–25 (2010). Kimbro also discusses the related issues of residency requirements and location restrictions and their hindrance on lawyers' ability to serve clients. *Id.* at 1–20, 24–28. She further notes that lawyers' use of cost-saving technology, such as by implementing virtual office practices or cloud computing business models, increases access to justice for low- and moderate-income clients by providing more affordable and convenient legal services. *Id.* at 2.

## B. THE LEGAL COMMUNITY BENEFITS FROM INVOLVEMENT WITH THE ARTS

Artists, lawyers, and the local community each benefit from the interchange between these groups in aiding regional and local economies through microenterprise development in the arts community. Some of the ways in which lawyers and the greater legal community benefit from this exchange include: enhanced law firm and lawyer image within the local community, development of a means of later client generation, the personal stimulation that derives from experiencing a creative exchange with artist clients, and the greater availability of cultural opportunities within the local community. In addition, new lawyers and students in law school clinical programs can gain a profound learning experience through assisting artists and arts businesses.

### *1. Enhanced Law Firm and Lawyer Image Within the Local Community*

Providing legal assistance to artists and other creatives enhances the image of law firms and lawyers within the community. It also strengthens the connection between the legal community and its residents, helping lawyers better respond to the needs of community residents by staying apprised of those needs. In turn, residents can come to appreciate the benefits provided by the legal community. Moreover, the overall economic health of the community is strengthened through the creation and maintenance of more sound businesses. Where artists or organizations are unable to afford legal services, lawyers can provide pro bono legal assistance. Law firms often seek out pro bono legal work in part because it enhances the firm's image as an institution that cares about the community, which in turn can attract more clients to the firm.

### *2. Means of Later Client Generation*

Artists and arts-based organizations that originally come to a firm as pro-bono clients may realize greater success later in their careers and operations. Prior clients no longer eligible for pro bono services will likely return to a law firm that nurtured their early artistic efforts, and continue to offer their business to the firm. Similarly, prior clients will likely refer friends and colleagues within their industries to law firms from which they received high quality service. In sum, small artists can become big artists, and as they become more established, they may become more lucrative clients for law firms and, due to their contacts, beneficial referral sources.

### 3. *Creative Exchange can be Stimulating for Lawyers*

Working with artists can prove stimulating to the individual lawyers working on their cases. Such representation may allow lawyers to connect with their own more creative personal traits and they may feel invigorated by the passion and energy displayed by their clients who are working in creative fields. In fact, scholar Richard Florida characterizes lawyers as belonging to the creative class themselves.<sup>176</sup> The parallels between lawyers and artists with regard to drawing from creative abilities in their work can create common ground between these two professional groups.

In 2009, law firms and other organizations donating a minimum amount to The Cleveland Play House received the added perk of being permitted to cast themselves as extras in the Play House's courtroom drama.<sup>177</sup> Such community outreach and fundraising efforts signify the recognition that many lawyers enjoy when they become part of the creative process. Such examples also demonstrate that there is opportunity for further collaboration and exchange among these two groups.

### 4. *Provides Learning Opportunities for New Lawyers and Students in Law School Clinical Programs*

Working with artists and arts-based organizations can serve as an important learning opportunity both for new lawyers and students enrolled in law school clinical programs. Providing education to artists about starting and operating an arts business deepens new lawyers' knowledge of their craft through experiencing its application. This is true whether the lawyers are recent law school graduates or law students working within the context of a law schools' pro bono clinical program providing transactional legal services to the arts community.

Most traditionally, legal clinics can assist artists and arts organizations through individual representation related to clients' specific needs. In addition and in the alternative, law school clinical programs can conduct law and policy research on behalf of the arts community. Law school clinical programs are particularly well-suited to undertake special projects

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176. See Florida, *supra* note 9, at 68–69. Florida includes lawyers within his definition of the “creative class” due to the regular use of creative thinking and problem solving in their work. *Id.* at 69. Florida classifies lawyers within the creative subset of “creative professionals,” though maintains that creatives within this category can move up to the “super-creative core” classification when in the course of their work they continually perform more activities such as “testing and refining new techniques, new treatment protocols, or new management methods and even develop such things themselves.” *Id.*

177. See Julie Washington, *Cleveland Play House's 'Inherit the Wind' sponsorship program allows lawyers and their clients to perform as extras*, CLEVELAND.COM (Oct. 24, 2009), available at [http://www.cleveland.com/arts/index.ssf/2009/10/cleveland\\_play\\_houses\\_inherit.html](http://www.cleveland.com/arts/index.ssf/2009/10/cleveland_play_houses_inherit.html).

identifying unique challenges and potential solutions for the arts and small business communities, as the time and resources required for these types of inquiries are often unavailable to practicing lawyers and arts organizations experiencing billable hour requirements and other time constraints. Requiring labor-intensive research and the synthesis of information, such projects deepen clinic students' understanding of the legal and business climates that affect their clients.

## VI. CONCLUSION

The artistic community within a regional area is a precious and homegrown resource and the entire region benefits from its support and development. As the benefits of a strong creative and innovative sector are realized across communities, the United States will be invigorated by both the dynamism of the thriving arts culture and a strengthened economy energized by creative small businesses and entrepreneurs. Everyone benefits, whether directly or indirectly, from a strengthened arts community and local economy.

Lawyers are poised to play an important role in supporting the creative economy by virtue of their legal expertise. This article discussed multiple issue areas where lawyers could provide direct representation and advocacy assistance to artists and arts organizations, in areas including: funding, operational and regulatory assistance, international considerations, and intellectual property rights. Additionally, this article discussed multiple community economic development, microenterprise development, and community arts development tools lawyers can use in providing this assistance. Most notably, law school clinical programs were identified as an important vehicle for supporting creative economic growth in communities, highlighted by an example of the Small Business & Community Economic Development Clinic at The George Washington University Law School.

Aside from providing an important benefit to the greater community by providing legal assistance, lawyers and the legal community also benefit personally and professionally through their interaction with arts clients and improved understanding of the creative economy. Lawyers and the greater legal community, through supporting creative businesses, will benefit from an increased connection to their communities and heightened level of excitement in their legal work. Lawyers will enjoy improved job-security through their timely response to the changing demands of the marketplace and willingness to become a part of the evolving creative economy.



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