

Hiring to Firing Podcast — From Ideas to Ownership: Navigating IP and Employment Law Through the Lens of *The Social Network*

Hosts: Tracey Diamond and Emily Schifter

Guests: Rusty Close and Austin Padgett

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Emily Schifter:

Hey everybody, and welcome to *Hiring to Firing*, the podcast. Today we have some special guests. We're doing a crossover episode featuring Austin Padgett and Rusty Close, who are our partners here in Atlanta, who host the No Infringement Intended Podcast, which talks about the intersection of IP and pop culture, so a great fit for our podcast. Tracey, do you have any IP related horror stories or events that have happened in your life that might come to mind on this topic?

Tracey Diamond:

I do, as a matter of fact, and once again, it evolves a family member. This time, my uncle Alan, may he rest in peace, who was a larger than life comedic wonder who came up with a really great idea for a board game that he called Pressure Boxes. So he was very excited about the idea and he created a format for it, an actual physical format for what the board game would look like, and he went to go shop it around. And wouldn't you know that one of the very well-known board game companies, who shall remain nameless, took his idea, changed the name, pretty much used the same idea, and it became a very well-known game that's still around to this day.

Emily Schifter:

No way.

Tracey Diamond:

So there are some really important lessons there that we're going to discuss in much more detail with Austin and Rusty, so stay tuned in for our episode.

Welcome to *Hiring to Firing*, the podcast. I'm here with my co-host and partner, Emily Schifter. Together we tackle all employment issues from hiring to firing.

Emily Schifter:

Today are our guests are our partners, Austin Padgett and Rusty Close. Austin and Rusty are my down the hall neighbors here in Atlanta, and they both focus their practice on intellectual property law. In their spare time, they co-host the fascinating and highly entertaining podcast, No Infringement Intended, which covers the intersection of IP and pop culture. Welcome, Rusty and Austin. We're excited to have you here. Why don't you tell us a little bit about your practices and about your podcast?

Austin Padgett:

Sure. Thanks for having us. No Infringement Intended is an IP podcast that really talks about things like why did Taylor Swift rerecord her albums? Why did the WWF change the WWE? Some of the things are dated, we go back to the early 1900s in a recent episode, on recordings and things like that. But it's really going at what's happening in real life and how does intellectual property intersect with that.

Emily Schifter:

The burning questions that we all have.

Austin Padgett:

That's right. If you have any, we're happy to take requests.

Tracey Diamond:

Well, at first blush, it might seem like IP, intellectual property, and employment law wouldn't really have a lot in common, but we actually overlap quite a bit. After all, a company's intellectual property is created by its people. Everything always goes back to the people. As some background for our listeners who don't deal in this area every day, what are the various kinds of intellectual property and how do they differ?

Rusty Close:

There's really three big ones that we think about, copyrights, trademarks, and patents. But in the employment space and in general, we also have this idea of trade secrets that's pretty important. Patents, I'd say just broadly protects ideas, and trademarks broadly protects brands, and copyrights protect works that are in a fixed medium. I think that's about as broad as we can put it. I think we'll touch on several of these things today.

Emily Schifter:

So just like Austin and Rusty do on their podcast, we always have a pop culture tie-in here on Hiring to Firing. And we're also going a little bit back in time here today using the 2010 movie, *The Social Network*, which if you're not familiar, tells the story of the creation of Facebook. Starring Jesse Eisenberg as Mark Zuckerberg, the film tells a somewhat fictionalized version of the story of how Facebook was founded and created and some of the subsequent legal battles after it became a big success.

In our first clip, we will hear about the dispute between Mark Zuckerberg and the Winklevoss twins, Cameron and Tyler. In the movie and real life, the twins who were college students with Zuckerberg at the time, claimed that he stole their idea for a social networking site that they called Harvard Connection in order to create Facebook. And they start by lodging a complaint about this with the university's administration. Let's take a listen.

[BEGIN CLIP]

University President:

Good morning.

Cameron Winklevoss:

Good morning, sir. I'm Cameron Winklevoss. This is my brother, Ty.

University President:

And you're here because? Either of you can answer.

Cameron Winklevoss:

I'm sorry, sir. I thought you were reading the letter.

University President:

I read the letter.

Cameron Winklevoss:

Well, we came up with an idea for a website called Harvard Connection that we've since changed the name to ConnectU, and Mark Zuckerberg stole that idea.

University President:

I understand. And I'm asking what you want me to do about it.

Cameron Winklevoss:

Well, sir, in the Harvard Student Handbook, which is distributed to each freshman under the heading, Standards of Conduct in the Harvard Community, it says, "The college expects all students to be honest and forthcoming in their dealings with members in this community. Students are required to respect public and private ownership and instances of theft, misappropriation-

University President:

Anne?

Anne:

Yes, sir.

University President:

Punch me in the face. Go ahead.

[END CLIP]

Emily Schifter:

So the university president is incredulous here that the twins were attempting to rely on a college code of conduct to protect their intellectual property. He later even tells them that the code of ethics they enter into was with the university and not each other. So if ethics and codes of conduct alone aren't enough, how would a company go about securing protections for its IP? What should the twins have done here?

Rusty Close:

It's such a good question, and Austin and I generally try to approach, we're sort of Monday morning quarterbacking a lot of these situations and trying to think back, what could these companies have done to protect themselves? And if you think about where they were in their business life cycle and what they actually had, their claim is that he stole our idea and ideas in and of themselves aren't afforded any protection, right? You can pursue a patent on an idea, but just because you had an idea doesn't mean you had any protection for that idea.

I think one of the things they might've had an opportunity to protect is I think they had some source code. They talk about they had hired two developers prior, and so at least ostensibly there was some work that had been done there. So could they have copyrighted that code? Sure, they could have copyrighted that if they had an idea for this social networking site. I doubt that's what they called it at the time, but they could have tried to pursue a patent on it. But that process takes a long time. And so it's not like they would've had any rights in that idea, even if they had a patent application pending.

They're in a tough spot because Mark, at some point, and maybe we get into this later, he says, "How's this different from MySpace?" So there's kind of this acknowledgement that this exists in the world and what's your differentiator? And it's kind of the exclusivity part of it, right? If you're the twins and you go, "Well, yeah, our invention is MySpace plus exclusivity," right? And you try to put that in a patent application and get a patent on that general idea, you could try to do it. I don't think you'd be terribly successful and it would take a long time.

Tracey Diamond:

How long does it take?

Rusty Close:

It's a good question. You should ask how long does it take and how much does it cost, right? Those are the two big ones.

Tracey Diamond:

Ah, that's an even better question.

Rusty Close:

It can be a years long process. So oftentimes what you do is you prepare that patent application and file it, and then it just sits there for a long time before a patent examiner picks it up and the patent examiner does his or her review of the application. And that sort of sets off this back and forth between the inventors and the examiner. It's not outside the norm for that process to take three years. And I generally tell people, "Look, you need to be prepared during the course of that three years to spend," let's just say \$30,000 as a rough number. And if we're talking somewhere over in the life sciences pharmaceutical space, it's just a different ball game altogether. But \$30,000 is a pretty reasonable number to have in your head, but it can certainly be more and can certainly take longer.

Tracey Diamond:

So you have to really believe in your idea in order to kind of outlay that kind of money, right?

Rusty Close:

Yes. And most people really believe in their idea in the beginning,

Tracey Diamond:

Which is a good thing, I guess.

Rusty Close:

Right? And 24 months on when they're only realizing now that the patent examiner is picking up their application, they don't always believe in it as much anymore. And they're usually pretty frustrated at that point that, "Wait a minute, we've already spent \$20,000 and now the process is just really starting?" They kind of hear that \$30,000, but it doesn't always sink in that this is going to go on for a while.

Austin Padgett:

Part of the challenge is that a lot of these startup folks come in and they've been pitching to angel investing clubs or something like that, and so they have the patter down and this really strong-held belief and salesmanship that comes with it. And part of the job is listening and kind of piercing through some of that and getting to the heart of the real person and the real thing that's going on here and seeing, "Okay, well, that sounds just like MySpace," or, "that sounds just like..." What is the other thing that we're doing that's this new approach? Or what are the new words you're using to describe this ecosystem that maybe we can get some level of protection on? It's one of those things where it's really helpful if the client has taken some time and put down thoughts on paper so that there's some level of preparation before you walk in and get the investment pitch.

Rusty Close:

The other big challenge, this doesn't really play out in the movie, but it does play out in reality, is at this early stage, the inventors, the founders, they have an idea of what their product is. And so you write a patent application that covers that invention at that point in time, and now these things are progressing on two different tracks. You've got the business that's going one direction and evolving and pivoting and doing all kinds of things, and you've got a patent application that's not matching that course, right? It's just as you wrote it fixed in time, and you can't change it, and you can't edit it, and you can't

revise it to match your business. So by the time it eventually gets picked up at the patent office, your business may have pivoted 15 times and not even match what you started with. There's some frustration that goes along with that as well, because the inventors are going but, "well, right, but that's not what we're doing anymore." And just go, well, that's part of how it works.

Tracey Diamond:

So bringing it back to the movie for a sec, the Winklevoss twins eventually hire legal counsel who send a cease and desist letter to Zuckerberg. In our next clip, Zuckerberg discusses the cease and desist letter with his friend, at the time, and co-founder Eduardo Saverin. Let's take a listen.

[BEGIN CLIP]

Eduardo Saverin:

Mark. What is this?

Mark Zuckerberg:

A what?

Eduardo Saverin:

This.

Mark Zuckerberg:

It's called a cease and desist letter. What were their names?

Eduardo Saverin:

Who?

Mark Zuckerberg:

The girls?

Eduardo Saverin:

When did you get this?

Mark Zuckerberg:

About 10 days ago, right after we launched the site.

Eduardo Saverin:

Jesus Christ.

Mark Zuckerberg:

Hey, the girls, what were their names?

Eduardo Saverin:

They're saying the Winklevoss twins are saying that you stole their idea.

Mark Zuckerberg:

I find that to be a little more than mildly annoying.

Eduardo Saverin:

Oh, well, they find it to be intellectual property theft. Look, why didn't you show this to me?

Mark Zuckerberg:

It was addressed to me.

Eduardo Saverin:

They're saying that we stole the Facebook from [inaudible 00:11:15] and the Winklevoss twins.

Mark Zuckerberg:

I know what it says.

Eduardo Saverin:

Did we?

Mark Zuckerberg:

Did we what?

Eduardo Saverin:

Don't screw around with me now. Look at me. The letter says we could face legal action.

Mark Zuckerberg:

No, it says I could face legal action.

Eduardo Saverin:

This is from a lawyer, mark. They must feel they have some grounds.

Mark Zuckerberg:

The lawyer is their father's house counsel.

Eduardo Saverin:

Do they have grounds?

Mark Zuckerberg:

The grounds are our thing is cool and popular and Harvard Connection is lame. Eduardo, I didn't use any of their code. I promise I didn't use anything. Look, a guy who builds a nice chair doesn't owe money to everyone who ever has built a chair. Okay? They came to me with an idea. I had a better one.

Eduardo Saverin:

Why didn't you show me this letter?

Mark Zuckerberg:

I didn't think it was a big deal.

[END CLIP]

Tracey Diamond:

Guys, what do you think about Mark's comment that a guy who builds a really nice chair doesn't owe money to everyone who has ever built a chair.

Rusty Close:

It's a little oversimplification, but I think he's right. From my perspective, they had an idea. Again, they had no legal protection in that idea, just in the universe as it existed. And we can talk about ways that they might have gone outside the IP world to protect themselves, but as far as we know from the movie, they didn't do those things. And I think Mark's point is well-founded, right? MySpace already existed. You built your idea of exclusivity and using this harvard.edu email as the gatekeeper. That's great. But what is it that and \$3 gets you a cup of coffee?

Tracey Diamond:

Is it only \$3 these days, Rusty? I don't know.

Rusty Close:

Well, if you're just going brewed black coffee. I think you're still safe for \$3, maybe a small for \$3. So I think he has a point there. It's not that simple. We find out later he does pay them a decent amount of money, but I don't think that's an acknowledgement that he stole anything. I think that was more an acknowledgement. It's a business decision, right? It's the quickest way to make this go away.

Tracey Diamond:

The realities of litigation. Yeah.

Rusty Close:

I don't know. Austin, do you have a different view?

Austin Padgett:

The characters are talking on two different planes, right? The Winklevoss, one of the twins 6 5 2 20, and there's two of me. He says, you stole our idea. Mark comes back and says, do you see any of your code in my code? They're talking past each other because they have different concepts. The movie brings us out when they're in Larry Summer's office where these guys are like, "we're Harvard men. This is wrong. You know what is right, and we know what is wrong." That's a tough position to be in when you weigh up against what's required under intellectual property law.

One thing we always come up with on the copyright side is generally you need to convey a copyright. You need a signed writing. And just in a lot of these types of things, and we'll talk about this as this goes on, you don't have a lot of signed writings in a lot of this stuff. It's, "Hey, come over to the bicycle room of our club and we'll tell you about an

idea and you'll say you're in." And that kind of thing. It kind of isn't a pretty fair portrayal of the way a lot of these things go down. And then two years down the line, everyone has money for attorneys now, and we're looking for basic documents, and there are none. That's one of the things that struck me is how the characters were talking past each other. And I think Mark's more versed by his attorneys of what is required to meet the elements of a claim here. And the Winklevoss twins and their attorneys are like, "This does not feel right."

Tracey Diamond:

It's not fair. Yeah. But for every client that says it's not fair, they get a big legal bill, right? Unfortunately, because the not fair doesn't always win.

Austin Padgett:

My kids say it all the time, and I send them invoices.

Tracey Diamond:

So one of the things that struck me is Winklevoss twins were actually kind of taking advantage of Zuckerberg in the beginning, and there was this arrogance about hiring him sort of as their minion thinking they clearly grossly underestimated him. So that brings us back to our world of employment law. So what should or could the Winklevoss twins have done when they hired Zuckerberg as their first and only employee, or leaving aside the fact that they didn't have other employees, just the Winklevoss twins were going to do it right from the beginning. What should they have done with regard to bringing Zuckerberg on to ensure the protection of their idea?

Rusty Close:

Did they hire him? Would be a question I'd have for you guys. We don't have any, was he getting a W2 from these guys? Or was it just sort of a loose arrangement of Yeah, we'll work together. And I think we see that a lot. We do a lot with early stage companies and startups, and it's sort of these loose arrangements and handshake deals and all of these things, and you find yourself in these same positions. I think the simplest thing they could have done was to have, at a minimum, just an NDA between themselves and Mark and just sort of scoping out what we're going to talk about, what we consider to be our own confidential information. We're going to share things with you, and you're only going to use what we share with you for this stated purpose, which is helping us put this website together. At least then you've got something to point at.

But like Austin and I, usually the conclusion we always come to in our podcast seems to be they should have just used contracts, right? You can't just rely on sort of these default intellectual property rights. You got to get something down on paper. And I think

you guys would say the same, right? I mean, I think you're encouraging. Hey, look, I know it seems early in your life as a company, but you got to formalize some stuff and it might feel like overkill, but you could save yourself a lot of heartache later on.

Tracey Diamond:

And that's really true whether they were going in it together or they were going in it with, were hiring you as an employee at X dollars an hour to do this for us. I mean, maybe the document looks a little bit different, but the fact that you should be documenting the relationship during the get go, on the get go, at the beginning.

Rusty Close:

From the get go.

Tracey Diamond:

That's a super important concept.

Austin Padgett:

Yeah. Rusty and I have another podcast outside of the firm where we do relationship advice. It's kind of like Terry Real meets Esther Perel meets the Gottman's. It's really well done,

Tracey Diamond:

Emily, we need to be guests.

Austin Padgett:

Yes.

Emily Schifter:

A hundred percent.

Austin Padgett:

Yeah, we'll bring you on. We'll go through these Netflix shows and things like that and talk about what they could have done better. But I often talk to my clients, particularly when they're early stage, is its kind of like the prenup. Let's figure this out while everyone loves each other, then at least we know what happens when the day comes because it will come. We can at least feel pretty good about knowing what's going to

happen when either we're selling the company and everything's going great, and we've got to split up the money and figure out who goes where. Or if just things, the wheels fall off the wagon success or defeat. We've got to figure this out. And it'd be better to do it now because at least from a high level, we know that something's going to happen.

Tracey Diamond:

We see that a lot.

Emily Schifter:

So let's say the Winklevoss twins were hiring Zuckerberg for the purpose of this next question. And it was an employment relationship that's been figured out. It's well documented. Were there any protections for the twin's company at that point? Because Zuckerberg, in my hypothetical, was clearly doing the work as part of his employment relationship.

Rusty Close:

From a copyright perspective. The copyright in the code, if he was truly an employee, you go with a Second Restatement of Agency, I think is he's using the company computers. He is getting paid. This is within the scope of employment. It would be a workmate for hire. And so what happens is that's a magical term in copyright because the work itself, actually, the copyright and actually vest in the company rather than the employee.

As a general rule in copyright, whoever creates the thing owns the thing. This is the big exception, probably the biggest one we have, is that except in these types of limited situations, employment and a few others, that the person never owns it. Otherwise, they'd have to assign it. And we can talk about that on the patent side, but in copyright, it magically just becomes the company's property as soon as it's created. And that's the real moment in copyright is as soon as you create something that is, it's fixed in a tangible medium. So you're writing it down, you're putting it into the computer, whatever that event is, that's when a copyright starts to exist and someone owns it. And usually it's the person doing it, but in an employee context, it is their employer who would own it.

Austin Padgett:

And in the US it's a little counterintuitive because if we're talking about patents, and again, now we're talking about ideas, it doesn't automatically flow to the employer. And so it's why it's so important that those employment agreements, while they're acknowledging that, "Hey, everything you do on behalf of the company, the company's going to own, but it can't stop there because it needs to say, and you as the employee

generally what you see, agree to assign." Sometimes it stops there, and now we've got a problem potentially. But what we want to see is, "And hereby do assign the work that you do for the company." So again, it comes back to the contracts, right? It's not the defaults.

It's just such a lesson that we see over and over. Don't rely on defaults. Don't think that the universe is just going to work itself out and you're going to get what you think is fair out of it. Put it down on paper. There's really some simple things you can do. But that assignment would be a key part of it, though, in this case, I'm not sure there's any evidence he ever did any actual work for them, right? They keep going back to this idea of, "Where's the code? Where's the code? Where's the code?" And I don't know if he was, "Yeah, yeah, yeah, I'm working on it," but he was actually working on his own thing.

And then you get into this question of, well, and let's just assume there was employment. What was the scope of your employment? Were you working on this during that time? Were you working on it during your free time? It becomes this real sort of fact intensive exercise. But at the end of the day, just put it in paper. Just get it down.

Tracey Diamond:

Yeah. And there are many state statutes really put some restrictions on the employer's ability to really wrap their own ownership around products that an employee makes on their own time using their own equipment without it being as part of the outside the scope of their employment. Just because they happen to be employed and have a day job doesn't mean the employer necessarily gets the rights to everything they do in the middle of the night.

Emily Schifter:

Yeah. California being one big example. But

Tracey Diamond:

Yeah. And there are others, yeah.

Emily Schifter:

Yeah, yeah, for sure. And I do think you're right about this idea of, let's put it all in writing when everyone's still happy with each other is a good one. I think we see that kind of with all sorts of employment issues. We see small companies who think, we don't need offer letters. We don't need an employee handbook. Everyone agrees we don't need an employment agreement with severance because we're all friends. But then you get to the end of the employment relationship and realize maybe we did need

some of those guardrails in place. And it's much harder to get somebody to agree with you when you're at the end of the line, even if you're not dealing with invention-

Tracey Diamond:

And the prenup versus the divorce agreement.

Emily Schifter:

Exactly. Exactly.

Austin Padgett:

Right. Or having a will versus it going into probate. I try to find those links where people have had experience and you can relate to it and say, "You know that this can be a nightmare for you. And it can be just a grueling and grinding process or we can have an agreement." And while as you mentioned, there are some limitations in general, the U.S. is really a nice place to do business because for the most part, your agreement, whatever you're agreeing to, for the most part, holds up .some key exceptions, but for the most part, it's a great practice.

Rusty Close:

There is this notion of sometimes it does feel a little overkill at those early stages, right? It's like, "Guys, do we really need to be this serious about it? Do we have to get this formal about it?" And I understand that as well. You're kind of walking this line a little bit of, one, there's cost associated with it, and are we ready to spend that money to get this stuff formalized? I think there's, I don't know that I'd say shortcuts, but there's ways to do it that you're not, it doesn't end up being overkill, but you still get enough of a framework together that if the issues come up, there's something to point back to.

Emily Schifter:

So you mentioned trade secrets before, and that's something that we see in our world too. How does that fit in with IP? Obviously a little bit less of a formal process. You're not filing for a trade secret protection the way that you would be a patent. How do you guys see that get [inaudible 00:23:27]?

Rusty Close:

I always like to make the joke that Michael Scott runs outside and says, "I declare bankruptcy." And trade secrets are kind of the same way, right? There's not a formal process. You don't send it into any government office and say, here's our trade secrets. It's one of those things where you want to be able to show after fact that we were

treating this like a trade secret. We put certain protections in place, we put certain guidelines in place at work and for our employees to protect the things that we considered to be our company trade secrets. And you got to have some paperwork in place to show what that kind of stuff is.

And so again, there's kind of no natural default and there's nothing that just in and of itself falls into the category of trade secrets. I think there's a lot of times where a company will say after the fact, "Oh, well, that's our trade secrets." And you're going, "Okay, what did you do? Explain to me how you treated it like a trade secret. I know you're saying you think it's a trade secret, but what did you have in place to kind of evidence that?"

Tracey Diamond:

Yeah. And you know what we see on the backend of that is it's really important to have the agreements and the policies and the processes in place, but if you're not managing to them and your employees are ignoring the paper and running amok and sending their great aunt all your trade secrets, they're no longer trade secrets anymore regardless of those policies.

Rusty Close:

Exactly.

Tracey Diamond:

So you really need to stay on top of it to make sure that trade secrets stay confidential.

Rusty Close:

It's not a position that I think you would want to be in as a company to reverse engineer your way into saying, we had trade secrets, right?

Tracey Diamond:

So many times that's what we see.

Rusty Close:

Absolutely.

Tracey Diamond:

Yeah.

Rusty Close:

Yeah, because you don't think about it until, "Oh no, what are we going to do? We have to think about this now."

Tracey Diamond:

Can you guys just talk for just a sec about the Defend Trade Secrets Act? Because that's a relatively new concept that not all of our listeners and clients are aware of. What is it and why is it important to include that disclaimer in your agreements?

Austin Padgett:

Yeah. Where it came out of is that prior to, I think it was 2016 and still each state has its own trade secrets protection. It's a state level protection that you get. And so similar to trademarks where there's a state level trademark protection in each state, and then there's a federal protection, there hadn't been any real meaningful federal protection for trade secrets. It was a state by state type of issue. And so the U.S. really needed this to make a more uniform statement about particularly our larger companies, trade secrets and other intellectual property. And so this is a piece of legislation that made it through that has a more unified approach to the trade secrets. It puts together a federal scheme for this level of protection.

Tracey Diamond:

Okay, so you guys, you've done all the right things. We've gotten your employees to sign invention, assignment agreements, and you're thinking you've got all your bases covered. But that alone might not be enough. Once a company or a product has become a success and everyone wants a cut of the profits, sometimes attention turns back to what was done at the founding stage. It sort of goes to what you were talking about before, Rusty, about everybody's happy sitting around the kitchen table and don't want to put all those formal agreements in place. And so what happens on the backend?

So taking us back to the movie, the Social Network, in our next clip, we learn about the other central dispute in the movie. The dispute between Zuckerberg and Eduardo who mark slowly pushes out as the company grows. In this scene, Eduardo confronts Zuckerberg about having his share of Facebook diluted from 34% to 0.03%. In my opinion, this is one of the most emotional scenes in the movie. Let's listen to it.

[BEGIN CLIP]

Mark Zuckerberg:

You signed the papers.

Eduardo Saverin:

You set me up.

Mark Zuckerberg:

You're going to blame me because you were the business head of the company and you made a bad business deal with your own company.

Eduardo Saverin:

It's going to be like I'm not a part of Facebook.

Sean Parker:

It won't be like you're not a part of Facebook, you're not a part of Facebook.

Eduardo Saverin:

My name's on the masthead.

Sean Parker:

You might want to check again.

Eduardo Saverin:

It's because I froze the account?

Sean Parker:

You think we were going to let you parade around in your ridiculous suits pretending you were running this company?

Eduardo Saverin:

Sorry, my Prada's at the cleaners along with my hoodie and my fuck you flip-flops, you pretentious douchebag.

Sean Parker:

Securities here, you'll be leaving now.

Eduardo Saverin:

I'm not signing those papers.

Sean Parker:

We will get the signature.

Eduardo Saverin:

Tell me this isn't about me getting into the Phoenix.

Sean Parker:

You did it. I knew you did it. You planted that story about the chicken.

Mark Zuckerberg:

I didn't plant the story about the chicken.

Sean Parker:

What's he talking about?

Eduardo Saverin:

You had me accused of animal cruelty.

Sean Parker:

Seriously, what the hell is the chicken?

Eduardo Saverin:

And I'll bet what you hated the most is that they identified me as a co-founder of Facebook, which I am. You better lawyer up, asshole because I'm not coming back for 30%. I'm coming back for everything.

[END CLIP]

Emily Schifter:

So clearly the tensions are running high here when potentially millions and dollars are at stake and old friendships and all of the emotions that go along with that. Is this something that you guys have seen with your practices play out in real life? Or is this a little bit more made for TV?

Austin Padgett:

There's a lot of truth in this. As I mentioned before, if no one figures out what's going to happen while they love each other, the honeymoon phase ends, the real relationship begins and the real work starts happening. And things often fall apart like this. Or people feel like they were done dirty and don't get their fair share, whatever the circumstances might be. And so there are a lot of issues where you have people who even might've thought that they were founders. I mean, you see this a lot in the music business. You hear about bands breaking up and all the nasty stories and all these sorts of things. But part of that is figuring out who owns this stuff and who's going to be able to make money from it later down the road and residuals and royalties and things like that. So it comes up quite often, not only just in forming startup companies, but really in any creative enterprise where people are involved, people are great, but they tend to ruin a lot of things as well.

Rusty Close:

I think music, there's so many examples. The Black Crowes, the band Credence, I mean all of these bands had disputes on who were the real creators and who gets to own that stuff and really make money off of it, which is, I guess the most important thing. One of the examples I always give is we work a lot with Georgia Tech. They're right across the street and they do these student projects. We do office hours over there to kind of advise these student groups on these issues.

And I swear every year I've seen this where there's a group of five students, this is my favorite one. There was a group of five students, four of the students decided somewhere along the way we're going to continue on with this business and you, fifth member, aren't coming with us. And the four, it's so crazy to think they did this, but the four students wrote a letter to the fifth student saying, "You didn't contribute to this project. We're going to go on without you. And we want you to sign this acknowledging that you did not contribute and everything belongs to us." You can imagine that this did not go over well.

And the advice we always give is like one, figure this stuff out on the front end. Two, if you didn't be a human being about it and think about how this is going to play out because it couldn't have played out much worse than that.

Tracey Diamond:

Ouch.

Rusty Close:

Crazy way to handle this thing. But it goes back to the same thing we've been saying all along is just figure it out earlier than later because it gets so much harder to figure it out once there's actual money and once there's, people aren't seeing eye to eye anymore.

Tracey Diamond:

So one last question and to quote Austin Powers, it's the million dollar one. What are some best practices for employers or founders who want to protect their intellectual property?

Rusty Close:

I think the obvious one is, again, let's get it down on paper. In the case of the twins, I'm not even sure that they had a business or if it was just three guys that were working together and wanted to bring in a fourth guy to work with them. So then you run into this question of, well let's say they even did hire Mark. Who's hiring him? Are the twins hiring? Who is he working for at that point? And maybe they're just hiring him as a consultant to do some work, right? Some time and materials kind of thing. It's just unclear.

But again, it sometimes seems too early to start being that formal but I think you really have to approach it that way and make sure you've got the proper assignment language in place. In terms of trying to protect your IP. I think that's the best starting point. I don't think you need to immediately go into, and we've got to file patent applications and we've got to file stuff with the copyright office and do these things. Those might be steps that make sense at some point, but it doesn't always make sense that early on for all the reasons we've talked about, not the least of which is, you just don't know where the business is going. And it's really hard to try to protect it formally from a patent perspective that early on I don't know, Austin, what do you think other than get it down on paper, get your prenup in place?

Austin Padgett:

Yeah, beyond that, when we have early startup or companies that come in early in their life cycle, I like to just ask them, "Hey, imagine the next five years going swimmingly. What does that look like for you?" And a lot of that gets their imaginations rolling where we can at least figure out, okay, what directions might this go? And also in the back of my mind and the heinous law school education that's gone through, I'm just imagining

these people doing the worst things to one another on subhuman level. Just how is this going to go awry so I can think through, okay, we need to make sure there's an entity first of all. That's probably one of those things of, is there an entity? Because who can own this stuff rather than these two people trying to share, let's bring a third person in, even if it's kind of a fictional person through an entity and give everything there. And then we'll have a corporate attorney set out a contract or an agreement or bylaws, those sorts of things of how this is going to operate.

But if I can get them thinking five years in advance, that's about the stretch of what, I don't practice patents like Rusty, and so copyrights and trademarks, that's about the extent of how long I can think out with the company and really get them some protection where I've got that amount of runway. And so I can find if they think, "Okay, we have this AI bot and does this little thing." And I'm like, "Okay, what else? If it goes well, what else could you imagine doing there?" "Well, we could do this in these industries." So I'm like, "well I can file a trademark application to cover all that." If we don't want to get to it, we just don't get to it. And we can drop that stuff off later.

But at least for now we can plant a flag. And I know Rusty and his team do the same thing where even with the clients, they're trying to help them think past just that moment and the urgency of what they view as their invention thinking through, "How can we get the broadest claims and possible so that we can have something down the road that might be even more valuable than it would be to you if we got it today."

And so the timing aspect of all of this is a challenge. And also I try to think through, and Rusty and I do this together sometimes, to think through the waves. "Okay, if we can get through the first year and this product actually makes money or is close to making money, that's probably when we need to start thinking about really spending some money on the IP and putting a budget together and those sorts of things." In the meantime, we'll scrape together. We will file a copyright because it's relatively cheap, we'll file a trademark because we need to have the name locked down. We need to make sure that they have the domain names and those sorts of things. And if we can put something together so they have something and they've documented a lot of stuff, then we can think through kind of in waves what comes next and then have pivot points along the way or exit ramps.

Rusty Close:

And a lot of times what I think we're telling people is take a step back and think less about the law and think more as a business person and let's focus on, because a lot of times your best advantage is in your headstart, it's in having a product that's better than what else is out there. Facebook's a good example, right? Facebook and MySpace lived in the same world and plenty of people used MySpace and Facebook ultimately won out. It's about having something that people want and you don't need a patent to explain why Facebook is different from MySpace. MySpace already existed and it was just build

a better version of it that people like more. It's got better features, it's got all that stuff. Your advantage can be there. And as opposed to we've got our patents to fall back on, sometimes they're really valuable in the pharmaceutical world, extraordinarily valuable. But in the software space, it's not always the IP that's going to define you, it's all the other stuff that goes along with it.

Emily Schifter:

You have to have a good product at the end of the day.

Rusty Close:

Right.

Emily Schifter:

Yeah. So a few minutes talking to a lawyer at the beginning might feel painful or unnecessary, but can save you some big headaches down the line sounds like.

Rusty Close:

They try to play business person and they try to play lawyer all at the same time and it's just too much to deal with.

Emily Schifter:

All right, well this was a super fascinating conversation. Thank you guys so much for joining us and letting us delve back into the founding of Facebook at the same time. To our listeners, thanks so much for tuning in. Check out our blog, HiringtoFiring.law and if you have any ideas, topics, things that we should tackle next, we always love to hear from you. Thanks so much.

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