Help Was Not on the Way: Intellectual Property Liability Relief in a Pandemic Era

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ABSTRACT

This Article argues that certain exceptions to patent and copyright liability should exist during the pandemic, especially for those who are volunteers contributing to response efforts. The authors first consider, as a case study, the massive risk of liability associated with the good faith efforts of nonprofits and individuals who are micro-manufacturing personal protective equipment (PPE) and other medical devices during a public health crisis. The Article discusses potential relief options such as compulsory licensing, march-in rights, and Defense Protection Act rights by proxy, and also draws on analogy to tort and real property doctrines including Good Samaritan laws, the doctrine of public necessity as a defense to trespass, and postponement of evictions during COVID-19 in real property to the extent that each may be helpful in fashioning a similar statutory emergency declaration as to IP.

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I. INTRODUCTION

On January 20, 2020, the U.S. recorded its first case of COVID-19. By April of that same year, numerous hospitals across the nation had exhausted entire reserves of personal protective equipment (PPE, with looming uncertainty as to when they would be replenished. As infection numbers increased exponentially, PPE manufacturers across the globe received production requests that exceeded their capacity by 2-3 times.

Volunteers across the nation have assembled teams of makers—some professionals, but also scores of amateurs—to craft the critical equipment needed to slow down the onslaught of the pandemic. From cloth masks to ventilator pistons, nonprofits and everyday citizens were able to partially alleviate a need neither the private sector nor the government could address adequately.

Extensive potential IP infringement liabilities exist for these well-meaning volunteers. For example, using open-source, freely-dispersed blueprints could in fact be in unwitting violation of an obscure, pre-existing invention whose patent is buried deep within the unwieldy database of the U.S. Patent and Trademark Office.

Currently, no defenses to such infringement exist, dissuading would-be heroes from assisting during a great time of need. Defendants could, however, look to other legal doctrines. In analogizing intellectual property to tangible property,[1] one might argue for a Good Samaritan doctrine or to the

[1] One of us has written about such an analogy at length in the context of IP takings. *See* Dustin Marlan, *Trademarks as Constitutional Property Under the Fifth Amendment Takings Clause*, 15 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 1581 (2013) (drawing on patent law precedent and

necessity defense to trespass from tort law. In landlord tenant law; to the extent that rents for real property have been deferred during the time of the pandemic, perhaps certain instances of intangible property "rent seeking" by the owners of patents and copyrights might be justifiably put on hold as well. Defendants could also look to creative applications of existing exception in patent law such as march-in rights and the Defense Protection Act.

Using this PPE and medical device production dilemma as a case study, we will consider the logistical and legal obstacles to accommodating public interest uses of intellectual property. Our analysis will recommend a procedure that will limit or defer liability and provide appropriate remedies, and also will incentivize crucial and well-meaning acts in times of pandemic.

This Article will proceed in multiple parts. Part II provides a case study centering on the coronavirus pandemic and the PPE problem, illustrating that volunteers would benefit from relief from the threat of intellectual property infringement to incentivize their public interest efforts. Part III(A) details the need for exceptions to intellectual property liability through focus on other patentable subject matter valuable to the public domain during times of crisis. Part III(B) focuses on copyright (though much is applicable in the realm of patent also) and deals conceptually with analogies to the common law—property and tort law—where safety valves to liability exist in the form of Good Samaritan laws, the public necessity defense to trespass, and moratoriums to eviction in the context of land-lord tenant law during COVID-19.

II. **Case Study: The PPE Problem**

Very few countries were prepared for such a quickly evolving epidemic. On January 31, 2020, the first two cases were confirmed in Italy.[2] February 21, 2020, the cluster and first death from the virus was reported 145 miles away from the original case in Padua, Italy.[3] By March 27, 2020, over 250,000 cases were confirmed and almost 35,000 deaths from the virus were reported.[4] By the time cases in Italy declined and the epidemic came under control about 5 months later, over 246,000 cases had been confirmed and about 35,107 deaths reported.[5] In Brazil, the first case was recorded on February 26, and the first death reported on March 17. By May 27, the country was reporting 20,000 new cases a day, with a daily average of 16,000 for that seven-day period. By July 22, Brazil reported over 67,000 new cases in a single day, with a daily average of 37,000 for the 7 day period, for a cumulative total of 2.4 million cases, and 87,000 deaths.[6] Though not at the same

finding that trademarks constitute, for better or worse, a similar form of property as real property); *see also* Irina Manta, *Keeping IP Real*, 57 Hous. L. Rev. 349 (2020) (analyzing the relationship between IP and tangible property).

2 Staff Reporter, *Two first coronavirus cases confirmed in Italy: prime minister,* REUTERS (Jan 30, 2020), https://www.reuters.com/article/us-china-health-italy/two-first-coronavirus-cases-confirmed-in-italy-prime-minister-idUSKBN1ZT31H.

3Ciro Indolfi and Carmen Spaccarotella, *The Outbreak of COVID-19 in Italy - Fighting the Pandemic,* J AM COLL CARDIOL CASE REP. 2020 Jul, 2 (9), 1414-1418.

4 Barbie Latza Nadeau and Livia Borghese, *Europe's biggest countries are seeing Covid surges -- but not this one*, CNN (August 10, 2020, 3:06AM), https://www.cnn.com/2020/08/09/europe/italy-coronavirus-return-normal-intl/index.html.

5 Staff Reporter, *Italy Coronavirus Map and Case Count*, NY TIMES (As of 7/26/20), https://www.nytimes.com/interactive/2020/world/europe/italy-coronavirus-cases.html.

6 Staff Reporter, *Brazil Coronavirus Map and Case Count*, NY TIMES (As of 7/26/20), https://www.nytimes.com/interactive/2020/world/americas/brazil-coronavirus-cases.html. Also in July,

speed, rates of infection and deaths in the US also reflected an exponential growth rate. From 15 cases on February 15, the US reported 718,000 cases on May 15. By July 26, the US reported a staggering 4.1 million cases total and 145,000 deaths.[7] At the time of this writing, there is no end in sight.[8]

A. Critical Shortages

Bombarded with an epidemic of this breadth and scale, hospitals all over the globe quickly extinguished their supplies of the most basic personal protective equipment such as hospital gowns, face masks, and face shields, and started re-using them against CDC protocol.[9] An immediate shortage of ventilator parts and hand sanitizer also became apparent.[10] At the University of Washington in Seattle, an entire shipment of N95 masks was stolen off of its loading docks; at George Washington University Hospital in Washington DC, individuals walked into the hospital to steal massive quantities of supplies.[11]

B. **Government Response**

The response from the federal government has failed to effectively remedy the PPE shortages, even half a year into the epidemic. Federal agencies did not remove barriers to enable the private sector to act in a timely manner. For instance, the US Center for Disease Control (CDC) was unable to produce its coronavirus tests at the scale needed, and requested the FDA to grant waivers permitting the private sector manufacturers to develop and reproduce tests of their own.[12] Not until February 29 was such waiver given,[13] over one month after first confirmed case in US.[14]

Similar patterns in response time were evident for medical device uses. Not until almost two months into the epidemic did the FDA issue emergency use authorizations (EUA) allowing hospitals and other healthcare providers to use certain devices that had not yet gone through FDA approval,

President Bosonaro and his wife contracted the disease. Alison Durkee, *Brazilian President Jair Bolsonaro Tests Positive For Covid-19*, FORBES (Jul 7, 2020).

7 Center for Disease Control website is available at https://www.cdc.gov/covid-data-tracker/#cases.

8 Jaimy Lee, Dr. Osterholm: Americans will be living with the coronavirus for decades, MarketWatch (Aug 1 2020), https://www.marketwatch.com/story/osterholm-americans-will-be-living-with-the-coronavirus-for-decades-2020-07-30.

9 Ken Budd, *Where is all the PPE?* (Mar 27, 2020), https://www.aamc.org/news-insights/where-all-ppe.

10 Health care institutions, from great to small, also had insufficient COVID-19 tests, Karen Duffin, Jon Hamilton, *How to Test a Country*, N.P.R. (March 18, 2020), https://www.npr.org/transcripts/818072542. However, because there is no known occurrence of test duplication by lay people and lay organizations, and hence, no known risk of unwitting IP infringement in test development, we do not address this issue in this article. The content of this article focuses on equipment and supplies that were easily produced by lay people.

11 *Supra* note 11.

12 *Supra* at note 11.

13 *Coronavirus (COVID-19) Update: FDA Issues New Policy to Help Expedite Availability of Diagnostics* (February 29, 2020) FDA website available at https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-issues-new-policy-help-expedite-availability-diagnostics.

14 *Emergency Use Authorizations for Medical Devices* (accessed at Aug 10, 2020) FDA website available at https://www.fda.gov/medical-devices/emergency-situations-medical-devices/emergency-use-authorizations-medical-devices.

or had approval for other uses but not the ones needed to serve the COVID-19 patients.[15] The EUA was accompanied by a declaration limiting liability for manufacturers of such devices.[16] This declaration was reserved, however, only for certain diagnostic tests, decontamination systems, respirators, certain ventilator parts, and face shields. It did not address reproduction of gowns, gloves, or non-respirator face masks; additionally, the protection was primarily focused on PPE made by professional manufacturers of similar devices made in other countries with their own national standards. In short, the protections were limited to those companies and individuals who are already in the manufacturing industry.[17]

The White House also stumbled in invoking its authority created by the Defense Production Act (DPA).[18] The DPA was passed in 1950 at the start of the Korean War and was modeled after the War Powers Act that allowed President Roosevelt to control the domestic economy in wartime to make sure that the country had sufficient medical and military supplies. Unlike the War Powers Act, war time is not a required condition, and the DPA has been frequently used since its inception to fulfill government contracts first, for a variety of sectors including defense. The DPA can be used to address and prepare for natural disasters and other cataclysmic events, even before such events occur. Amongst many other things the DPA enables the Office of the President to require private sector manufacturers to prioritize government orders, and set production and distribution priorities for needed equipment. It also allows the President to order companies to recalibrate their factories to address shortages of supply. The Pentagon estimates that it invokes the DPA on at least 300,000 orders a year for various types of military equipment.[19] FEMA has frequently used it to address food and bottled water shortages following hurricanes.[20] However, 2020 was the first time it was used to address a public health emergency.

President Trump openly expressed hesitation in using it, likening the US to Venezuela should it choose to do so.[21] He eventually used it on March 27 to require only six companies to ramp up in production of patient monitors, CTs and mobile X-ray devices, hospital beds, face

[15] *Id*; *See also* Public Health Emergency website available at https://www.phe.gov/Preparedness/legal/prepact/Pages/COVID19.aspx.
[16] *Id.*
[17] "Section V: Covered Persons…manufacturer includes a contractor or subcontractor of a manufacturer; a supplier or licenser of any product, intellectual property, service, research tool or component or other article used in the design, development, clinical testing, investigation or manufacturing of a Covered Countermeasure; and any or all the parents, subsidiaries, affiliates, successors, and assigns of a manufacturer…" *Id.*
[18] Camila Domonoske, *White House Not Using Defense Powers To Boost Medical Supplies*, N.P.R. (March 23, 2020), https://www.npr.org/2020/03/23/820074051/white-house-not-using-defense-powers-to-boost-medical-supplies see also Maegen Vazquez, *Trump invokes Defense Production Act for ventilator equipment and N95 masks*, CNN (Apr 2, 2020), https://www.cnn.com/2020/04/02/politics/defense-production-act-ventilator-supplies/index.html
[19] Anshu Siripurapu, *What Is the Defense Production Act?* (Apr 29, 2020), Council on Foreign Relations website available at https://www.cfr.org/in-brief/what-defense-production-act.
[20] *Id.*
[21] Ben Gittleson, *Defense Production Act could help amid coronavirus, even as President Trump resists: experts* (Mar 25, 2020) ABC News website available at https://preprod.abcnews.go.com/Politics/defense-production-act-amid-coronavirus-president-trump-resists/story?id=69789412.

masks, oxygen blenders, resuscitation devices and other respiratory medical equipment, many of which were already in the process of doing so.[22]

C. Volunteer efforts

Shortages continued long after the DPA was latently invoked. By March 25, 2020, a lack of access to PPE persisted nationwide in hospitals large and small.[23] This problem was only exacerbated in cash-strapped rural states suffering from shortages well into April.[24]

In response, throngs of volunteers coalesced. From bespoke makers of masks, to pilots helping with delivery and distribution, volunteer efforts manifested in numbers previously unseen.[25] A family-owned manufacturer of car parts voluntarily re-configured their machinery to produce the highly needed pistons.[26] High-end New York City fashion designers felt the call to duty, and collaborated with NY Governor Cuomo to produce between 500 to 1,000 face masks in a week; others committed to producing cloth face mask covers, lengthening the time a N95 respirator could safely be used.[27] In Georgia, the Atlanta Opera entered an agreement with Grady Hospital to make cloth respirator covers.[28]

The 3D community—or those heavily engaged in use three-dimensional printers as either hobby or profession—also stepped up. Teachers and students at a private day school in Washington DC fied up 3D printers to produce face shields using open-sourced plans and by April, the students produced 3,000 face shields.[29] From Louisiana to Montana, 3D hobbyist families are creating production lines in their own homes using their 3D printers.[30] Similar stories abound in

[22] Yelena Dzhanova, *Trump compelled these companies to make critical supplies, but most of them were already doing it* (Apr 4, 2020 12:12 PM) CNBC website available at https://www.cnbc.com/2020/04/03/coronavirus-trump-used-defense-production-act-on-these-companies-so-far.html.
[23] Rachel Chason, *Coronavirus leads hospitals, volunteers to crowdsource*, WASH. POST (Mar 24, 2020).
[24] Anastasiya Bolton, *Rural Texas hospitals 'desperate' for medical supplies needed to fight coronavirus* (April 6, 2020 10:22 PM) KHOU*11 website available at https://www.khou.com/article/news/health/coronavirus/rural-hospitals-desperate-for-coronavirus-medical-supplies/285-a8438a49-c178-43b0-95f5-1f3c4583be85.
[25] Emma Platoff, *In West Texas, volunteers manufacture medical supplies and amateur pilots deliver to remote hospitals*, THE TEXAS TRIBUNE (Apr 20, 2020).
[26] Kenny Malone & Karen Duffin, *Planet Money: The Parable Of The Piston*, N.P.R. (Apr 2, 2020), https://www.npr.org/2020/04/02/825800514/planet-money-the-parable-of-the-piston.
[27] Emilia Petrarca and Sarah Spellings, *Fashion Designers Are Pivoting to Face Masks*, N.Y. MAGAZINE (Mar 23, 2020).
[28] Meredith Hobbs, *Troutman, Smith Gambrell Protect Volunteer PPE-Makers From Legal Liability* (Apr 7, 2020) Law.com Daily Report website available at https://www.law.com/dailyreportonline/2020/04/07/troutman-smith-gambrell-protect-volunteer-ppe-makers-from-legal-liability/.
[29] Ashraf Khalil, *DC's High School 'Makers' Fire Up 3D Printers to Create PPE* (Apr 23, 2020) NBC Washington website available at https://www.nbcwashington.com/news/local/dcs-high-school-makers-fire-up-3d-printers-to-create-ppe/2282731/.
[30] Devin Dwyer and Jacqueline Yoo, Making 'PPE' at home: Families use 3D printers to address coronavirus shortages, (Apr 9, 2020, 3:08 AM) ABC News website available at https://abcnews.go.com/Politics/making-ppe-home-families-3d-printers-address-coronavirus/story?id=69995774.

other cities such as Chicago,[31] and in some states, public universities are encouraging lay people to produce PPE for health care providers.[32]

Nonprofits also began operating as quasi-distributors. Based out of New York City, Project N95 was formed before the President invoked the DPA, and quickly was able to serve as a switchboard for makers and health care providers in scores of cities all across the US.[33] These efforts spread nationally, such as #Findthemasks[34], and #getusppe (run by medical workers)[35], and in rural states as well, [36] where rural hospitals already daunted by budget crises have been particularly vulnerable to cost increases of crucial PPE.[37]

III. Legal Issues – The Need for IP Exceptions during Crisis

The legal issues in these scenarios are varied and plentiful, from tort, to intellectual property, to contract, and the actors implicated include not only micro-manufacturers but also distributors, distribution facilitators, and also those who circulated patented plans.[38] We limit the scope of this discussion to the intellectual property implications, with special attention to nonprofit organizations, small businesses, and individuals, or those netting little to no profit. However, much of the analysis is also applicable more widely.

A. Patent Issues

In patent law, the potential for infringement by volunteers is rampant. While makers may be operating in good faith when they use plans and blueprints obtained from open source websites, it is unlikely that volunteers operating in a crisis scenario have performed the extensive due diligence research needed to ensure that their design does not constitute patent infringement. A plan obtained from an open source website that does, in fact, infringe a patent, liability could implicate not only the individual who proffered the design/invention as his or her own, but also the producer

[31] *Maker Community Comes Together to 3D Print Personal Protective Equipment* (May 12, 2020), website available at https://polsky.uchicago.edu/2020/05/12/maker-community-comes-together-to-3d-print-personal-protective-equipment/.
[32] *Making Personal Protective Equipment (PPE) for Health Care Workers: Home - Resources for Baltimore, Maryland and beyond during the Covid-19 pandemic* (Jul 2, 2020) University of Maryland website available at https://guides.hshsl.umaryland.edu/ppe.
[33] TJ McCue, *Project N95 Launches To Battle 2020 Shortage Of N95 Masks During Coronavirus Outbreak*, FORBES (Mar 22, 2020).
[34] Find the Masks website available at https://www.findthemasks.com/.
[35] Get Us PPE website available at https://getusppe.org/.
[36] Arkansas Regional Innovation Hub website available at https://arhub.org/arkansas-maker-task-force/;
[37] Editor, *Coronavirus Threatens Rural Hospitals Already At The Financial Brink* (Mar 21, 2020) KASU website available at https://www.kasu.org/post/coronavirus-threatens-rural-hospitals-already-financial-brink#stream/0.
[38] "Indirect infringement (i.e., inducement) may occur if an individual knowingly causes another person to 3D print a patented device. Indirect infringement (i.e., contributory infringement) may also occur if an individual knowingly sells an essential "component" of a patented device to another person who then 3D prints the device." *Are There Patent Infringement Implications of 3D Printing PPE to Help Health Care Workers in the War Against COVID-19? Yes.* (Apr 2, 2020) Hunton Andrews Kurth website available at https://www.huntonak.com/en/insights/are-there-patent-infringement-implications-of-3d-printing-ppe-to-help-health-care-workers-in-the-war-against-covid-19-yes-web.html.

of the manufactured items; some even argue that liability could attach to the distributor or those who facilitate distribution.[39] Without adequate clearance searching—which can cost hundreds or thousands of dollars and take weeks or months to complete—there is no dispositive answer as to whether a use of plan or reproduction of an invention is an infringement of an existing patent.

Through the PREP Act of 2005, Congress created certain liability shields to facilitate production of PPE and related equipment, but not for the individuals, small businesses, and nonprofits from the aforementioned case studies. Rather, PREP protections were intended to protect large-scale professional manufacturers and end users (such as hospitals) in the industry who already were undergoing an FDA approval process or complying with FDA regulations in many other related areas.[40]

The PREP Act of 2005[41] provides immunity from liability for events arising from the "administration or use of countermeasures to diseases, threats and conditions determined by the Secretary to constitute a present, or credible risk of a future public health emergency to entities and individuals involved in the development, manufacture, testing, distribution, administration, and use of such countermeasures."[42] It requires a declaration by the Secretary of the Department of Health and Human Services to make a declaration specifically under the Act, which was made and incorporated into the CARES Act to address COVID-19.[43] The protection is limited to (1) "covered persons" (2) engaging in "recommended activities" (3) for "covered countermeasures." A covered person is defined as a manufacturer of a countermeasure, a distributor, program planner of a countermeasure; a qualified person who prescribed, administered, or dispensed a countermeasure; or an official, agent or employee of a manufacturer, distributor, program planner or qualified person. This language has been interpreted to mean those operating at a commercial level, such as a corporate manufacturer or common carrier, [44] and some have interpreted this liability protection to extend to intellectual property claims, such as patent infringement.[45]

The extent to which our case study of volunteers are "covered persons" under the Act is unclear, and underscores the inadequacy of the PREP Act in providing clear guidance to Good Samaritan micro-manufacturers. Rather, the PREP Act provides only after-the-fact relief that requires judicial interpretation of vaguely-defined protections for vaguely-defined parties.

[39] *Id.*
[40] Liability protection limited to "(Sec. 6005) This section extends targeted liability protection to certain manufacturers, distributors, prescribers, and users of approved respiratory protective devices that are (1) subject to specified emergency use authorizations; and (2) used during the period beginning on January 27, 2020, and ending on October 1, 2024. (Emergency use authorizations allow for the use of unapproved drugs, biological products, or devices, or for the unapproved use of such products, to respond to a declared emergency.)" H.R.6201 - Families First Coronavirus Response Act116th Congress (2019-2020).
[41] Joshua D. Sarnoff, *COVID-19 Highlights Need for Rights to Repair and Produce in Emergencies* (May 19, 2020) Harvard Law Petrie Flom Center Bill of Health website available at https://blog.petrieflom.law.harvard.edu/2020/05/19/covid19-intellectual-property-patent-law/.
[42] Public Health Emergency website available at https://www.phe.gov/Preparedness/legal/prepact/Pages/default.aspx.
[43] Public Health Emergency website available at https://www.phe.gov/Preparedness/legal/prepact/Pages/default.aspx.
[44] *Covered Persons Table*, Pillsbury Law website available at https://www.pillsburylaw.com/images/content/1/3/130913/Covered-Person-Table.pdf
[45] *Supra* note 46. .

1. Existing and proposed statutes requiring actions from the federal government

Either through legislation, or declarations issued by the White House or Congress, the federal government has an ability to offer relief to Good Samaritan PPE providers in a variety of ways.

a. Facilitating Innovation to Fight Coronavirus Bill

The scenarios involving lay micro-manufacturers were likely contemplated and under discussion by Congress when they created the CARES Act, though nowhere in the Act is this issue addressed. The most noted feature of the CARES Act was the $3 trillion package, a significant portion of which was dedicated to impacted businesses and unemployed individuals. Some of this financial assistance included support to rural hospitals and for improvements to internet infrastructure in rural areas. The CARES Act was passed unanimously by the Senate on March 25, 2020 and signed into law on March 27, 2020.

Shortly thereafter, on April 13, 2020, Senator Bill Sasse of Nebraska introduced a bill to address the issues faced by Good Samaritan PPE producers called the "Facilitating Innovation to Fight Coronavirus Act."[46] In addition to providing immunity for healthcare providers working outside their specialties or modifying FDA-approved devices for non-approved uses, and conducting testing outside of certified healthcare facilities, it also proposes to suspend patent rights of inventions used to fight the coronavirus epidemic during the time period in which there is a National Emergency declaration by the President. As compensation to IP owners, the bill also proposes to extend the period of the invention's patent for ten additional years, once the national emergency status is terminated.

As of the writing of this Article, the bill suffers from numerous fundamental shortcomings and faces much criticism. In its brevity (three pages), it fails to outline whether it would apply to existing patents or only those created during the period of coronavirus, and also does not adequately define its terms, specifically the definition of what is "used or intended for use in the treatment of…COVID-19.[47] Others argue that the bill stifles innovation by disincentivizing costly experimentation removing the ability to re-coop expenses until after the pandemic ends, at which time its inventions would no longer be in demand.[48] Other arguments decry that such loss of rights would result in the stripping from the patent-holder the ability to oversee quality control by the would-be infringer who could then produce dangerous or inferior products, or could price gouge.[49]

[46] Facilitating Innovation to Fight Coronavirus Act, 116th Cong. S. 3 (March 30, 2020).
[47] Courtenay C. Brinckerhoff, *Proposed Legislation To Delay, Then Extend Coronavirus Patents*, THE NAT'L L. REV. (Apr 13, 2020), https://www.natlawreview.com/article/proposed-legislation-to-delay-then-extend-coronavirus-patents.
[48] James Edwards & Gene Quinn, Facilitating Innovation to Fight Coronavirus Act— Legislation That's a Mixed Bag, (Apr 8, 2020) IPWatchdog.com, https://www.ipwatchdog.com/2020/04/08/facilitating-innovation-to-fight-coronavirus-act-legislation-mixed-bag/id=120483/.
[49] *Id.*

Arguably, potential gouging could be prohibited by invoking certain provisions of the Defense Production Act.[50]

Further, there is the question of proportionality; frequently, the patent-holder of an invention worthy of mass reproduction is a large, well-funded company, and less often is it an individual inventor. Ostensibly, the state of emergency will subside with the introduction of a vaccine. Presently, at least seventy vaccines are being developed[51] and experts have estimated that one will be widely available for use in the US by the spring of 2020. However, as with many diseases, vaccines, PPE and other COVID-19-related treatment items will have marketability long after a pandemic.

b. Compulsory licenses and the TRIPS Agreement

Various nations around the world have proposed the establishment of compulsory licenses in the context of the inventions needed to combat COVID-19. A compulsory license could establish a fixed licensing fee for the use or reproduction of a qualifying patented (or copyrighted) creation, and such license would be mandatory. Costa Rica, Chile, Colombia, Peru, Malaysia, the Netherlands and Israel are amongst the cohort of nations that either have already adopted compulsory licensing for inventions related to the virus, or are taking such a policy under consideration.[52]

Under the Trade-Related Intellectual Property Agreement (TRIPS Agreement), signed by all members of the World Trade Organization including the United States, federal governments of member nations can create compulsory licenses and utilize a patented work from any member nation without the authorization of the patent-holder.[53] It is a threshold agreement in which member nations can provide more but not less protection for the individual patent-holder. It creates exceptions to patent protection so long as the patent-holder is not unreasonably affected or prevented from exploiting the patent herself, and explicitly creates the right to establish compulsory licensing. Most European countries have opted into a compulsory licensing policy of some sort,[54] and under a 2006 EU agreement, most EU countries must allow for compulsory licensing to least developed and developing countries.[55] Even under these agreements, however, a country must first

[50] Avery, Barron; Johnson, Brian; Cadet, Orga, Impact of the President's Invocation of the Defense Production Act on Federal Contractors, (Mar 19, 2020) bakerlaw.com website available at https://www.bakerlaw.com/alerts/impact-of-the-presidents-invocation-of-the-defense-production-act-on-federal-contractors.

[51] Christine Soares, *Here are the drugs, vaccines and therapies in development to tackle COVID-19* (Apr 21, 2020) World Economic Forum website available at https://www.weforum.org/agenda/2020/04/drugs-vaccines-therapies-covid19-health.

[52] Elaine Ruth Fletcher & Svět Lustig Vijay, *Costa Rica Urges WHO To Lead Global Initiative For Pooled Rights To COVID-19 Diagnostics, Drugs & Vaccines* (Mar 3, 2020) Health Policy Watch website available at https://www.healthpolicy-watch.org/costa-rica-urges-who-to-lead-global-initiative-for-pooled-rights-to-covid-19-diagnostics-drugs-vaccines/.

[53] TRIPS Agreement, https://www.wto.org/english/docs_e/legal_e/31bis_trips_02_e.htm.

[54] European Patent Academy, *Compulsory licensing in Europe A country-by-country overview* (2018), http://documents.epo.org/projects/babylon/eponot.nsf/0/8509F913B768D063C1258382004FC677/$File/compulsory_licensing_in_europe_en.pdf.

[55] REGULATION (EC) No 816/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 May 2006, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006R0816.

try to obtain permission of the patent-holder, except for in extreme circumstances such as a pandemic. The compulsory license may only last for the duration of the emergency, and the amount of the licensing fee is open to litigation. Compulsory licensing is also available in copyright, which does not require emergency circumstances and may be in place indefinitely.

In the US, compulsory licensing is most commonly used in non-dramatic music; musicians may cover the original composition of another for a fixed statutory fee per reproduction.[56] So long as the melody of the original composition is preserved, the copyright holder may not object or litigate the amount. In the US, compulsory licensing is also used in public broadcasting,[57] retransmission by cable systems,[58] subscription digital audio transmission,[59] and non-subscription digital audio transmission such as internet radio.[60]

In patent law, however, the US has not enacted laws to enable compulsory licensing in the same fashion as has Europe.[61] US compulsory licensing of patents exist for plant variety protection to secure fiber, food, and feed supply;[62] all patents for use by the US government itself;[63] or where the US has funded the research and development at least in part.[64] The latter authority is termed "march-in" rights, has never been used, and is more thoroughly discussed in the next section.

There is a sole documented case in which Tommy Thompson, the Secretary of the Department of Health and Human Services threatened to "break" the patent for Cipro, held by German-based company Bayer, in order to stockpile supplies to treat anthrax during a 2001 nationwide scare.[65] The legal structure through which Secretary Thompson intended to use is unclear, as Bayer backed down before litigation occurred and sold the needed supplies at the government's requested price. Generally, however, the US has held firm on its position of upholding patent rights in the pharmaceutical industry, even when concerning life-saving drugs needed to treat HIV/AIDS or malaria in multiple countries in Africa.[66]

The US predilection against compulsory licensing in medical supplies not only prejudices Good Samaritans diligently seeking to address supply shortages, but also greatly prejudices the US should a successful vaccine first be developed elsewhere. Many argue that the assumption that compulsory licenses only grossly prejudices investors is a false one,[67] and that pro-market economic

[56] 17 U.S.C. § 115.
[57] 17 USC 118.
[58] 17 USC 111(c).
[59] 17 USC 114(d)(2).
[60] 17 USC 114(d)(1).
[61] Nafsika Karavida & Dara Onofrio & Deena Merlen, *Patent Rights and Wrongs in the COVID-19 Pandemic: EU and U.S. Approaches to Compulsory Licensing* (May 19, 2020), https://www.ipwatchdog.com/2020/05/19/patent-rights-wrongs-covid-19-pandemic-eu-u-s-approaches-compulsory-licensing/id=121709/.
[62] 7 U.S.C. § 2404 (2000).
[63] 28 U.S.C. § 1498.
[64] 35 U.S.C. § 203.
[65] Jill Carroll and Ron Winslow, *Bayer to Slash by Nearly Half Price U.S. Pays for Anthrax Drug,* WALL ST. J. (Oct. 25, 2001).
[66] *Id.*
[67] Jerome H. Reichman, *Compulsory licensing of patented pharmaceutical inventions: evaluating the options*, J LAW MED ETHICS (2009 Summer) 37(2): 247–263.

justifications for compulsory licenses do in fact exist.[68] However, the scope of this article primarily focuses on non-pharmaceutical inventions and will not further address the arguments for and against compulsory licensing in the pharmaceutical context.

Rather, a distinction could be made in the inventions discussed in the case study (ventilator parts, and PPE such as masks, gowns, respirators) and high costs items such as pharmaceuticals. We might look to the distinction between granting compulsory licenses in copyright versus pharmaceutical patents; that difference may be driven by the disparity in cost of research and development for a drug greatly exceeding the costs needed to develop a song, for instance. Thus, it may be that the government is more willing to require compulsory licensing in one context over the other. However, given the broad spectrum of medical equipment in which there are shortages, perhaps the US might consider revisiting this legal tool as applied to equipment with lower research and development costs, and leave the rarely used march-in rights device as the measure for items with higher start-up costs.

c. March-In Rights under the Bayh-Dole Act

The Bayh-Dole Act is considered one of the most definitive pieces of legislation in the US patent and innovation law. Its centerpiece features 1) enabled inventors of federally-funded inventions to maintain ownership of intellectual property rights for purposes of commercialization, and 2) enabled the government to grant exclusive licenses to any intellectual property it owns. As part of a balancing feature of this pro-market legislation, the Bayh-Dole Act also reserved for the federal government certain march-in rights,[69] allowing the federal government to override the intellectual property rights of the patent holder under certain circumstances, including any time it deems it "necessary to alleviate health or safety needs."[70] This enables the government to manufacture the invention itself, or direct a private sector company to do so. In return, certain types of patent holders (e.g., nonprofits or individuals) may sue the government for "reasonable and entire compensation for such use and manufacture", including the cost of litigation to collect such.[71] Past precedent indicates that reasonable royalties would include at least 10% of sales, and a compensation plan that could include the cost of development adjusted for risk and other factors.[72] The legislative intent appears to contemplate situations in which the patent-holder fails to move forward on a patent against the public's best interests.

The drawbacks from this approach are two-fold: 1) the protection is limited only to those patents in which the research and development was funded by a federal agency; and 2) this requires a proactive government that has the wherewithal not only to confront the private sector but also to undertake production and commercialization. Given how this Presidential administration has been hesitant in using its clear-cut authority under the DPA to compel the private sector into manufacturing sufficient PPE other than for a handful of necessary pieces of medical equipment, it

[68] Sean Flynn, Aidan Hollis, and Mike Palmedo, *An Economic Justification for Open Access to Essential Medicine Patents in Developing Countries,* J. OF L. MEDICINE & ETHICS (2009).
[69] 35 U.S. Code § 203(a).
[70] *Id.*
[71] 28 U.S. Code § 1498(a).
[72] Michael Liu, William Feldman, Jerry Avorn, and Aaron Kesselheim, *March-In Rights And Compulsory Licensing—Safety Nets For Access To A COVID-19 Vaccine*, Health Affairs Blog (May 6, 2020), https://www.healthaffairs.org/do/10.1377/hblog20200501.798711/full/.

is unlikely that it will use its march-in rights against private sector patent-holders to product sufficient PPE. Nor is this administration alone in its hesitance; never before in the history of the US have march-in rights been used.

2. Non-government solutions: Solutions requiring legal expertise, high costs & sufficient time

Others have pointed to potential solutions that require actions by either the patent holders, the would-be patent infringers, or both. These potential solutions do not rely on federal or state governments to compel action from private patent-holders, or confer liability protection through a statute.

a. Due diligence procedures

Some practitioners have recommended that Good Samaritan PPE producers adopt a three-part process before engaging in the potentially infringing activity. The process includes 1) obtaining an IP clearance, 2) researching the IP asserted, and 3) requiring requesting party to supply all info it possesses about relevant IP and infringement risks.[73]

b. Creative Licensing and Patent Pooling

These same practice experts have also suggested a contractual method to avoid patent infringement. For instance, they suggest that the Good Samaritan PPE producer negotiate a creative licensing arrangement with the patent-holder allowing him to produce a limited supply under defined circumstances for a minimal fee. [74] Others have suggested negotiating for a patent pooling arrangement, in which a set of patent holders issue a pooled license that results in licensing fees that become more affordable for the Good Samaritan PPE producers as an economy of scale is reached.[75]

c. Contractual Devices

Practitioners have also suggested relying on legal language in agreements and notifications. For instance, the Good Samaritan PPE producer could draft indemnification language in a supply contract when asked to produce PPE. [76] She should also insert statements making clear that no representations or warranties of intellectual property ownership is being made by reproduction of such items.[77] The Good Samaritan PPE producers could also require the requesting party to purchase insurance against IP infringement or obtain it on its own.

[73] John Cotter, Patrick McElhinny, Christopher Verdini, and Christopher Warner, *COVID-19: IP Strategies for Universities and Nonprofits During the Pandemic – Mitigating Patent Infringement Risks When Making PPE and Other Health-Related Supplies*, NAT'L L. REV (Apr 23, 2020).
[74] *As a Response to COVID-19, 3D Printing Provides Some Wins … and Some Compelling Intellectual Property Questions* (Mar 25, 2020), https://www.jdsupra.com/legalnews/as-a-response-to-covid-19-3d-printing-52289/.
[75] John Cotter, Patrick McElhinny, Christopher Verdini, and Christopher Warner, *COVID-19: IP Strategies for Universities and Nonprofits During the Pandemic – Mitigating Patent Infringement Risks When Making PPE and Other Health-Related Supplies*, Nat'l L. Rev (Apr 23, 2020).
[76] *Id.*
[77] *Id.*

All of the devices described in this section, however, require the time and expertise of a patent attorney, (and the recognition for the need for one) which the Good Samaritan PPE producers in the case study will not likely be able to afford. Even if the financial resources were present, the time needed to negotiate a sophisticated pooled patent arrangement or to undergo a due diligence process can be extremely time intensive and unrealistic in a pandemic environment.

3. Potential New, Common Law Doctrines as Relief

Given the inertia of the federal government to use its authority, and the level of legal sophistication and resources required of Good Samaritan PPE producers to adopt due diligence review or negotiated solutions, perhaps the more realistic option would be the development of protective legal doctrines.

a. Right to Repair and Produce Extended to Pandemic

The right to repair and produce enables purchasers of inventions to repair using un-patented parts, and without requiring the permission of the patent-holder. This "exhaustion doctrine", has been upheld by the US Supreme Court.[78] However, case law left open the possibility that liability might still exist in the case of patented medical devices, (e.g., ventilator parts); nor did the Court address the possibility that such parts are not available in sufficient supply during a life-threatening pandemic, or might only be available at exorbitant prices. While this may not cover the full spectrum of PPE, a revised version of this doctrine certainly could be relevant to the reproduction of ventilator parts, and other components of critical machinery.

b. March-in rights by proxy

The current conditions suggest a need for a doctrine which allows others to engage in roles traditionally filled by the government to address shortages of PPE and other critical supplies. These are issues often characterized as ones of national security and there is clear, statutory, Congressional authorization for the government, specifically, the President and federal agencies on his behalf, to act. The fact that the President and the President's administrative directors choose not to do so does not take away the identified need and the administrative authority to do so.

Where government agencies and the President fail to act or for whatever reason are unable to act in a way that sufficiently addresses these national security issues, the courts should explore the concept of march-in-rights by proxy to protect, and even incentivize, organizations and individual actors to act in a way that serves the public. These entities, whether they are nonprofit organizations, individuals, or for-profit businesses should be allowed to undertake at least some of the activities authorized by the Bayh-Dole Act as part of the march-in rights on patents that were developed with federal funding. Specifically, these actors should be authorized a blanket license to use the patent where there is a finding that the patent-holder has not exploited these rights in a manner required to secure national security. The patent-holder should be paid a reasonable amount for exploitation that includes reimbursement of research and development and possibly ten percent of any proceeds after production costs of the infringer are covered, just as they would be entitled to had the federal government been the one to execute its march-in rights. In essence, the relief given

[78] *Supra* note 46, citing Impression Products, Inc. v. Lexmark International, Inc.

to the patent-holder would mirror any relief possible under the Bayh-Dole march-in rights, and the Good Samaritan infringers would be able to act without being punished for their good deeds.

The creation of march-in rights by proxy dovetails off of the concept that third parties should be able to utilize intellectual property where there is a necessity, and where the owner has not sufficiently commercialized in order to meet an emergent public need. March-in rights by proxy would not disincentivize inventions because the patent holders would still recover a portion of fees and reimbursement for research and development if such profits are made, and this would only occur where such R&D expenses were at least partially funded by the federal government.

d. DPA by Proxy.

Should the courts adopt a doctrine of march-in rights by proxy, a gap in protection remains where the would-be infringer exploits a patent that did not in fact receive funding from a federal agency. For those instances, we propose the doctrine of DPA by Proxy. Under this theory, a third party could break the patent and compel a compulsory license under the same circumstances outlined in the DPA for the government: the would-be infringer must make a due diligent effort to contact the patent-holder except in extreme circumstances such as a pandemic; the license may only last for the duration of the emergency, the would-be infringer cannot interfere with the patent-holder's use and commercialization of the patent, and the amount licensing fee can include a percentage of profits and reimbursement of R&D costs if the would-be infringer sells for an amount in excess of production costs. The would-be infringers would be required to comply with all other relevant aspects of the DPA such as the prohibition against hoarding and gouging.[79]

Under DPA by Proxy a balance between the interests of the patent-holder and the Good Samaritan would-be infringer are met: the Good Samaritan is not penalized for acting on behalf of an immediate public interest unmet by the government or the patent-holder, and the patent-holder is compensated for her expenses if there is any money to be made.

d. Analogies from Tort and Property Law

Other solutions could be argued under tort and property law. The Good Samaritan doctrine, the doctrine of public necessity in trespass, and and landlord-tenant laws regarding rent moratoriums provide useful concepts that could be applied to infringement of both patent and copyright. These solutions are discussed more thoroughly below in the context of copyright, and much is applicable to patents as well.

B. Copyright

[79] "…to prevent hoarding, no person shall accumulate (1) in excess of the reasonable demands of business, personal, or home consumption, or (2) for the purpose of resale at prices in excess of prevailing market prices." 50 U.S.C. § 4512.

In addition to patent, the need for free use of copyrighted materials is exacerbated during the pandemic.[80] This section will consider the potential for infringement of copyrighted works by those who must adapt to functioning in a time of crisis.

Consider some of the copyrighted items pledged as free IP during COVID-19, such as manuals, blueprints, datasets, and technical drawings. For instance, an "[i]nstruction manual to construct a low cost, easy-to-use outdoor shelter for healthcare workers to conduct safer COVID-19 drive-up or walk-up testing."[81] A technical drawing for a "Safe Supply" outdoor grocery store set up by Bow Market Somerville to provide a COVID-19 friendly layout, with a suggested operational structure using pre-scheduled time slots and one-way paths, and a touchless ordering system..[82] And Microsoft has pledged a "dataset of anonymized Bing queries relating to the COVID pandemic, useful for research on the spread and containment of the pandemic, public concerns and the information being disseminated about it."[83]

Beyond the response to the pandemic itself, the free use of copyrighted materials is likewise important in an educational environment radically altered by COVID-19. Libraries have had to close, with faculty, staff, and students coming to rely on virtual materials and modes of instruction. One of us had multiple students who were displaced in the early weeks of the pandemic and who had to be sent digital copies of court texts with the physical copies now thousands of miles away. As classes have moved online, teachers tend to record them as a matter of policy, capturing copyrighted audiovisual material recordings—e.g., YouTube videos, music, photographs—along with the lectures.[84]

1. **Flexible Licenses**

Certain authors and publishers have extended permissions in the form of "flexible licenses" to utilize materials.[85] In terms of textbooks, some publishers, like Cengage and Cambridge University Press, have allowed college students free access to digital copies of textbooks. And Macmillan Children's Publishing Group and HarperCollins Children's Books, as well as author J.K. Rowling, have allowed teachers to post videos of themselves reading their books to children. While such permission is helpful in isolated instances, a clarification that emergency uses of copyrighted materials constitute fair use during a pandemic would allow responders, educators, and students confidence that they are not breaking the law in adapting to radically altered demands. Perhaps copyright's fair use doctrine could be helpful in that regard.

2. **Fair Use**

[80] *See*, e.g., Matthew Bultman, Online Teaching During Pandemic Raises Copyright Concerns, Bloomberg Law (April 3, 2020), https://news.bloomberglaw.com/ip-law/online-teaching-amid-virus-raises-copyright-questions

[81] https://opencovidpledge.org/2020/05/20/drive-up-booth-for-safer-covid-19-testing/

[82] https://opencovidpledge.org/2020/05/20/bow-market/

[83] https://opencovidpledge.org/2020/05/19/microsoft-bing/

[84] See Emily Hudson and Paul Wragg, *Proposals for Copyright Law and Education During the Covid-19 Pandemic*, unpublished manuscript available at file:///C:/Users/dmarlan/Downloads/SSRN-id3617720.pdf.

[85] Matthew Bultman, Online Teaching During Pandemic Raises Copyright Concerns, Bloomberg Law (April 3, 2020), https://news.bloomberglaw.com/ip-law/online-teaching-amid-virus-raises-copyright-questions.

The common law-derived doctrine of fair use is currently copyright's only safety valve. In 1976, it was codified in the Copyright Act. Fair use consists of four factors to consider in determining whether use of a copyrighted work is "fair" and thus not constituting copyright infringement. These factors are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. Overall, fair use is intended to serve as a flexible mechanism designed to balance the interests of copyright holders with the interests of other creators and the public.[86]

On March 13, 2020, a group of copyright specialists—college, university, and public librarians—released a public statement regarding "Fair Use & Emergency Remote Teaching & Research."[87] The Statement is "meant to provide clarity for U.S. colleges and universities about how copyright law applies to the many facets of remote teaching and research in the wake of the COVID-19 outbreak." In evaluating the fair use factors, the Statement concludes that although no fair use decisions "squarely address[] copying to help minimize a public health crisis, the other variety of public benefits cited by courts leads us to believe that this purpose would weigh extremely heavily in favor of fair use."[88]

The Statement then goes on to analyze the copying during a public health emergency under the four fair use factors. What follows is a summary of that analysis interspersed with our own thoughts on how fair use might apply.

Under the first factor—"the purpose and character of the use"—courts tend to "favor uses where the purpose is to benefit the public, even when that benefit is not 'direct or tangible.'" This factor, considered "the heart of the fair use inquiry," tends to consider whether the use is "transformative in nature." Here, while the copyrighted works themselves may be substantially the same as the original version, the circumstance itself—a once in a century pandemic—can be found to be highly transformative.

As to the second factor—"the nature of the copyrighted work"—it is rarely considered in a fair use analysis.[89] However, in certain cases, works that provide a "substantial public benefit" lean toward a holding of fair use.[90] This would certainly seem applicable to works used in adapting during times of crisis.

[86] https://www.slj.com/?detailStory=librarians-address-copyright-concerns-argue-fair-use-applies-amid-academic-closures-coronavirus-covid19

[87] Public Statement of Library Copyright Panelists: Fair Use & Remote Teaching & Research (March 13, 2020), available at https://docs.google.com/document/d/10baTITJbFRh7D6dHVVvfgiGP2zqaMvm0EHHZYf2cBRk/mobilebasic#ftnt6 (citing Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015); Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968); Online Policy Grp. V. Diebold, Inc., 337 F. Supp. 2d 1195 (N.D. Cal. 2004).

[88] *Id.*

[89] Public Statement *supra* note 87.

[90] *See*, e.g., A.V. ex rel. Vanderhye v. iParadigms (holding that a digital antiplagiarism service "provide[d] a substantial public benefit.

The third factor—"the amount and substantiality of the work"—encourages reasonableness. "A use can be fair," according to the Statement, "as long as it reproduces what is reasonable to serve the purpose." Copying the entirety of a work, or at least a substantial portion of it, in the educational context during COVID-19 appears to be reasonableness given the circumstances, in many cases.[91]

The fourth and final factor is "the effect of the use upon the potential market for the copyright work." It "requires a balancing of the benefit the public will derive if the use is permitted" as compared to "the personal gain the copyright owner will receive if the use is denied." According to the Statement:

> While in normal circumstances there may be licensing markets for some items, the spontaneity of a move to remote teaching under emergency circumstances reduces the importance of this factor. Checking for and relying on licensed alternatives bolsters the case for fair use under the fourth factor, but lack of time to check for licenses should not be a barrier to meeting the needs of our communities.[92]

The problem with fair use, though, is that, as Michael Carroll notes, its "context sensitivity renders it of little value to those who require reasonable ex ante certainty about the legal value of a proposed use."[93] We do not know if something, in other words, is a fair use prior to a legal determination, which only occurs once a legal proceeding is well under way. A law that declares emergency use of copyright materials in the context of a pandemic, analogous to the common law doctrines discussed in the next Part, would therefore be preferable to relying on individual fair use determinations in preventing the chilling of productive uses of copyrighted as well as patented materials. Thus, solutions beyond fair use appear to be warranted.

3. Common Law Analogies for Proposed Legislation Permitting Emergency Uses of Copyrights

This subpart analogizes to the common law in proposing a statutory emergency exemption to certain intellectual property liabilities in the face of the Covid-19 pandemic. In doing so, it looks to (1) Good Samaritan laws, (2) the public necessity defense to trespass, and (3) landlord-tenant law, in the context of eviction moratoriums during COVID-19. In each of these cases, emergencies provide defenses to violations of tort or property rights. In the case of IP's statutory regimes, though, no exemptions to infringement, either for patent and copyright, exist for crises despite incredible need.

[91] *See*, e.g., Authors Guild v. Google Inc., 770 F. Supp. 2d 666 (2d Cir. 2015) ('unchanged copying has repeatedly been found justified as fair use when the copying was reasonably appropriate to achieve the copier's transformative purpose and was done in such a manner that it did not offer a competing substitute for the original); Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).
[92] Public Statement of Library Copyright Panelists: Fair Use & Remote Teaching & Research (March 13, 2020), available at https://docs.google.com/document/d/10baTITJbFRh7D6dHVVvfgiGP2zqaMvm0EHHZYf2cBRk/mobilebasic#ftnt6
[93] Michael W. Carroll, *Fixing Fair Use*, 85 N. CAR. L. REV. 1087 (2007).

The constitutional purpose of intellectual property—at least as to patent and copyright—is "to promote the Progress of Science and the useful Arts." Guiding the Constitution's Intellectual Property clause is the longstanding premise that economic incentives are needed to encourage inventors and creators.[94] This proposal does not appeal to a moral claim, which is long out of favor in the utilitarian world of intellectual property. Instead, each of the following analogies is intended to show that during times of crisis, IP's *individual* economic incentives must sometimes yield to incentivize *collective* public interests. To the extent that IP can be likened to tangible property, these common law doctrines can be used as guidance in fashioning an emergency declaration regarding intellectual property liability in the wake of COVID-19.

a. Good Samaritan Laws

Good Samaritan laws—those protecting anyone who renders aid in an emergency to one who is sick or injured—provide the first area of analogy. Good Samaritan doctrines in the U.S. have long provided a defense against tort claims (most often negligence) arising from attempted rescue. Though originally derived from the common law, Good Samaritan laws have, since 1959, been codified in statute in all 50 states. Its elements generally include some minor variation of: (1) the care was performed as a result of an emergency; (2) the initial emergency was not caused by the volunteer; and (3) the emergency care was not given by the volunteer in a grossly negligent or reckless manner. For example, Massachusetts' Good Samaritan Law reads:

> Any person, whose usual and regular duties do not include the provision of emergency medical care, and who, in good faith, attempts to render emergency care including, but not limited to, cardiopulmonary resuscitation or defibrillation, and does so without compensation, shall not be liable for acts or omissions, other than gross negligence or willful or wanton misconduct, resulting from the attempt to render such emergency care.[95]

Some statutes go further in mandating a duty to rescue, to the extent that a bystander witnesses an emergency, he or she must, in these states, such as Rhode Island, assist those who are suffering, thus requiring assistance to be rendered during a true medical emergency. In April of 2020, the Wisconsin state government implemented rules providing immunity from civil liabilities resulting from injuries related to the manufacture and distribution of "emergency medical equipment" for " disease associated with the public health emergency related to the novel coronavirus pandemic." The immunity is limited to "Good Samaritan" suppliers where the items are either donated, or sold "at a price not to exceed the cost of production."[96]

[94] Cf. Eric E. Johnson, *Intellecutal Property and t*e Incentives Fallacy, 39 Fl. State L. Rev 623 (criticizing the incentives justification given that social science finds that "innovative and creative activity will thrive without artificial support."); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. (2008) ("Copyright's principal justification has for long been the theory of creator incentives . . . Yet current copyright doctrine does surprisingly little to give effect to this theory.").
[95] MGL Chapter 258C, Section 13.
[96] Paul J. Covaleski and Josh Johanningmeier, *Wisconsin COVID-19 Law Includes Limited Civil Liability Immunities for Suppliers of Essential Equipment and Medical Professionals*, NAT'L L. REV (Apr 15, 2020).

The purpose of a Good Samaritan law, as a matter of public policy, is to encourage emergency assistance by removing the threat of liability for damage done by the assistance.[97] It is meant to protect those that do not usually administer assistance—i.e., non-experts—in the event they encounter an individual who needs help. In other words, if people stopped to think about whether they will face liability prior to offering potentially life-saving assistance, valuable time would be lost. Thus, "we are improved as a society if the potential rescuers (i.e., the good Samaritans) are solely concerned about helping a person in need as opposed to worrying about the possible liability associated with assisting their fellow man or woman." While the premise underlying Good Samaritan laws traces its origin to a New Testament parable, the justification for such laws is now framed as a utilitarian rather than a deontological one.

b. Public Necessity

In tort law, the common law doctrine of necessity is an affirmative defense that can be used against charges of trespass to real or personal property—an intentional tort—in cases where a defendant interferes with a plaintiff's property out of need. Trespass is an infringement on a property owner's legal right to enjoy the benefits of ownership, in which a civil action can be brought. The law draws a distinction between private necessity—where the trespass is necessary to protect harm to oneself or others—and public necessity—an emergency situation to protect the greater community or society as a whole from a greater harm that would have occurred had the defendant not committed trespass. While private necessity provides only a partial defense to trespass, public necessity serves as an absolute defense where a defendant is not liable for any damages caused by trespass.

The action of public necessity consists in appropriating or destroying another's property so as to avert a public calamity.[98] According to the Restatement Second of Torts: "One is privileged to enter land in the possession of another if it is, or if the actor reasonably believes it to be, necessary for the purpose of averting an imminent public disaster."[99] The classic case involves destroying property to prevent the spread of disease or fire or other calamity and thus injury to the public.[100] The elements of necessity are the following: (1) a reasonable belief that one's actions were necessary to prevent imminent harm; (2) there was no practical alternative available for avoiding the harm; (3) the actor did not cause the threat of harm in the first place; and (4) the damage caused was less than the harm that would have occurred otherwise. The principle underlying public necessity is that the

[97] Brian West; Matthew Varacallo, Good Samaritan Laws, unpublished manuscript available at https://www.ncbi.nlm.nih.gov/books/NBK542176/ (also noting that "the premise underlying the good Samaritan law traces its origin to the ancient biblical definition of a good Samaritan as an individual who intervenes to assist another individual without prior notion or responsibility or Samaritan *promise of compensation."); Eric A. Brandt, Good Laws – The Legal Placebo: A Current Analysis*, 17 AKRON LAW REVIEW (1984) (noting the biblical origin).

[98] Perhaps the landmark case of public necessity is Surocco v. Geary, 3 Cal. 69 (Cal. 1853) (mayor of San Francisco ordered fire department to destroy plaintiff's house to contain wildfires; defense successful because potential damage to the city would have been substantially more severe without the order to demolish the plaintiff's home.).

[99] Restatement (Second) of Torts § 196 (1965).

[100] The paradigmatic cases of private necessity include Vincent v. Lake Erie Transportation Co., 124 N.W. 221 (Minn. 1910) (destruction of wharf to save life) and Ploof v. Putnam, 71 A. 188 (Vt. 1908) (destruction of dock to save life)

law regards the welfare of the public as superior to individual interests. Thus individual interests must yield to collective ones when there is a conflict between the two.[101]

According to renowned criminal law scholar Glanville Williams, "Some acts that would otherwise be wrong are rendered rightful by a good purpose, or by the necessity of choosing the lesser of two evils."[102] Like the Good Samaritan doctrine, public necessity can be seen as a utilitarian calculation consistent with modern IP theory, not a moral principle. That is, courts grant necessity privileges when the risk of harm to an individual (in the case of private necessity) or the public (in the case of public necessity) is greater than the harm to property. In situations "where there is an unhappy choice between the destruction of one life and the destruction of many, utilitarian philosophy would certainly justify the actor in preferring the lesser evil."[103] Indeed, necessity "represents a concession to human weakness in cases of extreme pressure, where the accused breaks the law rather than submitting to the probability of greater harm if he does not break the law." In this way, public necessity is consistent with the economic and utilitarian calculus underlying modern patent and copyright law.[104]

In a pandemic area, we may need to appropriate the intellectual property of others to save lives. To the extent we consider intellectual property the functional equivalent of real or personal property, trespassing on a patent or copyright would be excused and no damages should be awarded if the reason was COVID-19 related. This is because when a private actor invokes publicity necessity, they have a complete privilege and does not have to pay compensation to the property owner.[105]

3. **Emergency Bans on Evictions during Covid-19**

In the real property context, many states, counties, and municipalities across the country are taking disparate steps to minimize the impact of COVID-19 on tenants by putting moratoriums on evictions, prohibiting late rent fees, and putting holds on the shut off of utilities due to nonpayment.[106] Landlords are ordinarily allowed to evict tenants under circumstances where rent is past due, assuming certain conditions are met—but not so during COVID. Under the CARES Act, renters living in properties with government-backed mortgages were being protected from eviction, at least temporarily. Freddie and Fannie Mae have so far prohibited landlords of single family properties with Freddie and Fannie Mae backed mortgages from evicting tenants.

Under our analysis, copyright and patent can be thought of as property, and IP owners can be considered landlords. As Brian L. Frye writes in his Jurist essay *OK, Landlord: Copyright Profits Are Just Rent*, to the extent that copyright owners argue that copyright is a property right, which should

[101] John Alan Cohan, *Private and Publicity Necessity and the Violation of Property Rights*, 83 N. DAKOTA L. REV. 651, 653 (2007) (citing City of Durham v. Eno Cotton Mills, 54 S.E. 453, 464 (1906)).
[102] Glanville Williams, The Sanctity of Life and the Criminal Law 198 (Alfred. A Knopf. Inc. 1957).
[103] Id. at 200.
[104] But see George C. Christie, T*he Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L. J. 975 (1999).
[105] RESTATEMENT (SECOND) OF TORTS § 196 cmt. a (AM. LAW. INST. 1965)
[106] https://www.nolo.com/legal-encyclopedia/emergency-bans-on-evictions-and-other-tenant-protections-related-to-coronavirus.html

receive the same rights as other property, then they are like landlords.[107] After all, copyright violations can result in misdemeanors and felonies and fines of hundreds of thousands of dollars.[108]

> Copyright owners want to own the property metaphor? Then, let 'em own it. If copyright is property, then they are landlords and copyright profits are rent. Just like landlords, copyright owners simply make a capital investment in creating or acquiring a property, then sit back and wait for the profits to roll in.
>
> Of course, copyright owners and their proxies object that my analogy is unfair. They're right, it's unfair. To landlords.[109]

Under this analogy, where copyright is a form of rent-seeking, what we need is a moratorium on copyright and patent damages just like there has been a moratorium on rents.

IV. CONCLUSION

This Article has highlighted the need for emergency relief from intellectual property liability—or the threat of liability—during the COVID-19 pandemic. In the context of patent and copyright, we have discussed the potential for liability, focusing especially on the PPE crisis. We then discussed potential solutions including march-in rights, compulsory licensing, and free IP pledges. Ultimately, an emergency declaration along the lines of a Good Samaritan Law would provide a comprehensive solution so that collective efforts aimed at combating the pandemic are appropriated balanced with patent and copyright's individual economic incentives model during this time of crisis.

[107] Brian L. Frye, *OK, Landlord: Copyright Profits Are Just Rent, JURIST* – Academic Commentary, April 8, 2020, https://www.jurist.org/commentary/2020/04/brian-frye-copyright-profits/
[108] Lanier Saperstein, *Copyrights, Criminal Sanctions and Economic Rents: Applying the Rent Seeking Model to the Criminal Law Formulation Process*, 87 J. CRIM. L. & CRIMINOLOGY 1470 (1996-1997).
[109] *Supra* note 117.