1-29-2024

Copyright and COVID

Sean Flynn

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INTRODUCTION

During the COVID-19 pandemic it became widely recognized that speedier access to patent rights should be enabled to speed global scale-up of vaccine production.[1] This understanding was expressed in a proposal by India and South Africa that the World Trade Organization suspend multilateral intellectual property rules on COVID vaccines, treatment and containment.[2] The original waiver proposal proposed a suspension of WTO rules on *all* forms of intellectual property needed for a broad range of COVID-19 response measures, including "vaccination," "treatment," and "containment."[3] The final "TRIPS Waiver," however, was ultimately limited to a minor provision of TRIPS permitting greater use of compulsory licenses on patents for vaccine production.[4] Other intellectual property issues, such as the many copyright

[1] *See*, *e.g.*, Dr. Tedros Adhanom Ghebreyesus, *Waive Covid vaccine patents to put world on war footing*, World Health Organization (Mar. 7, 2021), https://www.who.int/news-room/commentaries/detail/waive-covid-vaccine-patents-to-put-world-on-war-footing; Stephen Buranyi, *The world is desperate for more Covid vaccines – patents shouldn't get in the way*, The Guardian (Apr. 24, 2021), https://www.theguardian.com/commentisfree/2021/apr/24/covid-vaccines-patents-pharmaceutical-companies-secrecy.

[2] Council for Trade-Related Aspects of Intellectual Property Rights, *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19*, WTO Doc. IP/C/W/669/Rev.1 (May 25, 2021), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669R1.pdf&Open=True [hereinafter "Revised TRIPS Waiver Proposal"].

[3] Council for Trade-Related Aspects of Intellectual Property Rights, *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19,* WTO Doc. IP/C/W/669 (Oct. 2, 2020) https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True.

[4] For a comparison chart of TRIPS Waiver drafts, *see* Lokesh Vyas, *Trips Waiver and Its (Jabby) Journey: Side By Side Comparison Of The (Waiver?) Drafts From 2020 – 2022* InfoJustice (Jul. 12, 2022) https://infojustice.org/archives/44799.

barriers to responding to COVID, were left unaddressed in the waiver and also largely unexamined in the academic literature.[5]

This chapter analyzes, in the first part, the myriad and important ways that access to copyrighted works was essential for COVID-19-related research, manufacture and repair of medical devices and equipment, manufacture of mRNA vaccines, and for promoting the social distancing in education and other spheres required to contain outbreaks. The second part describes how international copyright law permits exceptions to copyright that could serve the demands of pandemic responses, but notes that few countries had such exceptions at the time. One response, discussed in the third part, is to authorize administrative action to authorize emergency uses of works modeled on Article 17 of the Berne Convention or on the several domestic laws that contain such provisions. These models may be useful to international and domestic policy makers seeking to prepare our laws for the next pandemic.

1. USES OF COPYRIGHTED WORKS TO RESPOND TO COVID

Although the focus of intellectual property barriers to pandemic responses during COVID was on the need for access to patent rights, patents were not the only intellectual property barrier to pandemic responses. This part explains ways that access to copyrighted materials was needed to enable access to vaccines, medicines and devices and to promote social distancing through online education and research.

1.1 Research

One of the great successes of the global response to the COVID-19 pandemic was the speed with which effective vaccines were developed. Part of the reason such speed was possible is that computational research methods were available in some countries to radically shorten literature reviews and other steps of the research process.[6] But, as described in part 2 below, computational research

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[5] For a useful exception, *see* Doris Estelle Long, *The Overlooked Role of Copyright in Securing Vaccine Distribution Equity*, TradeRX Report (Sept. 6, 2021), https://www.traderxreport.com/covid-19/the-overlooked-role-of-copyright-in-securing-vaccine-distribution-equity/.

[6] Will Knight, *Researchers Will Deploy AI to Better Understand Coronavirus*, Wired, (Mar. 17, 2020, 08:00 AM), https://www.wired.com/story/researchers-deploy-ai-better-understand-coronavirus/; Carrie Arnold, *How Computational Immunology Changed the Face of COVID-19 Vaccine Development*, Nature: Nature Medicine (Jul. 15, 2020), https://www.nature.com/articles/d41591-020-00027-9; Emily Waltz,

methods are not used to the same extent in every country, in part because the reproductions of whole works required are not clearly lawful everywhere.[7]

1.2 Vaccines and Treatment

Patents are not the only intellectual property barrier to the production of vaccines and treatments. To create mRNA vaccines, for example, it is essential to access computational algorithms (which may be subject to copyright) for key steps in the process.[8] Even if a competing vaccine or treatment is lawfully produced, companies sometimes use copyrights on product labels to halt or delay competition.[9] Copyright is also frequently used to block repair of medical devices, including ventilators, through restrictions on access to copyrighted software or repair manuals.[10]

1.3 Containment through Social Distancing

To promote social distancing during COVID-19, essential public institutions – including schools, universities, libraries, archives, and museums – closed their

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What AI Can – and Can't – Do in the Race for a Coronavirus Vaccine, IEEE: IEEE Spectrum (Sep. 29, 2020).

[7] *See* C. Handke et al., *Is Europe Falling Behind in Data Mining? Copyright's Impact on Data Mining in Academic Research*, *in* New Avenues for Electronic Publishing in the Age of Infinite Collections and Citizen Science: Scale, Openness and Trust: proceedings of the 19th International Conference on Electronic Publishing 120 (B. Schmidt & M. Dobreva eds., 2015).

[8] Rishav Ray & Priyanka Pandey, *Surveying computational algorithms for identification of miRNA–mRNA regulatory modules*, 60 The Nucleus 165 (2017).

[9] *See* Zvi S. Rosen, *Product Labels and the Origins of Copyright Examination*, (Mostly) IP History (May 23, 2017) http://www.zvirosen.com/2017/05/23/product-labels-and-the-origins-of-copyright-examination/ (describing the U.S. history of manufactures attempting to use copyright claims to gain marketing exclusivity); WHO/WIPO/WTO, *Promoting Access to Medical Technologies and Innovation: Intersections between public health, intellectual property and trade*, 87 (2nd ed. 2020) (explaining that "courts have sometimes found that generic pharmaceutical producers cannot reproduce for their own products direct copies of the original expressions contained in package inserts of the first producer").

[10] Leah Chan Grinvald & Ofer Tur-Sinai, *Intellectual Property Law and the Right to Repair*, 88 Fordham L. Rev. 63, 104 (2019); Jason Koebler, *Hospitals Need to Repair Ventilators. Manufacturers Are Making That Impossible*, VICE: Motherboard (Mar. 18, 2020, 11:15 PM), https://www.vice.com/en/article/wxekgx/hospitals-need-to-repair-ventilators-manufacturers-are-making-that-impossible; Kat Walsh, *Medical Device Repair Again Threatened with Copyright Claims*, Electronic Frontier Foundation (June 11, 2020), https://www.eff.org/deeplinks/2020/06/medical-device-repair-again-threatened-copyright-claims.

physical facilities. UNESCO, for example, reported that COVID-19 "created the largest disruption of education systems in history," "affecting nearly 1.6 billion learners in more than 190 countries," "94 per cent of the world's student population," and "up to 99 per cent" of students in low- and lower–middle-income countries.[11] These closures meant that many uses of materials for learning and research needed to be moved online, for which some rights holders demanded additional licenses.[12]

2. STATUTORY COPYRIGHT EXCEPTIONS

As shown above, it was crucial during COVID for copyright exceptions to be sufficiently open and flexible to permit new kinds of uses of works that are rarely envisioned by copyright law. This part briefly describes the ample flexibility in international copyright law to adopt more open exceptions that could serve many of the needs for uses of copyrighted materials during the COVID pandemic. But most laws do not take advantage of this flexibility. The third part discusses models for authorizing administrative exceptions.

2.1 Flexibility for Statutory Exceptions in International Copyright Law

The international copyright framework dating from the 1967 revision of the Berne Convention and extending through the 1996 WIPO Internet Treaties provides for fairly specific exclusive rights while leaving exceptions largely to the discretion of each member state. This is in contrast to the World Trade Organization's agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) provisions on patents, for example, which includes a highly specific provision on compulsory licensing, including in an "emergency" or

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[11] U.N., *Policy Brief: Education during COVID-19 and beyond*, 2 (Aug. 2020). *See also 1.3 Billion Learners are Still Affected by School or University Closures, as Educational Institutions Start Reopening Around the World, Says UNESCO,* UNESCO (Apr. 29, 2020), https:// en .unesco .org/ news/ 13 -billion -learners -are -still -affected -school-university-closures-educational-institutions, *COVID-19 Impact on Education*, UNESCO (last visited Oct. 06, 2021) https://en.unesco.org/covid19/educationresponse (global monitoring of school closures caused by COVID-19).

[12] For example, Access Copyright, a reproduction rights collective in Canada, published an article warning organizations: "your co-workers are probably sharing content without permission from the copyright owners," threatening "legal action for copyright infringement" without an extended license form the organization including online uses. *Working from home and copyright,* Access Copyright, https://www.accesscopyright .ca/businesses/working-from-home-and-copyright/ (last visited Jan. 15, 2021).

situation of "extreme urgency."[13] There is no comparable mention of emergency authorizations to use copyrighted works.

The original Berne Convention of 1886 had one specific provision for exceptions – protecting "the liberty of extracting portions from literary or artistic works for use in publications destined for educational or scientific purposes, or for chrestomathies."[14] The 1967 revision of the Berne Convention added a right of reproduction in Article 9(1). This broad right was paired with a general exception that could be used for any purpose:

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Article 9(2) permits exceptions for any work, by any user, for any purpose subject to its "3-step" proportionality analysis. Although sometimes described chiefly as a restraint on countries' freedom to adopt exceptions, the three-step test permits general exceptions and "can serve as a source of inspiration for national law makers seeking to institute flexible exceptions and limitations at the domestic level."[15] Exceptions to the reproduction right are highly relevant to many of the uses described above, including the uses of works in research, vaccine production, and accessing software and manuals for repairing devices which all require technical reproduction of copyrighted works that need not be seen as conflicting with normal uses and markets for copyrighted works.

The 1996 WIPO Copyright Treaty (WCT) was the first to require copyright laws to protect an exclusive right of "communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them." This right is highly relevant to many of the uses of works described above needed to

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[13] World Trade Organization, Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 31 Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) (hereinafter *TRIPS*).

[14] Berne Convention for the Protection of Literary and Artistic Works, art. 8, Sep. 9, 1886, S. Treaty Doc. No. 99-27 (1986). The limited nature of the exception – permitting uses only in certain "publications" – was due to the limited nature of the treaty itself, which did not include a reproduction right.

[15] Christophe Geiger et al., *The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, 29(3) American Uni. Int'L. L. Rev. 581 (2014).

promote social distancing and accessing works online. Like Berne Article 9(2), Article 10(1) of the WCT provides a general exception authority:

> Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

An agreed statement makes clear that Contracting Parties may "carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention."[16]

The combination of Articles 9(2) of the Berne Convention and 10(1) of the WCT make clear that countries may authorize both the reproduction and communication of works for important public interests, as long as the use does not threaten the "normal exploitation" and "legitimate interests" of rights holders. Meeting the requirements of the three-step test may involve tailoring authorized uses to specific needs and sometimes may require compensation. But certainly the general nature of the exceptions is sufficiently flexible to permit many of the uses needed during COVID-19.

2.2 Lack of Needed Exceptions in Comparative Copyright

Despite the openness of international copyright treaties on limitations and exceptions, most countries, especially in developing countries, lack statutory exceptions for the kinds of uses needed in a pandemic, as described above. Only a few countries have fully open general exceptions like the U.S. fair use exception, which turns on the nature of the use (i.e., whether it is "fair") rather than the category of the purpose for which it is used. Countries with specific exceptions for uses such as research and education, which almost every law provides, may also be formulated in a more open manner (i.e., applying to all works, users, and uses) that can allow adaptation to specific circumstances. Unfortunately, most exceptions around the world were not sufficiently open to cater to pandemic needs.

One of the areas where more open exceptions are needed is for research purposes. As noted above, text and data mining research requires reproductions and other uses of whole works to enable computers to help us "read" literature and speed observations in medical research. Nearly every country has an

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[16] The WIPO Copyright Treaty, Dec. 20, 1996, art. 10, TRT/WCT/00.

exception at least for limited copies made in the course of research.[17] But only a few countries have specific copyright exceptions for "computational" or "information" analysis, or "text and data mining," or otherwise provide research exceptions that are sufficiently open to accommodate these purposes.[18] Most countries restrict research uses to "private" or "personal" uses, only cover reproduction and not communication of research materials, or limit the kinds of works that can be used (often excluding software and databases). Such restrictions may effectively limit their application to many of the needed uses to help respond to a pandemic discussed above.

The other classes of uses needed during COVID-19 meet a similar fate in many countries. Very few countries have exceptions that apply specifically to uses required for regulatory reasons, such as for labels required on medicines. While most countries have educational exceptions and exceptions for uses by libraries and other cultural heritage institutions, it is common for such uses to be limited to use in a physical facility.

Of course, one response to the limitations on statutory copyright exceptions is to change legislation to take advantage of the flexibility in international copyright law by providing for more openness in their framing. But passing copyright amendments in the midst of a pandemic may not be the surest and most efficient way to meet an urgent challenge. One available alternative is to provide for a mechanism for administrative action to address specific and urgent problems.

3. ADMINISTRATIVE EMERGENCY USE EXCEPTIONS

Emergencies present time-sensitive needs that may need to be addressed more quickly than the legislative process may allow. In the context of the limited nature of statutory exceptions in many countries discussed in the second part, this part surveys potential models for internationally and domestically authorizing administrative permission to use of copyrighted works.

3.1 Article 17 of the Berne Convention

Possibility of Control of Circulation, Presentation and Exhibition of Works

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[17] Paul Goldstein & Bernt Hugenholtz, International Copyright: Principles, Law, and Practice (4th ed. 2019) (finding that most copyright laws contain an exception for private reproductions for a research purpose).

[18] *See* Sean Fiil-Flynn et al., *Legal reform to enhance global text and data mining research*, 378 Science, 951 (2022).

> The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right.

The general limitations and exceptions provisions of the Berne Convention and WCT, as described above, provide that it may be "a matter for legislation" to provide exceptions to copyright. In the area of patent law, the World Trade Organization's agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) provides for the use of administrative authority to respond to emergencies (and other purposes) through case-by-case compulsory licenses.[19] Copyright treaties lack a similar provision.

One possible model for international law to authorize administrative action to permit uses of works can be found in Article 17 of the Berne Convention. Article 17's terms authorize governments "to permit" uses of copyrighted works by "regulation" if "the competent authority may find it necessary." Although the plain terms would appear to permit emergency declarations permitting circulation of works for any reason considered "necessary," the dominant interpretation of the article is that it is restricted to government action relating to censorship decisions. Thus, for example, Von Lewinski posits:

> The governmental right to permit, to control, or to prohibit certain acts *reflects the ordinary activity of censorship authorities*, which is to decide whether the relevant public order reasons require the prohibition or other control of the work's circulation.[20]

The narrow interpretation of Article 17 as applying only to censorship decisions was contested in the 1967 revision of the Berne Convention.[21] In that

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[19] *See* TRIPS *supra* note 14, art. 31(b) (authorizing compulsory licenses without negotiation with the right holder in cases of emergency or extreme urgency).

[20] Silke Von Lewinski, International Copyright Law and Policy 171 (2008) (emphasis added). *See also* Paul Goldstein & Bern Hugenholtz, International Copyright: Principles, Law, and Practice 37 (4th ed. 2019) (positing that "[t]he words 'to permit' give rise to two differing interpretations" and reading Article 17 as a whole to apply only within the confines of censorship decisions); Paul Goldstein & Bern Hugenholtz, International Copyright: Principles, Law, and Practice 37 (4th ed., 2019) ("it seems clear that Article 17 does not constitute authority for the governmental imposition of compulsory licenses").

[21] On the relevance of using preparatory work as a "supplementary means" to interpret a treaty *see* United Nations Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, I-18232, 1155 UNTS 331 VCLT (positing that such work can confirm an interpretation supported by the text and context of the provision).

year, the United Kingdom, supported by Australia, proposed to eliminate the words "to permit" from the text. The Report notes:

> Mr. WALLACE (United Kingdom) said that Article 17 had doubtless been originally drafted with the questions of censorship and the control of obscenity in mind; but the words 'to permit' did suggest that States had an inherent power to override the author's rights, despite the provision for such rights under certain articles of the Convention. Therefore, as proposed in document S/171, his Delegation considered that those words should be deleted; he believed that would be in line with the Main Committee's general feeling.[22]

Other delegates, with that of South Africa being particularly vocal, opposed the UK amendment. South Africa argued that deletion of the words "to permit" "would curtail the sovereign right of governments to legislate when the interests of the people demanded it, in its own territory. … He could not, therefore, support any substantive change in an article that had served the Convention well for 81 years."[23] The UK and Australia responded to concerns by proposing "the insertion of a new paragraph leaving countries free to enact such legislation as is necessary 'to prevent or deal with any abuse, by persons or organizations exercising one or more of the rights in a substantial number of different copyright works, of the monopoly position they enjoy.'"[24] South Africa continued to oppose the UK proposal, in part because the notion of "abuse" may be too narrow and should, in South Africa's opinion, be replaced by the concept of "public policy."[25]

Ultimately, the 1967 conference did not revise Article 17. The dispute suggested that at least some countries interpreted Article 17 as conveying general compulsory licensing authority to serve public interests. The final report of the committee noted the broader interpretation of some members, but concluded that a narrow definition of the scope of the provision was required:

> The overwhelming majority of the Committee, however, interpreted Article 17 in another sense, even in its present form including the words 'to permit. This Article referred mainly to censorship: the censor had the power to control a work which it was intended to make available to the public with the consent of the author and,

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[22] 2 WIPO, Records of the Intellectual Property Conference of Stockholm 1967, 1147 (1971).

[23] *Id* at 938 ¶ 1881 (Mr KRUGER (South Africa) ("He could not, therefore, support any substantive change in an article that had served the Convention well for 81 years.").

[24] *Id* at 1174 (Report on the Work of Main Committee I (Substantive Provisions of the Berne Convention: Articles 1 to 20), Svante Bergström (Rapporteur).

[25] *Id*. at 938 ¶ 1881 (endorsing broader protection for government uses for "public policy").

> on the basis of that control, either to 'permit' or to 'prohibit' dissemination of the work.[26]

The Report also noted the more general point that questions of public policy would always be a matter of domestic regulation, but did not locate that authority within Article 17:

> The Committee accepted, without opposition, the proposal of its Chairman that mention should be made in this Report of the fact that questions of public policy should always be a matter for domestic legislation and that the countries of the Union would therefore be able to take all necessary measures to restrict possible abuse of monopolies. Whereupon, the proposals of Australia and the United Kingdom relating to abuse of monopoly were withdrawn.[27]

At bottom, Article 17 provides a possible model for international authorization of compulsory licenses or other administrative action to permit uses of copyrighted works in an emergency. It appears possible to interpret the article as providing that authority on its plain terms, supported by the views of some delegations in the preparatory work of the treaty. But the dominant view is that Article 17 is not a general compulsory licensing provision, even for emergency uses. As discussed above, the more general authorizations in Berne Article 9(2) and WCT Article 10(1) provide ample flexibility to adopt emergency use provisions. Several domestic copyright laws provide examples that could be used as models.

3.2 Administrative Exceptions in Comparative Copyright

A number of domestic laws provide authority for administrative agencies to compulsory-license or otherwise authorize uses of copyrighted works in cases of emergency or necessity or other compelling public interest. There is no record of such provisions being used to respond to the COVID pandemic, which shows that merely having such provisions on the books is not a panacea. But they nonetheless provide possible models to consider for international and domestic efforts to prepare for the next pandemic.

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[26] *Id*. at 1174 ¶ *262*.

[27] *Id at* 1174 ¶ 263 ("The Committee accepted, without opposition, the proposal of its Chairman that mention should be made in this Report of the fact that questions of public policy should always be a matter for domestic legislation and that the countries of the Union would therefore be able to take all necessary measures to restrict possible abuse of monopolies. Whereupon, the proposals of Australia and the United Kingdom relating to abuse of monopoly were withdrawn.").

The copyright law of the Dominican Republic provides an example of a compulsory license that uses terms very similar to those contained in Berne Article 17. The law states:

> The State may order the use, *for reasons of public necessity*, of the economic rights in a work that is considered to be of high cultural, scientific or educational value for the country, or of social or public interest, subject to payment of fair compensation to the holder of said rights.[28]

Mexico's law contains a similar compulsory license for "[t]he publication or translation of literary or artistic works necessary for the advancement of national science, culture and education." The provision declares that such use "is considered of public utility," thus linking their dissemination to important public interests. It then provides for the possibility of compulsory-licensing such content if it cannot be reasonably accessed:

> When it is not possible to obtain the consent of the owner of the corresponding economic rights, and through the payment of compensatory remuneration, the Federal Executive, through the Ministry of Culture, ex officio or at the request of a party, may authorize the mentioned publication or translation. The foregoing shall be without prejudice to the international treaties on copyright and related rights signed and approved by Mexico.[29]

The inclusion of the declaration that such compulsory licenses shall be "without prejudice to the international treaties on copyright" provides some evidence that the provision was being drafted with an attempt to comply with international copyright treaties.

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[28] Law No. 65-00 on Aug. 21, 2000, art. 48 [Copyright Act] (Dom. Rep.) ("Prior to the expiry of the term of protection of a work, the State may order the use, for reasons of public necessity, of the economic rights in a work that is considered to be of high cultural, scientific or educational value for the country, or of social or public interest, subject to payment of fair compensation to the holder of said rights.").

[29] Ley Federal del Derecho de Autor, publicada en el Diario Oficial de la Federación el 24 de diciembre de 1996, art. 147 [Copyright law] (Mex.) ("The publication or translation of literary or artistic works necessary for the advancement of national science, culture and education is considered of public utility. When it is not possible to obtain the consent of the owner of the corresponding economic rights, and through the payment of compensatory remuneration, the Federal Executive, through the Ministry of Culture, ex officio or at the request of a party, may authorize the mentioned publication or translation. The foregoing shall be without prejudice to the international treaties on copyright and related rights signed and approved by Mexico.").

Cuba's law authorizes compulsory licenses for "social interest," including where access to work is "necessary for the development of science, technology, education or professional improvement":

> For reasons of social interest, the competent authority may grant a license to reproduce and publish in printed or other analogous work published in the same way, or to translate and edit it, or to broadcast it on radio, television or other sound or visual media, in its original language or in translation, or to reproduce in audiovisual form any fixation of the same nature, without the authorization and remuneration provided in subsections c), ch) and d) of Article 4 of this Law, and provided that the following conditions are met:
> a) that the work is necessary for the development of science, technology, education or professional improvement;
> b) that its distribution or dissemination is free of charge or, in the case of sale of printed materials, it is carried out non-profit;
> c) that its distribution or diffusion takes place exclusively in the territory of the Cuban State.[30]

Other laws provide for compulsory licenses or other administrative authorizations for specific purposes considered necessary to promote important public interests. For example, the copyright law of Indonesia provides for compulsory licenses "to carry out translation and/or Reproduction of scientific and literary Works which are granted under the decision of the Minister upon request for the purposes of education and/or science as well as research and development activities."[31]

The law of Vietnam is similar in authorizing government action to permit uses for specific critical activities, providing:

> In the circumstances where the achievement of defense, security, people's life-related objectives and other interests of the State and society specified in this Law should be guaranteed, the State may prohibit or restrict the exercise of intellectual property rights by the holders or compel the licensing by the holders of one or several of their rights to other organizations or individuals with appropriate terms.[32]

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[30] Ley n. 14 de 28 de diciembre de 1977 de Derecho de Autor, art. 37 [Copyright Act] (Cuba).

[31] Law of the Republic of Indonesia No. 28 of 2014 on Copyright Article 84 (Indon.) ("Compulsory License. Article 84 … A compulsory license is a License to carry out translation and/or Reproduction of scientific and literary Works which are granted under the decision of the Minister upon request for the purposes of education and/or science as well as research and development activities … Article 85. Every Person may apply for a compulsory license of scientific and literary Works as referred to in Article 84 for the purposes of education, science, and research and development activities to the Minister.").

[32] Law on Intellectual Property (No. 50/2005/QH11) [Intellectual Property Act] art. 7(3) (Viet.) ("In the circumstances where the achievement of defense, security, peo-

In addition to authorizing compulsory licensing, in Vietnam "the State may prohibit or restrict the exercise of intellectual property rights." Thus language enables uses potentially without compensation, for example where there is an abuse of exclusive rights.

CONCLUSION

In an emergency such as the world experienced with the COVID-19 pandemic, it may become necessary to administratively authorize uses of copyrighted works that are not clearly covered by a country's exceptions and limitations. One solution, of course, is to make one's exceptions more open, flexible and adaptable to emergency conditions. Another option is to provide for specific provisions to administratively authorize uses of works in an emergency, such as is provided by the laws of countries discussed in the previous section. International law could provide further guidance, and Berne Article 17, which covers government actions "to permit" uses of works "by … regulation" where deemed "necessary" provides a possible model. For example, the Pandemic Treaty being negotiated at the World Health Organization could include an authorization of administrative use of works where needed for education, research, and other purposes in a pandemic. The controversy over Berne Article 17 and the dominant interpretation that it applies only to censorship proceedings indicates that such an emergency use provision for copyrighted works in the international framework may be useful.

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ple's life-related objectives and other interests of the State and society specified in this Law should be guaranteed, the State may prohibit or restrict the exercise of intellectual property rights by the holders or compel the licensing by the holders of one or several of their rights to other organizations or individuals with appropriate terms.").