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Sea Change: The Rising Tide of Pro Bono Legal Services for the Creative Community

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Sea Change: The Rising Tide of Pro Bono Legal Services for the Creative Community

Victoria F. Phillips*

“Lawyers have a license to practice law, a monopoly on certain services. But for that privilege and status, lawyers have an obligation to provide legal services to those without the wherewithal to pay, to respond to needs outside themselves, to help repair tears in their communities.”

Justice Ruth Bader Ginsburg¹

INTRODUCTION

Despite the ubiquity of the internet economy and the increasing importance of the creative sector, pro bono legal services have not generally been available to those needing assistance in intellectual property, technology and related fields of the law. Client services available from traditional legal services entities and law firm pro bono hours typically offer general civil and sometimes criminal representation but not more specialized legal help. Little to no relevant intellectual property or related pro bono expertise has been widely available from private law firms, state, local, or national bar associations or legal services entities. Pro bono legal assistance at law school clinics has historically mirrored these generalized offerings. Until recently, very few law school clinics were engaged in any kind of practice serving the creative clients in their communities. In addition, public interest and consumer policy advocacy and impact litigation in IP and technology law by nonprofit groups and academic centers has only recently emerged.

The creation of the earliest pro bono intellectual property law school clinics was revolutionary and the clinics were somewhat controversial in clinical legal education when they first arrived on the scene.² However, the vision for these new clinics was simple and modeled on the goals of existing clinical programs. Law students would represent clients in the creative community who had real IP and related legal problems for no fee. Students interested in intellectual property, technology and related areas would finally enjoy an experiential opportunity long available to their classmates in other fields of law. These students would also gain an understanding and appreciation for pro bono service and the public interest dimensions inherent in the intellectual property regime. Most importantly, the new clinics would be a resource for specialized pro bono legal advice to the many communities of creators and those hoping to enter the new internet economy but unable to access assistance in the traditional legal marketplace. In other articles I have explored the growth and maturing of this new and vibrant community of law school intellectual property law and technology clinics.³ In this Article, I suggest that the rapid growth

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¹ Justice Ginsburg delivered introductory remarks at the 2014 Pro Bono Institute Annual Conference celebrating the Institute’s Corporate Counsel project. Justice Ruth Bader Ginsburg, 2014 Pro Bono Institute Annual Conference (Mar. 6, 2014), <http://www.probonoinst.org/events/annual-conference/2014-pbi-annual-conference/remarks-from-justice-ginsburg/> [<https://perma.cc/N2VZ-F72M>].

² As an example, the Glushko Samuelson Intellectual Property Law Clinic was founded in 2001 by WCL professor Peter Jaszi and initial seed funding was provided by his fellow IP scholar/advocate and Berkeley Law Professor Pam Samuelson and her husband Robert Glushko. See *About, GLUSHKO SAMUELSON INTELL. PROP. L. CLINIC*, <https://ipclinic.org/about/> [<https://perma.cc/R92H-J2KZ>].

³ See Cynthia L. Dahl & Victoria F. Phillips, *Innovation and Tradition: A Survey of Intellectual Property and Technology Legal Clinics*, 25 CLINICAL L. REV. 95 (2018) (surveying all the new IP and technology clinics and discussing work taken on and innovations in this new community); Victoria F. Phillips, *Intellectual Property Law Gets Experienced*, 59 IDEA 249 (2018); Christine Haight Farley, Peter Jaszi, Victoria Phillips, Joshua Sarnoff & Ann Shalleck, *Clinical Legal Education and the Public Interest in Intellectual Property Law*, 52 ST. LOUIS U. L.J. 735 (2008).

and success of the work taken on by the new IP clinic community and the community's innovative collaboration with the U.S. Patent and Trademark Office is inspiring a rising tide in the availability of pro bono expert legal assistance for the creative community throughout the wider legal marketplace.

I. SHIFTING TIDES OF PRO BONO LAWYERING FOR UNDERSERVED COMMUNITIES

Helping others has always been part of the fabric of our society and members of the bar bear increased responsibility to use their privilege and status to work for the common good. This responsibility is laid out in the American Bar Association's (ABA) Model Rule of Professional Conduct 6.1. Every lawyer "has a professional responsibility to provide legal services to those unable to pay."⁴ Virtually every state has adopted some version of this rule, and most states follow the ABA's goal of fifty hours of pro bono service per year.⁵ Similarly, the ABA Standards and Rules for Approval of Law mandate that law schools provide opportunities for students to participate in pro bono activities. In the last few decades, pro bono work by the private bar has also grown tremendously and as a result firms, law schools, corporate counsel offices, and government agencies have made pro bono central to the legal profession.⁶

The Latin phrase *pro bono publico* means "for the public good." While the ABA rules define pro bono as the provision of legal representation to persons of limited means without a fee, many other lawyering activities can be undertaken for the public as opposed to private good.⁷ Access to counsel and justice for those of limited means has its origins in the 1215 Magna Carta which states: "To no one will we sell, to no one will we refuse or delay, right or justice."⁸ This principle grew into a general right to counsel in English legal proceedings.⁹ The obligation to provide legal counsel for those who cannot afford an attorney became codified in a 1495 English civil law statute which provided appointment of "learned Councill" to represent indigent litigants.¹⁰ It remains unclear how often courts made such appointments and how often lawyers did so without compensation.¹¹ The statute's application was somewhat limited in the beginning.¹²

While some early American colonies had similar provisions for appointed counsel, it is unclear whether these discretionary appointments were actually made.¹³ There is little information available about how often lawyers provided voluntary or court-ordered uncompensated representation.¹⁴ In the late-nineteenth century, various jurisdictions had provisions for appointing counsel in cases involving serious crimes, but such appointments were typically discretionary or exceptional and often ineffective.¹⁵ Although the earliest pro bono efforts were focused on providing counsel to criminal defendants, in 1876, the first American legal aid society, Der Deutsche-Rechtsschutz-Verein opened to serve the German immigrants of New York on a range of civil matters.¹⁶ The legal society provided ad hoc assistance in matters such as landlord-tenant disputes and aimed more towards discouraging the exploitation of German immigrants rather than a recognition of any generalized right of access to counsel.¹⁷ While this legal aid society

⁴ MODEL RULES OF PROF'L CONDUCT r. 6.1(a) (AM. BAR ASS'N 1983).

⁵ *Id.*

⁶ *Id.*

⁷ Scholars have argued that that an unnecessarily narrow understanding of pro bono law is based on outmoded, early twentieth century ideas that do not serve us well today. See Susan D. Carle, *Re-Envisioning Models for Pro Bono Lawyering: Some Historical Reflections*, 9 AM. U. J. GENDER SOC. POL'Y & L. 81 (2001). It is beyond the scope of this essay to wrestle with these definitional issues, but it is important to acknowledge that lawyering for the public good in all areas of the law can and should take many forms.

⁸ CHARLES K. ROWLEY, *THE RIGHT TO JUSTICE: THE POLITICAL ECONOMY OF LEGAL SERVICES IN THE UNITED STATES* 3 (1992).

⁹ DEBORAH RHODE, *ACCESS TO JUSTICE* 47 (2004).

¹⁰ DEBORAH RHODE, *PRO BONO IN PRINCIPLE AND IN PRACTICE* 4 (2005); see ROWLEY, *supra* note 8, at 3.

¹¹ RHODE, *supra* note 10, at 4.

¹² *Id.*

¹³ Marlene Coir, *Pro Bono and Access to Justice in America*, 90 MICH. B.J. 54 (2011).

¹⁴ RHODE, *supra* note 10, at 5; RHODE, *supra* note 9, at 50–51.

¹⁵ Coir, *supra* note 13, at 1.

¹⁶ *Id.* at 2.

¹⁷ See ROWLEY, *supra* note 8, at 4; Coir, *supra* note 13, at 2.

initially only served German immigrants, it soon expanded its services to all indigents and became known as the New York Aid Society.¹⁸ By the turn of the century hundreds of similar organizations had been formed across the country supported for the most part by private charitable donations.¹⁹

Reginald Heber Smith—who organized the Boston Legal Aid Society—brought the inequality of justice to light with his 1919 publication, *Justice for the Poor*.²⁰ At that time, forty-one cities were represented by some form of legal aid organization that provided legal assistance to low-income people.²¹ In his book, Smith recommended that the nation open up the courts to the poor and increase financial support for legal aid. His goal was to achieve the formation of a national association of legal aid offices.²² Smith's work moved the American Bar Association to create what became the Standing Committee on Legal Aid and Indigent Defendants (SCLAID) in 1920.²³ The SCLAID works to ensure the availability of civil legal aid and public defender services through advocacy and policy work.²⁴ The next decade saw the formation of the National Legal Aid and Defenders Association.²⁵

The quality and availability of services throughout the next several decades depended on the enthusiasm of local bar associations and attorneys in promoting and funding these pro bono endeavors.²⁶ The rise of the U.S. civil rights movement and War on Poverty in the 1960s led to a surge of interest and realization of the critical need for legal aid programs.²⁷ The government first centralized legal services through the creation of a legal aid program under the Office of Economic Opportunity (OEO).²⁸ Under OEO, legal service lawyers achieved large victories, primarily in reforming and expanding federal entitlement programs.²⁹ The federal government's involvement in providing legal services peaked when Congress created the Legal Services Corporation (LSC) in 1974 which provided support and some autonomy for poverty law legal aid programs.³⁰

The centralization of pro bono legal services within the government through organizations such as the OEO and LSC eventually came to an end. Pro bono increasingly became viewed by conservatives as political and they believed that the organizations were pushing a liberal agenda of expanding benefits and reforming business practices.³¹ Amidst Reagan era efforts to eliminate the LSC, the organization mandated that its grantees make funds available for private attorney involvement (PAI).³² The PAI program paid private practitioners for doing legal services work, but ultimately it served to stimulate the expansion of organized pro bono groups and marked the emergence of a privatized civil legal services regime.³³ As a result, pro bono practice in large private law firms surged during the 1990s and today pro bono is solidly entrenched in the private bar.³⁴

II. THE FIRST WAVE OF PRO BONO ASSISTANCE FOR THE CREATIVE COMMUNITY

¹⁸ Coir, *supra* note 13, at 2.

¹⁹ ROWLEY, *supra* note 8, at 4.

²⁰ *Id.*; see Reginald Heber Smith, *Justice and the Poor*, 35 POL. SCI. Q. 1 (1920).

²¹ ROWLEY, *supra* note 8, at 5.

²² *Id.*

²³ Coir, *supra* note 13, at 2; see American Bar Association, *Standing Committee on Legal Aid and Indigent Defendants*, AM. B. ASS'N, https://www.americanbar.org/groups/legal_aid_indigent_defendants/ [https://perma.cc/3YNV-MWDR].

²⁴ American Bar Association, *supra* note 23..

²⁵ Coir, *supra* note 13, at 2.

²⁶ *Id.*

²⁷ *Id.*; see also RHODE, *supra* note 9, at 73–74 (discussing the rise of consumer and public interest legal organizations and the legal challenges they have brought since the 1960s).

²⁸ Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 20 (2004).

²⁹ *Id.* at 21.

³⁰ Coir, *supra* note 13, at 2.

³¹ Cummings, *supra* note 28, at 19–21.

³² *Id.* at 24.

³³ *Id.*

³⁴ *Id.* at 25–26.

Despite a long history of pro bono in the legal profession and its solid footing across the legal marketplace, the availability of specialized and focused pro bono legal expertise for the needs of the creative community has a much more recent history. The earliest forms of direct pro bono legal assistance to this community began with regional volunteer lawyer groups formed to support local artists. The first Volunteer Lawyers for the Arts (VLA) was founded in New York City in 1969.³⁵ VLA provides access to legal representation and education programs to support people in the arts community across the disciplines, from acting to graphic design to photography to music. The assistance takes various forms including in-house consultations, clinics, and pro bono placements.³⁶ VLA also offers mediation services to resolve disputes, contract negotiations, and relationship management to creatives in a neutral, confidential forum at a nominal cost.³⁷

Similar pro bono assistance programs gradually spread from New York to other parts of the country. In the early 1970s, Chicago-based Lawyers for the Creative Arts was founded,³⁸ followed by the California Lawyers for the Arts in 1974.³⁹ The California organization now has five offices assisting artists in the Los Angeles, San Diego, Sacramento, San Francisco, and Berkeley areas.⁴⁰ Texas Accountants and Lawyers for the Arts was founded in 1979 to meet the legal and accounting needs of artists and art nonprofits.⁴¹ In 1983, Washington Area Lawyers for the Arts (WALA) was started to support artistic expression and creative innovation in the DC, Virginia and Maryland arts and cultural communities.⁴² Colorado's VLA was founded in 1985 inspired by David Rockefeller's national Business Committee for the Arts and created with a mission to educate, motivate and recognize business support for and participation in the arts in Colorado.⁴³ Today there are more than thirty VLA pro bono programs providing legal services to creative communities throughout the country.⁴⁴ While most are stand-alone nonprofit organizations, some are also housed within local art councils, art service organizations, and local bar associations.⁴⁵ Although these VLAs operate independently, they share a mission of offering a broad range of free and low-cost legal services and educational programs serving the needs of creatives in all artistic disciplines. Emerging at the same time as the federal legal service entities of the civil rights era, the VLAs were the first efforts to provide the creative community with access to pro bono IP and related legal expertise through their education, advocacy, legal clinics, and legal referral services. In addition to the growing need for the provision of direct legal services to artists and other members of the creative community, the rise of the internet-based information economy also spurred the need for more specialized expertise in public interest IP and technology-related policy advocacy. A host of new consumer groups was formed as the century came to a close and the digital era dawned to focus on IP and public interest in the new economy. The Electronic Frontier Foundation and Center for Democracy and Technology were both founded in the early 1990s to promote civil liberties on the Internet.⁴⁶ The Digital Future Coalition was a copyright advocacy organization founded by leading IP scholars and activists in

³⁵ VOLUNTEER LAW. FOR ARTS, <https://vlany.org/> [<https://perma.cc/B9Z8-TJ55>].

³⁶ *Pro Bono Legal Services*, VOLUNTEER LAW. FOR ARTS, <https://vlany.org/pro-bono-legal-services/> [<https://perma.cc/VU3W-X2KT>].

³⁷ *Id.*

³⁸ *History*, LAW. FOR CREATIVE ARTS, <https://www.law-arts.org/history> [<https://perma.cc/XP3X-FXDF>].

³⁹ CAL. LAW. FOR ARTS, <https://calawyersforthearts.org> [<https://perma.cc/EL5R-PVZ2>].

⁴⁰ *Contact Us*, CAL. LAW. FOR ARTS, <https://calawyersforthearts.org/contact-us.html> [<https://perma.cc/5X5M-3T9Y>].

⁴¹ TEX. ACCT. & LAW. FOR ARTS, <https://talarts.org> [<https://perma.cc/ET27-K2BT>].

⁴² WASH. AREA LAW. FOR ARTS, <https://waladc.org/> [<https://perma.cc/8K9A-AB3L>].

⁴³ COLO. BUS. COMMITTEE FOR ARTS, <https://cbca.org/about-cbca/> [<https://perma.cc/WLA6-7X3J>].

⁴⁴ *National Directory of Volunteer Lawyers for the Arts*, VOLUNTEER LAW. FOR ARTS, <https://vlany.org/national-directory-of-volunteer-lawyers-for-the-arts/> [<https://perma.cc/E4PV-GVRT>].

⁴⁵ *Id.*

⁴⁶ *A History of Protecting Freedom Where Law and Technology Collide*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/about/history> [<https://perma.cc/RXF9-MTNK>]; CTR. FOR DEMOCRACY & TECH., <https://cdt.org> [<https://perma.cc/H9PS-7PWS>].

the library and public interest world to take on the high protectionist positions of the content industry.⁴⁷ Public Knowledge was started soon thereafter to advocate for intellectual property and technology law and policy serving the public interest.⁴⁸ Today these groups along with others have forged a strong and respected voice for the underfunded positions of consumers and civil rights stakeholders in ongoing IP and technology debates.

III. A SECOND WAVE OF PRO BONO FOR CREATIVE COMMUNITIES EMERGES IN LAW SCHOOL CLINICS

The internet information economy and emerging public interest activism ushered in a new wave of IP and technology focused clinics at law schools. The digital economy had highlighted the need for increased expertise in intellectual property, technology and related legal services for communities of creators and consumers of limited means. Many IP academics were instrumental in starting or involved in some of the early digital advocacy organizations. At the same time the educational landscape was seeing experiential offerings blossoming across campuses including in the law school curriculum. On the heels of a series of reports recommending an increase in these opportunities for students, in 2016, the ABA ultimately imposed experiential learning requirements for all law students.⁴⁹

The earliest forms of clinical legal education arose in the 1970s out of the same civil rights struggle and war on poverty forces as the early legal services organizations. The earliest clinics were similarly funded by grants to provide hands-on legal training to students through the provision of legal services for traditionally unrepresented clients under faculty supervision. The new IP clinical community extended the same goals of pro bono legal assistance and public interest advocacy to underrepresented communities of creators. Like the national network of VLAs, these clinics began to provide local, national and international creative communities with vital access to the IP system through intellectual property rights acquisition, counseling, and education. These clinics provided pro bono lawyers for both local communities as well as larger communities of practice across the country and globe. Law students were available to counsel clients on both copyright, patent, and trademark matters. They performed IP searches, drafted clearance memos, and prosecuted applications for federal registration. This work was often undertaken for underrepresented creatives and inventors who were often minorities or women. The IP clinics also engaged in a wide range of client counseling and transactional work for creatives.

The clients served by these clinics would not have been able to find this kind of legal assistance in traditional legal aid offices or law firm pro bono offerings and would certainly not be able to afford such help in the legal marketplace. These clinics have been influential in spreading a commitment to pro bono for the creative community into the larger legal marketplace for a number of reasons. Most importantly, graduates of the growing community of these clinical programs have been awakened to the importance of pro bono work and have started to seek out similar work as they start their legal careers. Many of these graduate move into private practice firms with IP specialties and they will bring their commitment to help

⁴⁷ Patricia Aufderheide, *How a Strategic Alliance Helped Save the Internet: The Digital Future Coalition*, CTR. FOR MEDIA & SOC. IMPACT (Oct. 8, 2018), <https://cmsimpact.org/fair-use-blog/how-a-strategic-alliance-helped-save-the-internet-the-digital-futures-coalition> [https://perma.cc/CT3V-TY9G].

⁴⁸ *Public Knowledge*, DEMOCRACY COLLABORATIVE, <https://community-wealth.org/content/public-knowledge> [https://perma.cc/5GF7-2PQA].

⁴⁹ AM. BAR ASS'N STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016-2017, 16–17 (2016) [hereinafter ABA STANDARDS], https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rule_s_of_procedure.authcheckdam.pdf [https://perma.cc/86JL-VCH3]; WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, CARNEGIE FOUND. FOR ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 7–8 (2007), http://archive.carnegiefoundation.org/pdfs/elibrary/elibrary_pdf_632.pdf [https://perma.cc/3JXE-YAX9]; see also AM. BAR ASS'N SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992), [https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_macgrate_report\).authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_macgrate_report).authcheckdam.pdf) [https://perma.cc/3GU6-77BD].

local creative communities with them. In addition to influencing the culture of IP practice among young lawyers, the new IP clinics have been leaders in forging innovative collaborations across the wider legal community. These collaborations have in turn inspired more sectors of the legal marketplace to join in taking on pro bono representation in this area.

One of the most successful initiatives responsible for expanding the delivery of IP pro bono assistance and growing the community of IP clinics has been the clinic community's collaboration with U.S. Patent and Trademark Office (USPTO) in the establishment of the Law School Certification Program in 2008. The creation of the program allowing law student practice in the agency has made it possible for individuals and small entities that otherwise would not obtain quality legal services in the marketplace to receive competent legal representation in IP matters. Sixty-three law schools now have clinics participating in this program and what started as a pilot program has now been codified into law.⁵⁰ Through the program, participating law school students have assisted numerous clients seeking IP rights to further their start-up businesses and nonprofits. Since its inception, students practicing in the program have filed more than 3330 trademark applications and over 850 patent applications and provided legal services to more than 4100 underrepresented clients. The program continues to grow in scope and in reach. In the most recent fiscal year, the USPTO reported that the law school clinic students had undertaken 2217 client representations and successfully obtained forty-one patents and 428 trademarks.⁵¹ In their 2016 report to Congress on the program, the USPTO reported that more than 2700 law school clinic students have been able to practice patent and/or trademark law before the USPTO under the guidance of a Faculty Clinic Supervisor. The agency noted that "not only has this provided superior legal training and invaluable experience to these students, but by providing their IP services to the public pro bono, this has also increased access to legal representation for the public. Specifically, by expanding education about patents, trademarks, and the patents and trademarks system at the law school level, independent inventors and entrepreneurs that have otherwise not been able to obtain quality legal services, have been afforded access to the competent legal representation necessary to succeed and compete in today's economy."⁵² The USPTO clinic program has also contributed to the tremendous growth of IP clinics since it was initiated.⁵³

IV. A TIDE OF PRO BONO FOR CREATIVES HAS STARTED TO RISE ACROSS ALL LEGAL SECTORS

While a commitment to pro bono work is now an integral part of the fabric of most law firms today, most firms still do not routinely engage in IP or pro bono work for clients in the creative community. A concern for conflicts—generally professional development conflicts rather than those rooted in ethics concerns, has rendered pro bono help in IP, especially in the patent area—risky and undesirable. Associates in IP firms looked to other areas of law for their pro bono hours requirement and rarely were called on to use their expertise to assist creative clients. Volunteering for VLA referrals was generally the only available route to do this work. But partially as a result of changes in the legal landscape due to the proliferation of law school IP clinics and new priorities placed on pro bono service by governmental entities like the USPTO, attitudes about pro bono for creative clients has started to wash across the wider legal community.

⁵⁰ See *Law School Clinic Certification Program*, U.S. PAT. & TRADEMARK OFF. (Dec. 16, 2007), <https://www.uspto.gov/learning-and-resources/ip-policy/public-information-about-practitioners/law-school-clinic-1> [<https://perma.cc/88WN-RZER>]; see also Act of Dec. 16, 2014, Pub. L. No. 113-227, 128 Stat. 2114.

⁵¹ U.S. Patent and Trademark Office, Office of Enrollment & Discipline, Law School Clinic Certification Program Webinar (Aug. 6, 2019) (PowerPoint on file with *IP Theory*).

⁵² MICHELLE K. LEE & WILLIAM RO. COVEY, U.S. PATENT & TRADEMARK OFFICE, REPORT ON THE LAW SCHOOL CLINIC CERTIFICATION PROGRAM (2016), https://www.uspto.gov/sites/default/files/documents/USPTO_Law_School_Clinic_Cert_Program_Report-Dec_2016.pdf [<https://perma.cc/M2PA-M5KD>].

⁵³ Dahl & Phillips, see *supra* note 3.

One notable exception was Public Interest Intellectual Property Advisors (PIIPA), a law firm-supported organization providing pro bono IP services to developing countries. Founded in 2002 by Michael Gollin, with support from Venable LLP, PIIPA was established as an independent international service and referral organization. PIIPA provided pro bono IP legal counsel to governments, businesses, indigenous peoples, and public interest organizations in developing countries that aim to promote health, agriculture, biodiversity, science, culture, and the environment.⁵⁴ Over 3500 attorneys, academics, policymakers, and practitioners from fifty countries volunteered their time as part of the “IP Corps.” These volunteers covered all areas of IP, from patent, trademark, and copyright to trade secrets. Sadly, just this past summer, PIIPA closed its doors after seventeen successful years of operation.

In addition, after the successful launch of the law school clinic program, the USPTO launched another initiative focusing specifically on patent assistance. Agency records had long demonstrated that access to the patent system has been denied to underfunded inventors and entrepreneurs most particularly minority and women inventors. In 2011, then-director David Kappos along with regional IP lawyers and John Calvert, then Administrator of the agency’s Inventor Assistance Program (IAP) launched the LegalCORPS Inventor Assistance Program in Minnesota, the first patent pro bono program of its kind.⁵⁵ The Minnesota pilot was a success, having received thirty-seven inventor requests for assistance in its first year.⁵⁶ Out of those requests, seventeen met the screening criteria and were matched with attorneys and twelve inventors eventually received patents.⁵⁷ The pilot then received forty requests in its second year and thirty-eight in its third.⁵⁸

In 2011 Congress also passed the American Invents Act (AIA), which among other things initiated the implementation of the Patent Pro Bono Program nationwide.⁵⁹ While the USPTO had tried for years to promote the creation of pro bono programs, these efforts had previously met with little to no success.⁶⁰ Pro bono efforts in this field had actually encountered affirmative resistance from the private IP bar as fears of professional development conflicts abounded. With the passage of the AIA, consistent, nationwide progress became possible. Section 32 of the AIA directed the USPTO to work with and support intellectual property law associations to establish pro bono programs around the United States.⁶¹ The AIA Pro Bono Task Force convened in October 2011 to coordinate efforts to develop similar programs to eventually cover all fifty states.⁶² Today the program has created a nationwide network of independently operated regional programs that match volunteer patent professionals with financially under-resourced inventors and small businesses so they can secure patents.⁶³ To qualify for assistance, applicants must meet specific income, knowledge, and invention requirements.⁶⁴ Following the success of the Minnesota pilot, Colorado’s ProBoPat program soon followed in April 2012.⁶⁵ California also established its own program that same year but unlike Minnesota and Colorado’s

⁵⁴ Michael A. Gollin, *Answering the Call: Public Interest Intellectual Property Advisors*, 17 WASH. U. J.L. & POL’Y 187 (2005).

⁵⁵ Amy M. Salmela & Mark R. Privratsky, *Patent Law Pro Bono: A Best Practices Handbook*, 4 CYBARIS INTELL. PROP. L. REV. 1, 8 (2012).

⁵⁶ Jennifer M. McDowell & Saurabh Vishnubhakat, *The USPTO Patent Pro Bono Program*, 7 CYBARIS INTELL. PROP. L. REV. 1, 44–45 (2015).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Leahy-Smith America Invents Act, 125 Stat. 284 (2011); see McDowell & Vishnubhakat, *supra* note 55, at 44–45.

⁶⁰ Anne Shea Gaza, *The USPTO Patent Pro Bono Program: Creating New Opportunities for Helping Local Communities*, Fed. Law., June 2015, at 4, [https://www.uspto.gov/sites/default/files/documents/Patent Pro Bono Article-June 2015.pdf](https://www.uspto.gov/sites/default/files/documents/Patent%20Pro%20Bono%20Article-June%202015.pdf) [<https://perma.cc/KZ4R-GTCG>].

⁶¹ *Id.*

⁶² Salmela & Privratsky, *supra* note 55, at 9.

⁶³ *Patent Pro Bono Program*, U.S. PAT. & TRADEMARK OFF, <https://www.uspto.gov/patents-getting-started/using-legal-services/pro-bono/patent-pro-bono-program> [<https://perma.cc/97Q9-BEMW>].

⁶⁴ *Id.* Applicants’ gross household income must be less than three times the federal poverty level guidelines. Additionally, they must have already filed a provisional application with the USPTO and successfully completed a certificate training course to show they understand how the patent process works and what to do once he or she receives a patent. Finally, they must be able to describe the specific features of the invention and how it works. *Id.*

⁶⁵ McDowell & Vishnubhakat, *supra* note 56, at 14–15.

state-specific program, serviced residents from nine western states: California, Washington, Oregon, Montana, Idaho, Nevada, Arizona, Alaska, and Hawaii.⁶⁶ The Program started its mass national expansion in 2013 and 2014, when Texas, Ohio, Massachusetts, the Greater Philadelphia area, the Carolinas, New York, Michigan, and Georgia all established its regional programs.⁶⁷ Just this spring, the USPTO launched the “Expanding Innovation Hub”, a centralized online platform to make the patent process more accessible to diverse inventors in the agency’s ongoing effort to “inspire more women, minorities, veterans, and geographically and socioeconomically diverse applicants to join the innovation economy.”⁶⁸ VLA offers a patent pro bono program that provides application drafting services to individuals who have not yet filed for a patent as well as assist those who have already filed provisional or non-provisional applications. In addition to the establishment of new regional programs, existing programs were also expanded. For example, in 2014, Minnesota’s LegalCORPS program joined with William Mitchell College of Law to provide pro bono assistance to Wisconsin, North and South Dakota, and Iowa. The D.C. program also began serving West Virginia and Delaware. On August 6, 2015, President Obama announced that the Pro Bono Program officially extended to all fifty states.⁶⁹

A review of pro bono activities described on large IP law firm websites indicates that there is still very little pro bono work being done in this area and many pro bono efforts by firm attorneys are in more traditional civil legal aid practice areas. However, there are signs that the private bar is slowly starting to come around to engaging in more pro bono outreach to creative communities inspired perhaps by the many efforts percolating in law school clinics and encouraged by the government. One shining example is a 2012 program initiated by D.C. IP firm, Sterne Kessler Goldstein & Fox. Attorneys there launched pro bono outreach dedicated solely to the intersection of intellectual property and human rights.⁷⁰ The program focuses on protecting, transferring, and enforcing intellectual property rights as an example of economic, social, and cultural rights. Sterne Kessler represents both organizations and underserved communities locally and internationally. Among other projects, the firm has helped develop IP policy for Union for Ethical BioTrade, an organization that promotes the conservation of biodiversity through ethical sourcing practices.⁷¹ It assisted a member of the Monacan Indian Nation of Virginia in preparing and filing patent applications on novel feeding and growing techniques useful in the hydroponic industry.⁷² Firm attorneys also prosecuted several patent applications on the use of a blue colored rainforest fruit from Colombia as a source of edible colorants for the food industry.⁷³

In the trademark realm, the International Trademark Association (INTA) has just recently answered the call and initiated its own Pro Bono Trademark Clearinghouse Pilot Program, the first pro bono program of its kind dedicated primarily to trademarks.⁷⁴ Potential clients can apply for pro bono assistance by filling out an online intake form, and after a determination of whether they meet eligibility requirements they will be then matched with a volunteer attorney if one is available.⁷⁵ INTA has members in more than 190 countries. The Clearinghouse is currently running as a pilot program and is limited to trademark matters in the United States but the group’s goal is to roll out a large-scale clearinghouse open to all eligible INTA members and pro bono clients worldwide.⁷⁶

⁶⁶ *Id.* at 17.

⁶⁷ *Id.* at 21–33.

⁶⁸ *Expanding Innovation*, U.S. PAT. & TRADEMARK OFF. (Mar. 3, 2020), <https://www.uspto.gov/initiatives/expanding-innovation> [<https://perma.cc/PK7R-SRJM>].

⁶⁹ McDowell & Vishnubhakat, *supra* note 56, at 34.

⁷⁰ *Pro Bono*, STERNE KESSLER GOLDSTEIN & FOX, <https://www.sterneessler.com/about/pro-bono> [<https://perma.cc/L3AW-FXVL>].

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *INTA Pro Bono Committee Spotlight*, INT’L TRADEMARK ASS’N (2017), https://www.inta.org/Membership/Pages/INTA-Pro-Bono-Committee_Spotlight.aspx [<https://perma.cc/EDF4-LUPR>].

⁷⁵ *Pro Bono Clearinghouse*, INT’L TRADEMARK ASS’N, <https://www.inta.org/Advocacy/Pages/ProbonoClearinghouse.aspx> [<https://perma.cc/87VY-3NUZ>].

⁷⁶ *Id.*

CONCLUSION

In legal practice and in law schools, pro bono representation has long been grounded in notions of professional responsibility and service. It encourages lawyers and law students to use their valuable license to attend to the legal needs of the disenfranchised and further the social justice mission. Law school IP clinics have emerged to address unmet legal needs in the creative community. Justice Ginsberg has urged us to “fight for the things that you care about, but do it in a way that will lead others to join you.”⁷⁷ These clinics, their graduates and their innovative collaboration with government are playing a role in inspiring a sea change across the wider legal community to look beyond the veil of perceived conflicts and help others. The bar is slowly awakening to the pressing need to make available more pro-bono legal services for underserved communities of creators, non-profits and underfinanced entities in need of expertise in these fields.

⁷⁷ Alanna Vagianos, *Ruth Bader Ginsburg Tells Young Women: “Fight for the Things You Care About”*, HUFFPOST (June 02, 2015), https://www.huffpost.com/entry/ruth-bader-ginsburg-fight-for-the-things-you-care-about_n_7492630 [https://perma.cc/9ECA-VFDU].