

The waiving of intellectual property : a poor response to a real problem*

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1. Since it was announced on 5 May 2021 that the Biden/Harris administration supported the proposition to wave intellectual property rights (i.e. the so-called “TRIPS waiver”) linked to Covid-19 initiated by India and South Africa in front of the WTO, the subject of the patent waiver has come to the forefront of public debate. We would like to shed some light on this debate.

The waiving of intellectual property discussed at the WTO

2. Since autumn 2020, the WTO has been discussing a possible waiving of the obligation of member states to enforce intellectual property rights in connection with the current pandemic. The waiver is not limited to patents and concerns all intellectual property, including secret know-how, which is of the utmost importance to implement patents.
3. It should also be emphasized that the waiver for which some countries, led by India and South Africa, are campaigning is intended solely to prevent States from being obliged to act at national level. This initiative can neither have the aim nor the result of expropriating patent holders. At the most, it can leave to each State the choice to protect or not certain patents, with the industrial consequences that this implies for its economy.

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4. The expropriation of patent holders is not in line with WTO's members commitments, since they have signed the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement within the WTO. This Agreement provides for the possibility of limiting the use that can be made of a patent, subject to compliance with strict conditions. States are free to provide such provisions in accordance with the Agreement, but cannot provide for expropriation, as only limitations under certain conditions are permitted. As such, in France, the Intellectual Property Code sets up a system of *ex officio* compulsory licensing, which allows the State to facilitate access to patents when the interest of public health so requires (Article L. 613-16 of the French Intellectual Property Code).
5. Furthermore, there is currently no precedent for expropriation. Therefore each country would have to devise a specific procedure, which does not exist at present, whereby the State would have for example to identify the patents linked to COVID-19 and assess compensation for each of them.
6. Finally, there is no evidence that the waiving of intellectual property rights would increase vaccine production, as it is the global production capacity which appears to be limited at present.

The case of patents and their place in the crisis

7. Often caricatured as instruments intended to make the shareholders of "Big Pharma" rich, patents are in fact instruments meant to foster research, in particular by securing R&D investments. As such, they are a means for States to direct private investment into sectors that are useful for public health.
8. A patent is indeed a property title pertaining to an invention which is issued by an administration (e.g. the European Patent Office) which grants, for a period of 20 years, an exclusivity on the invention which it discloses. In other words, contrary to what is often heard, a patent does not guarantee any secret, but allows research to be disseminated.
9. The technology of messenger RNA-based vaccines, on which much of the response to the current health crisis depends, has benefited from considerable private investment over several years. Without this private investment, this technology would probably not have been available to respond to the COVID-19 pandemic.
10. Patents are a key instrument in the system of private funding of biotechnology research and development, whether the funding is provided by pharmaceutical companies or by other investors. The exclusivity they confer on the technologies developed with the help of the investments secures future revenues and thus the expected return on investment. Very large investments in research and development of therapies cannot be expected without temporary exclusivity of exploitation.
11. If patents are waived, i.e. the exclusive right to exploit them is waived without compensation in the context of the current epidemic, investors will be exposed to the risk of future waivers, which will result in lower expected returns on investments in technologies for the prevention or treatment of epidemic infectious diseases. There is thus a great risk that private investment will flee to other technology sectors and that the burden of funding research and development in the field of epidemic infectious diseases will be left solely to public actors or non-profit organizations in the future, with the danger that this will lead to an underfunding in this essential area of public health.

Other options, more respectful of the rights of patent holders, are available

12. Voluntary agreements between patent holders and those willing to produce vaccines should be favoured and promoted in the first place.

13. In a situation of blockage affecting public health, it is possible to consider implementing the mechanism of *ex officio*/compulsory licensing, which exists, e.g. in French positive law in accordance with the TRIPS Agreement (Article 31*bis*). This mechanism could facilitate the manufacture of vaccines, if manufacturers with the technology and the means of production requested it, in the event of the continued inability of the patent holders to ensure an adequate supply of vaccines, while compensating the latter.
14. It should also be emphasized that the debate is in fact very complex, since access to health care also depends on various other economic, legal and social factors that need to be improved at the international level and in each country according to its particularities. Neither the waiving of patents nor even the usefulness of *ex officio*/compulsory licenses (whose mechanisms should be improved) seem to us to be sufficient to properly set out this complex debate or to resolve it.