

Free use of patents in the fight against COVID-19

The Open COVID Pledge initiative - good news in times of crisis

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Social distancing has entered the daily lives of much of the planet's population today, and at the same time it has created the preconditions for strong social solidarity. This phenomenon is observed both in human and interstate relations, but it is also present among major economic players. Countries around the world are actively working on new measures to support their health and economic systems, making us witnesses of unprecedented examples of charity. Against this background, the scientific community is investing enormous resources in the search for a cure and vaccine against the new coronavirus. It is a battle against time as the disease takes new lives every hour and causes severe economic damage. The stakes in this battle are too high for it to be individually led.

A group consisting of scientists, lawyers, entrepreneurs and individuals have initiated the creation of a worldwide movement to support the fight against COVID-19 by making intellectual property rights available free of charge. Intellectual property law around the world is based on the principle that obtaining consent and paying remuneration are necessary for the use of a third party's IP right. This is most frequently done by virtue of a license agreement, subject of trade negotiations, entry in registers, etc. However, this process takes time which humanity currently does not have and further gives an advantage to those who can afford to pay for the rights of a greater number of patents and technologies. It is these constraints that are overcome with the principles of [Open COVID Pledge](#).

The initiative emerged as topic of discussion in the scientific community in early April 2020. In just a few days, the campaign garnered support from major corporations such as Intel Corporation, Mozilla, Unified Patents and Creative Commons. The founders of the campaign believe that immediate action is needed to stop the COVID-19 pandemic and treat patients. They consider that it is imperative for society to bring together each discovery, and each tool that anyone has at their disposal needs to be freely and quickly available to the development and deployment of technology at a global level.

Participation in the initiative is possible at three levels: (1) formal confirmation of compliance with the principles of making intellectual property freely available (making the pledge); (2) the effective implementation of the Open COVID Pledge principles via a license detailing the terms and conditions, under which intellectual property is made available; and (3) public support for the initiative ('support the pledge'). The legal team behind the movement has created a [template license agreement](#) that could be used. It states that a non-exclusive, royalty-free, worldwide, fully paid-up license (without the right to sublicense) is granted to make, have made, use, sell, import, reproduce, adapt, translate, distribute, perform, display, modify, create derivative works of and otherwise exploit all patent, copyright and other intellectual and industrial property rights (other than trademarks and trade secrets) in products, services, compositions of matter, machines, articles of manufacture, processes, and works of authorship in order to speed the development and dissemination of the technologies needed to end the COVID-19 pandemic and mitigate the effects of the disease. The time limitation of the license is fixed at one year after WHO declares the end of the COVID-19 pandemic. The starting date is December 1, 2019. The template license is composed of 5 articles and is fully compliant with common legal requirements in the world. Of course, undertakings wishing to join the movement may need to comply with additional mandatory requirements under their national legislation.

The available data set is growing every day. Intel has pledged its global portfolio of over 72,000 patents as part of the campaign. Numerous scientific organisations have supported the initiative, including The Neuro (Montreal Neurological Institute-Hospital), the Stanford Centre for Compassion and Altruism Research and Education (CCARE), the Stanford Program in Law, Science, and Technology, the Health Law and Policy Institute of the University of Houston, and the Idea Laboratory for Intellectual Property in Bogota, among others. On April 20 tech giants Amazon, Facebook, Hewlett Packard Enterprise (HPE), IBM, Microsoft, and Sandia National Laboratories followed Intel by making all of their patents freely available to the public for use in the fight against COVID-19. US pharmaceutical company AbbVie has lifted restrictions on the production of its combination medication Lopinavir / Ritonavir for the treatment of the new coronavirus. An active campaign is currently underway to promote the initiative among the scientific community, and all those who have joined by April 21 will be considered founders of the movement.

Moreover, there are other similar endeavours in specific countries aimed at striking a new balance between the business interests of the pharmaceutical industry and the need for a rapid resolution of the COVID-19 crisis. Only time can tell whether this approach, analogous to the open source technology in computer science, will allow humanity to tackle the situation. Nevertheless, it is certain that such initiatives will become more widespread, as the world we live in is becoming more global and our progress depends on many factors, which implies greater unification.

"Patent pool" was a known term on the international market even before the appearance of COVID-19. It refers to a legal association between proprietors of various patents (including patents in the field of medicine) that optimises the management of patent rights. This optimisation could aim at market capitalisation, but it could also be targeting easier patent management in favour of public needs and health - something that is no stranger to history as such a patent pool was also created in relation with the fight against HIV.

Furthermore, it could be pointed out that bad examples have not been completely eradicated despite the severe epidemiological situation. There is no shortage of the so-called "patent trolls" - market players who own inventions or have filed for patents for an invention and are trying to limit any use of similar technology in order to make a profit even if the invention in question is not used. Another approach is for the right holders to such inventions to claim a high remuneration in order to make the invention available for use by a third party. Various legal methods are used as "patent troll" instruments in accordance with national law - filing court claims, imposing interim measures, administrative proceedings, etc.

Specifically with respect to the patent holder's non-market claims, the Bulgarian Patents and Utility Models Registration Act provides for a possible solution through a so-called compulsory license. It applies when an interested party has unsuccessfully attempted to obtain a license from the proprietor on fair terms. In this case, the person concerned may request the Patent Office to grant a compulsory license in his favour. Nevertheless, for that purpose, some additional conditions must be met. Some of them are:

- the invention has not been used by the patent holder within the specified time limits;
- the invention has not been sufficiently used to meet the national market needs;
- where the public interest so requires, without negotiations with the patent holder of the protected work - undoubtedly the situation with the spread of COVID-19 and the need of protection against it is in the public interest and that is why a compulsory license may be useful;

The problem with a compulsory license is that it is a contentious proceeding of administrative nature. The procedure for granting a formal license involves exchanging documents between the person seeking the license and the proprietor, response deadlines of up to 3 months, conduct of meetings, a deadline for adjudication by the competent authority, etc. That is to say, in light of the time sensitivity at the moment, patent trolls would achieve their goal to limit the use of technology in order to make profit.

In conclusion, it should be noted that the severe crisis created by the COVID-19 Pandemic has urged many national and international market leaders to demonstrate a strong social commitment. The elimination of restrictions on the use of inventions from different fields has become a key factor in the creation of a drug and/or vaccine against COVID-19, which will lead to a return of daily life for people and restore the previous rhythm of world economy. For this reason, businesses, academics and lawyers have focused on initiatives such as Open COVID Pledge and the creation of patent pools for the benefit of society and public health.