

Kluwer Patent Blog

A French Collective Tribune of Experts for Covid-19 Compulsory License

Matthieu Dhenne (Ipsilon) · Thursday, March 11th, 2021

Regular readers of the Blog may be aware of my particular interest in pharma patents and, more especially since the Covid-19 pandemic, for compulsory licensing (see for instance [here](#)). I was therefore very happy (and proud) to participate in a Collective Tribune bringing together renowned specialists in property and patent laws (academics and practitioners), who invite the French public authorities to reform the compulsory licensing procedure and to engage it to facilitate the manufacturing of Covid-19 vaccines in France.

This Tribune has been published on March 10, 2021, in French in the weekly newspaper dedicated to economy (*Les Echos*), and will also be published in a more detailed version in a general legal journal (*Semaine juridique - Édition Générale - LexisNexis*).

A patent policy for public health

Some people claim that the lack of vaccine production against COVID-19 is linked to patents held by the pharmaceutical industry; it is not possible to endorse such an idea. On the one hand, a patent encourages research by rewarding it with temporary exclusivity to exploit an invention. On the other hand, it participates in the dissemination of the research results, since obtaining a patent is submitted to the disclosure of the invention.

Nevertheless, access to inventions could be made more flexible in the interests of public health by adjusting the conditions for granting an ex officio licence and then initiating this procedure, more particularly to allow companies to manufacture vaccines developed by others. This is the proposal put forward by several experts in property and patent law in this Tribune.

Ex officio licensing: a tool for access to medicines that should be mobilised

A patent licence is a contract by which the patent holder - the patentee - grants a third party - the licensee - the right to exploit the invention in return for royalties. While the patentee is in principle free to conclude this type of contract or not, by

exception, this conclusion may be imposed to him in the interest of public health: this is the system of *ex officio* licence.

This licence presupposes that medicines are made available to the public in insufficient quantity or quality or at abnormally high prices. In these cases, a political will would be sufficient for such a licence to be adopted: an administrative procedure can be initiated by the Minister of Health, who makes a request to the Minister of Economy and Finance, who can then submit the patents in question to the *ex officio* licence system by means of a ministerial order.

It is therefore not a question of expropriation, which would risk discouraging investment in research, but of a balanced mechanism which, respecting the interests of those who have invested in research and been able to carry it out successfully, by guaranteeing them royalties, and to allow at the same time full access to medicines.

The compulsory licence, a tool for access to medicines that needs to be improved

This *ex officio* licence, which could be implemented today, since it is provided for by French Law, nevertheless suffers from a certain cumbersomeness, which requires time, whereas reactivity is required in a situation like the one we are experiencing.

The recent introduction of an article L. 3131-15 in the French Public Health Code is, however, a step in the right direction and is likely to facilitate the improvements that we are advocating here, as it allows the Prime Minister “by regulatory decree issued on the report of the Minister responsible for health, for the sole purpose of guaranteeing public health : [...] 9° Where necessary, [to] take any measure enabling appropriate medicines to be made available to patients for the eradication of the health disaster”.

In order to optimise the existing mechanism, it would be appropriate to :

- to specifically target the case of an extreme health emergency to which an accelerated procedure could or should be linked;
- to provide that patent applications - and not only granted patents as is the case today - may be subject to this *ex officio* licence;
- to extend the scope of the licence to all the know-how necessary for the manufacture of the medicine.

Thus, as part of an overall policy of secure access to essential medicines, an *ex officio* licence adapted to present needs, as we are advocating, could facilitate the manufacture of vaccines on French territory and thus the fight against the pandemic.

List of signatories

Jean-Michel Bruguière, Professor at the University of Grenoble-Alpes, **Anne-**

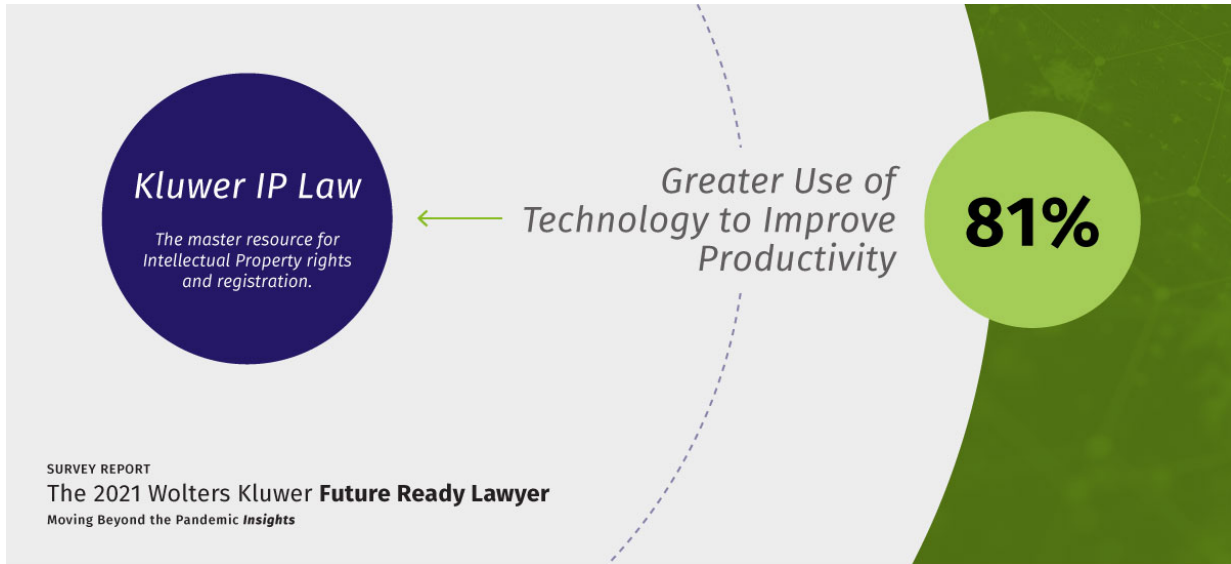
Catherine Chiariny, Associate Professor at the University of Montpellier, **Jean-Pierre Clavier**, Professor of private law at the University of Nantes, Director of the Master in Intellectual Property Law, **Matthieu Dhenne**, Attorney-at-Law at the Paris Bar, President of de Boufflers Institute, **Charles de Haas**, Attorney-at-Law at the Paris Bar, **Jean-Christophe Galloux**, Professor at the University Panthéon-Assas (Paris II), President of the Intellectual Property Research Institute (“IRPI”), Member of the National Academy of Pharmacy, **Christophe Geiger**, Professor at the University of Strasbourg (CEIPI), **Thibault Gisclard**, Associate Professor at the University of Lille, Director of the University Diploma of Industrial Property, **Alexandra Mendoza-Caminade**, Professor at the University of Toulouse 1 Capitole, **Didier Patry**, CEO France Brevets, **Emmanuel Py**, Associate Professor at the University of Burgundy, **Jacques Raynard**, Professor at the University of Montpellier and at the CEIPI, **Thierry Revet**, Professor at the University of Panthéon-Sorbonne (Paris 1), **Laurent Teyssède**, European Patent Attorney, **Michel Vivant**, Professor Emeritus at the Law School of Science-Po, Doctor *honoris causa* of the University of Heidelberg, **Bertrand Warusfel**, Professor at the University of Paris 8, Attorney-at-Law at the Paris Bar.

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