

Kluwer Patent Blog

The IP waiver for Covid-19: a wrong good idea

Matthieu Dhenne (Ipsilon) · Thursday, May 13th, 2021

Although he pronounced against the IP Waiver on 23 April, French President Emmanuel Macron declared having changed his mind on 6 May, following the US administration's surprising decision on 5 May. These contradictory statements have rekindled the controversy over the IP waiver, which is a wrong path that distracts the debate from the real issue: how to make the compulsory licensing procedure effective?

IP is (too?) rarely emerging from the political discourse in France and Europe. However, since the announcement on 5 May by the Biden administration, which supports the [proposal for the IP waiver linked to Covid-19](#), which emerged at the WTO under the leadership of India and South Africa, the subject of the patents come to the forefront of public debate, since the IP waiver concern mostly patents.

It should also be noted that Mrs Merkel has spoken out against the suspension of intellectual property, which is strange when you consider that a law passed in April 2020 by the German Parliament (Infektionsgesetz, summarised in English [here](#)) declares exactly the opposite: that patents linked to Covid-19 can be deprived of their effects at any time if necessary (which is contrary to Article 31 bis of the TRIPS Treaty, but then again, that's not the case...)

A reminder to political leaders: what is a patent?

Often caricatured as instruments intended to fill the portfolios of the shareholders of "Big Pharma", in particular, by keeping the secrets of their formulas, patents are in reality instruments for encouraging research, in particular for the amortization of R&D investments.

A patent is in fact a property title relating to an invention which is issued by an administration (i.e. the INPI) which grants, for a period of 20 years, an exclusive right to exploit the invention it discloses. In other words, contrary to what we often hear, a patent does not guarantee any secrecy, but allows research to be disseminated, as long as it is public.

Thus, expropriating patent owners would discourage investment in private research, which is far greater than investment in public research. Such a discouragement would appear, at the very least, in similar situations (e.g. pandemic with a variant requiring a new vaccine). Not to mention that in this case the patents, for the time being, do not

concern vaccines as such, but manufacturing methods (such as messenger RNA) that were invented prior to the pandemic and that come solely from private investment (see a summary [here](#)). Finally, the patents are very often held by SMEs and not multinationals, as is the case with BioNTech or Moderna for example.

The IP waiver proposed at the WTO

Since autumn 2020, the WTO has been discussing a possible IP waiver in connection with the current pandemic. Of course, this waiver does not only concern patents, but all intellectual property, including apparently know-how, which is not only secret, but also very important for the exploitation of the lessons learned from patents. This know-how is essential for adapting production capacities, particularly for the messenger RNA technique.

It should also be emphasized that the IP waiver is intended solely to prevent States from being obliged to act at national level. In other words, the aim is to avoid each State having to implement the compulsory license procedure individually, which would risk driving the pharmaceutical industry out of their territories, in favor of a collective measure to suspend intellectual property.

This change of scale – from national to international – also serves as a pretext for moving from an compulsory license (limited by Article 31 bis of the TRIPS Treaty and subject to royalties proportional to the exploitation of the invention) to a pure and simple suspension (akin to expropriation which will at best be compensated by means of a patent indemnity).

In any case, there is currently no precedent for this, so each country would have to devise a specific procedure, which does not exist at present, whereby the State would have to identify the patents linked to COVID-19 and assess compensation for each of them.

The real problem: the lack of effectiveness of the compulsory licensing mechanism

In the end, it is hard to understand why political leaders are only for or against the IP waiver, while pretending to ignore the mechanism of the compulsory license, which exists in our positive law and could facilitate the manufacture of vaccines.

This lack of vision seems particularly damaging insofar as compulsory licensing would offer significant advantages: existing mechanisms and royalties proportional to the exploitation of the invention, so that a balance would be maintained between the reward that encourages research and the interest of public health.)

Moreover, it would be quite conceivable for WTO members to adopt collectively, at the international level, a declaration of intent by which they would undertake to implement the automatic licensing procedure, without any question of suspension (and therefore of expropriation).

It should be noted, however, that a bill tabled in the Senate on 8 April this year (see translation [here](#)), with a view to granting such a license, could (at last) make up for

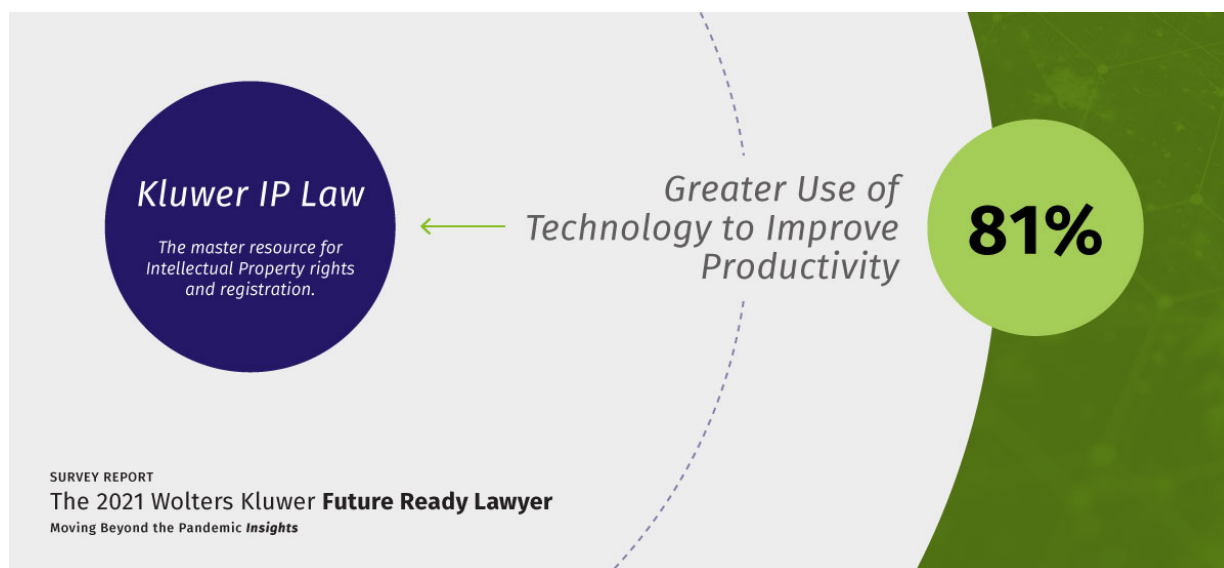
this unfortunate governmental deficiency.

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