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Patent, Design and Trade Mark Attorneys

Universities must guard their IP rights to ensure COVID-19 innovations reach the vulnerable in poorer nations

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As world leaders met for the annual World Health Assembly online on 18 May 2020, more than 140 prominent figures, including current and former world leaders, had signed an open letter calling on governments to unite behind a people's vaccine against COVID-19.[1] Among other things, this calls for any vaccine to be "patent-free".

A notable absentee is President Trump who has, in line with his "America First" approach, made clear his intention to secure exclusive rights to a vaccine.

The UK Government's policy paper on Coronavirus (COVID-19): scaling up our testing programmes [6 April 2020] called for solutions to "be as open source as possible with the ability for components, consumables, chemicals and digital components to be produced by a range of manufacturers – quickly and easily."

Is open source the answer? Maybe. But, contrary to popular opinion, "open source" does not mean "patent-free". Counterintuitive as it may seem, patents and intellectual property could be powerful weapons *against* President Trump – in an open source model that makes any vaccine available globally on ethical terms that are *legally enforceable*.

UK universities can play an important role in ensuring that if a vaccine or therapeutic is developed, poorer countries do not lose out in favour of the highest bidders.

This can be seen by exploring the following scenario. Following rigorous clinical trials that demonstrate is efficacy, a university research term successfully develops and publishes a vaccine. In theory, the open source approach means that will be free for the world to use. Or will it?

The reality will be different, for the vaccine now needs to be administered to 7 billion people. No one has any legal right to stop anyone else from manufacturing, importing or selling the vaccine – but raw materials are limited, supply chains are controlled, and other practical obstacles stand in they way of this unprecedented challenge. The biggest players will use their clout to control the market, and while no one has a *legal* monopoly, they do have the *commercial* monopoly in their deep

[1] https://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2020/may/20200514_covid19-vaccine

pockets and big market share – not to mention the vast resources of the Trump administration demanding exclusivity.

In this scenario, the vaccine has not been open sourced. In any meaningful sense, the university has relinquished all control.

By publishing the vaccine, the legal choice the university has made is to tell the world "you can do whatever you want with this". And what President Trump wants, is to leverage the resources and clout of the world's largest economy to pursue an Covid-19 America First agenda.

Now let's consider an alternative scenario, involving the strategic use of intellectual property law. Before publishing the vaccine, the university applies to patent it in the United States to secure control - in this case, their goal is the opposite of profiteering.

Once they have a patent, they control what can and cannot be done with it in the jurisdiction of the United States. Anyone who wants to sell or import the vaccine in the United States needs the permission of the University, which they will likely grant, *but with stringent ethical conditions attached*.

For example, one condition could be that any company wishing to manufacture and distribute the vaccine in the US also has to manufacture and distribute to other countries around the world.

In this scenario, the university's *legal* monopoly puts them on a level playing field with the big players who would otherwise have a *commercial* monopoly.

(An irony that might be lost on President Trump is that the university's right to do this is bestowed on them by the United States Constitution).

And this, in a nutshell, is a true open source model – one that recognizes that "open source" and "patent-free" are not the same thing.

A common mistake is to think that intellectual property monopolies, such as patents and registered design rights, are restrictive because they concentrate power in few hands. However, this ignores the role which intellectual property rights can play in enabling innovation and ensuring that if an effective measure is designed or invented to fight the COVID-19 pandemic, it will reach the people that need it.

The philosophy of open source is to foster a common purpose, where everyone contributes to the solution and everyone benefits – it is a system of give and take that is *legally mandated* by the creators of intellectual property. What is frequently misunderstood is that an open source *licence* is just that – a licence. If you have no intellectual property rights to license in the first place, you cannot stop others from taking something which you have no right to give.

Traditionally, the open source model has been applied to software – and the legal rights at the heart of the licence are often forgotten about because they automatically come into existence at the point of creation. This is called copyright and it protects

software because software is considered a “literary work” (the code) created by an author (the coder). Copyright law is old. *Copyright law also does not apply to a vaccine - there is no copyright in a vaccine.* If you want to protect a vaccine, so that you can license it on legally enforceable ethical terms, you need to actively protect it with a patent, before you release it to the world.

Intellectual property is just that – property. Ownership of property has good and bad outcomes. Property is owned by good and bad people. Patents and intellectual property are no exception.

If land within an area of outstanding natural beauty is owned by the National Trust, they can preserve it and keep it open to the public and stop Donald Trump from buying it and turning into a golf course. If a university develops a vaccine and patents it, they can do the same.