



COVID-19: philanthropists, not-for-profits and startups need to guard their intellectual property

By Virginia Driver and Tom Woodhouse

By 17 June 2020, according to [Center for Disaster Philanthropy \(CDP\)](#), some \$11.4 billion had been donated to help tackle the COVID-19 outbreak.

Large donations have been made by some of the world's leading companies and foundations, and universities are racing to develop a vaccine.

Are organisations neglecting to guard their intellectual property (IP) rights in the rush to find solutions?

Will this impact poorer countries?

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Are intellectual property rights being forgotten in the rush to help?

On 10 March, the Bill & Melinda Gates Foundation, Wellcome and Mastercard announced a commitment of up to \$125 million in seed funding to speed-up the response to the COVID-19 epidemic. Other entrepreneurs and philanthropists have offered products and resources.

Peter Beech, writing for the World Economic Forum, says:

"From hand free door opening devices that can be 3D printed to basic ventilators, the Coronavirus pandemic has ushered in an era of urgent innovation.

It is reminiscent of the inventions of the Second World War when the first digital computer and rocket technology came to the fore."

Meanwhile, Donald Trump was reported in to be keen to get his hands on the vaccine: "[Trump offers large sums for exclusive access to coronavirus vaccine](#)".

According to Virginia Driver, patent attorney and intellectual property strategist with Page White and Farrer, innovators and philanthropists should not forget their intellectual property rights in the rush to provide assistance:

"It is a little ironic to see this level of philanthropy and social cohesion in these days of social distancing. But it is heartening to see some exciting announcements about joint ventures and initiatives to respond to the pandemic.

However, corporate philanthropists and university research teams need to think carefully about the intellectual property rights that might be created from the money or ideas which they have donated."

Is open source the answer?

The UK Government, in publishing its policy paper on [Coronavirus \(COVID-19\): scaling up our testing programmes \[6 April 2020\]](#) has called on 'all British life science companies to turn their resources to creating and rolling out mass testing at scale for new national industrial capability that meets a set of clear principles'.

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Alarminglly, these principles include that:

*"It must 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."*

The UK Government guidance uses open source as a model for COVID-19 innovation, but an open source licence inherently requires some kind of licensable IP right, such as copyright in software or images.

The philosophy of open source is to foster a common purpose, where everyone contributes to the solution and everyone benefits.

Patent attorney Tom Woodhouse explains

"The reality is that weak open source licences are open to abuse if someone with deep pockets decides they are not going to play ball."

There is a long and complex history to this in the software/tech space: '[Commons clause stops open source abuse](#)'.

"The most effective open source models have strong safeguards to prevent such abuse – but you cannot achieve this without enforceable legal rights in the thing you are open sourcing. Otherwise, you have nothing to license, and no basis on which to set the terms of use by others. "

Busting the intellectual property myth

In such an era when everyone needs to pull together and decisions need to be made quickly, it is easy to think that open source is good and intellectual property monopolies, such as those created by patents and other registered rights, are inherently bad because they concentrate power in few hands.

However, this is a common myth built upon a fundamental misunderstanding of the role which intellectual property rights can play in enabling innovation.

In the particular case of fighting the COVID-19 pandemic, intellectual property has a vital role to play in ensuring that if an effective measure is designed or invented, it reaches the people who can benefit from it most – not profiteers!

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Protection from the profiteers

If an innovation is simply made available to the public by donating it or explaining it in a magazine or online video, then it is easy for less scrupulous operators to take up the idea and start creating a market. For example, they might start charging for the delivery of a product which you invented and which you intended should be given to the public on a philanthropic basis.

Sadly, intellectual property offices around the world are already seeing [opportunists register hundreds of trade marks in relation to the virus](#).

Power in the right hands

Virginia Driver says:

"We are seeing COVID-19 innovation across a full spectrum of technologies, from the above-mentioned 3D printable door opening mechanisms, applications of discoveries in virology, developments in protective clothing and equipment and med-tech applications."

If you have registered the appropriate intellectual property rights for the innovation, the power to exercise choice about how your idea is used is in your hands. You may use that intellectual property right against less scrupulous operators to ensure that they are enjoined from economic practices with which you do not agree.

For example, with granted patent rights, you could, compel them to give their supply of any products manufactured to your design to you so that you could donate them charitably.

Alternatively, you could reach a licence arrangement with them and donate the resulting royalties to charity. Consider how Great Ormond Street Children's Hospital has benefitted to J.M Barrie's gift of the rights to Peter Pan.

Without an intellectual property right, such measures are not possible.

Take care with funding agreements

Many leading foundations are offering grants to fund innovation programmes and startups.

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For example, The [Novartis U.S. Foundation](#) has advertised grants “upwards of USD 100,000 through the US COVID-19 Community Response Fund, which will accept proposals for programs...” “...establishing digital platforms for COVID-19 related data collection, remote delivery of healthcare and effective dissemination of important public health information”.

Any business attracted by such funding, whether a startup or established, needs to be careful to check that your business objectives are aligned with the funders’ aims and objectives.

“Who will own the IP arising from such a venture?” is a key question which needs to be determined at the outset.

Harmonious hackathons

Other organisations are setting up hackathons to generate ideas rapidly.

The difficulty with joint IP which arises from a hackathon, or any collaboration, is where parties have different commercial or ethical goals, and this is not given due consideration from the outset.

If IP is jointly created without any agreement over the IP rights, this creates a black hole, because the law on joint IP is complex and one of the least well-harmonized aspects of intellectual property law around the world.

But if you were looking at an ‘open source with safeguards’ model, provided you have a clear agreement at the beginning about the terms on which the technology will be open sourced, it remains a viable model.

Who will own the vaccine?

If and when a vaccine is developed, who will be first in line? Will poorer countries lose out in favour of the highest bidders?

These are core ethical questions at the heart of this crisis, and understandably have been the cause of much concern: [Covid-19 vaccines: pressure is on to ensure they go to the most needy, not the highest bidder.](#)

“If and when a vaccine is developed, who will be first in line? Will poorer countries lose out in favour of the highest bidders?”

Tom Woodhouse considers a potential scenario where a university research team discovers a vaccine:

"If they simply publish it - they lose control at that point. Multinationals can adopt whatever business model they like and choose to sell the vaccine to the highest bidder.

While no one has a legal monopoly, large corporations will probably have a de-facto commercial monopoly in the early stages, for example if raw materials are limited, supply chains and distribution channels are tightly controlled, and specialist manufacturing equipment is required."

This hypothetical example about the vaccine makes the point that an open source licence inherently requires some kind of licensable IP right.

By publishing the vaccine formula, what they have done is equivalent to granting the world a 'Beerware' licence – for anyone to take their innovation and do with it whatever they please. [<https://en.wikipedia.org/wiki/Beerware>].

Unlike software, there is no copyright in the vaccine, so no enforceable right to license. The university simply has to trust that everyone will play fair or that governments across the world will intervene effectively if they do not. This is not a good open source model.

How can intellectual property law help?

By taking a strategic approach to the management of their intellectual property, the university can achieve much more by patenting the vaccine and they retain control. This prevents others from manufacturing and distributing without a licence.

Tom explains how:

"A condition which could be attached to that licence can be a fair distribution between rich and poor countries, at a fair price, or whatever ethical terms the university chooses to impose."

If the university can choose to license their patent to the world, royalty free, on enforceable ethical terms. In other words, they can open source the patent rights in the vaccine in a way that is less open to abuse by big players with deep pockets. This is a good open source model.

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Can IP rights protect the vulnerable?

There is also a practical point in that, unlike a big pharmaceutical company seeking to monopolize a drug worldwide, a university or company adopting an ethical open source licensing model would not have to spend hundreds of thousands of dollars patenting the vaccine everywhere in the world for the model to be effective.

It would also provide a means of dealing with President Trump's attempt to monopolize the vaccine.

Tom explains:

"Let us say the university patented it in the United States only. That single national patent could render President Trump's highest bid ineffective, because they could impose a licence condition that any company wishing to manufacture, import, use or sell the vaccine in the US would only be allowed to do so if they guaranteed a supply to other countries as well and on fair and reasonable terms.

They would not need to patent the vaccine in those other countries, because their leverage comes from their monopoly over the US market."

By targeting patent spend in only the handful of countries at the top, the playing field is levelled worldwide, and the only people who lose out are the lawyers – this option is ethical and thrifty!

'FRAND' as a model for collaboration

Another possible source of inspiration would be to look at the practices around standards-essential patents, where companies collaborate to agree technical standards.

Individual companies are still free to protect individual IP that they might be contributing to the standard, but there is a mutual agreement from the outset to license standard-essential patents on FRAND terms – that is, Fair, Reasonable and Non-Discriminatory.

https://www.eesc.europa.eu/sites/default/files/files/factsheet_-_standard_essential_patents_1.pdf.

This approach is also not without complications, as is evident from much of the recent FRAND litigation. However, as an existing model for collaboration that balances the individual interests of commercial entities with the pursuit of a wider goal, it could merit some consideration.

"It would also provide a means of dealing with President Trump's attempt to monopolize the vaccine"

Key things for philanthropists and grant-makers to consider

- Will you own any IP rights?
- Will you be able to choose how the results of your donations are exercised?

Key things for innovators to consider

- Are you giving away your IP?
- If so, what right of control are you retaining as inventor or author?
- Are you thinking of the implications for your business beyond this crisis?

How we can help

At Page White and Farrer, we have a team of patent, design and trade mark attorneys with expertise across all technologies and experience in working together when an innovation crosses different technical boundaries.

We can assist you with obtaining appropriate rights and advise you on the effect of any agreements that are made when donating or receiving funds.

Free IP consultation

We are providing initial advice pro bono.

For more information about our free IP clinic, please contact Virginia Driver or visit:

<https://www.pagewhite.com/free-consultation>

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