



Waiving intellectual property rights during the pandemic

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TRANSCRIPT

Hello. I'm Professor Jonathan Griffiths. COVID-19 brought intellectual property into the mainstream news. As is widely known, access to COVID vaccination hasn't been equal across the globe. According to the House of Commons Library, as of the 7th of January 2022, only 9% of people in low-income countries had received at least one vaccine dose compared to 77% in high-income states. Some have argued that this imbalance is exacerbated by intellectual property rights, which allow pharmaceutical companies to control the distribution of medicines, including vaccines.

Acting on this belief, in October 2020, the governments of South Africa and Brazil proposed that international intellectual property rules that require states maintain high levels of IP protection should be relaxed to facilitate the production and distribution of essential medicines during the pandemic. More specifically, these countries propose the obligations to protect intellectual property rights under the TRIPS Agreement, an intellectual property agreement between member states of the World Trade Organization, should be waived in relation to the subject matter of IP rights relating to the prevention, containment, or treatment of COVID-19, and this is the so-called TRIPS waiver proposal.

Over 100 other countries have supported the proposal, including the United States through President Joe Biden, who gave the proposal his backing in 2021. Other countries, while recognizing the inequality in the global distribution of COVID vaccines and medicines, have been less supportive, arguing that the waiver would actually be counterproductive.

The arguments in favour of a waiver were set out at a relatively early stage in the pandemic in an article by Thambisetty et al. They argued that moral and human rights claims favoured improved access to vaccination across the globe, suggesting that a waiver of TRIPS obligations would allow the generic manufacture of medicines and vaccines relating to COVID and would thus result in a wider delivery of drugs and downward pressure on prices where relevant, and a consequent reduction in the likelihood of the creation of new variants.

They also argued that provisions facilitating compulsory licenses that already existed under the TRIPS Agreement, and indeed existing voluntary measures on vaccine sharing between states and companies hadn't been effective, and that pharmaceutical companies had made adequate profits from their technology already, and indeed that there was some evidence of pandemic pricing that is of overpricing in some instances. In some instances, COVID medicines and all vaccines have been sold at lower prices in higher income countries than in lower income countries. Furthermore, the fact that public funding had often been used for research that resulted in the production of vaccines and other relevant medicines was pointed to as a reason in favour of the waiver.

The arguments against the waiver, on the other hand, were set out in a position statement of the Max Planck Institute for Innovation and Competition in May 2021. While recognizing again the unequal distribution of vaccine, the statement argued that the proposed TRIPS waiver wouldn't help to solve the problem because global inequality did not only arise as a consequence of IP rights, and there were lots of other causes of the situation. Rather, the position statement from the Max Planck Institute suggested that a greater role is played by absence of manufacturing capacity in some countries, distribution structures, know-how, and raw material, and a waiver would not address those issues.

It was also argued in the Max Planck statement that TRIPS already allows certain flexibilities. For example, it permits compulsory licensing during health emergencies, and that intellectual property rights have actually allowed collaboration between commercial partners and drugs companies, and that they've lessened the potential burden of IP themselves, the private parties that have invented these medicines and other pharmaceuticals. For example, AstraZeneca has sold its vaccine at cost and Moderna has agreed not to enforce certain intellectual property rights.

The statement suggests that a comprehensive waiver of IP rights relevant to the treatment and prevention of COVID-19 would actually damage incentives to work on improvements and further technical advances. For example, it would hinder the development of vaccines against future variants, it is argued. Finally, any waiver wouldn't be effective in requiring the disclosure of important know-how that is protected, as intellectual property students may well know, as trade secrets on the UK under breach of confidence law, and this know-how related to production and distribution processes was not covered by any waiver.

As it can be seen in this summary, there are strong arguments on both sides of the question. Countries also have competing economic and social interests, for example. Some countries have a more powerful pharmaceutical industry within their borders than others, for example. It may therefore have different economic and social pressures upon them when it comes to making policy in this area. In this situation, it's not surprising that the political debates on the COVID waiver proposal originally advanced by India and Brazil have proved difficult. They've taken place in the TRIPS Council which is responsible for determining policy relating to TRIPS. There's been a period of stalemate for some time.

However, what's interesting is that debates on the waiver finally seem to be about to bear fruit. In March 2022, a preliminary text of a more limited, compromised waiver proposal that covered only vaccines and not, for example, other COVID medicines or diagnostics, and was effective only in relation to patent rights and not, for example, to other IPR, like design rights or trade secrets, has finally been passed. The question now is, will such a limited waiver have the benefits originally envisaged by India and South Africa?