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Professor Duncan Matthews (QMIPRI, Queen Mary University of London)

Email: d.n.matthews@qmul.ac.uk

Professor Timo Minssen (CeBIL, University of Copenhagen)

Email: timo.minssen@jur.ku.dk

Raising the Bar: Lessons from the Covid-19 Pandemic for the European Patent System

Abstract

The Covid-19 pandemic has been characterised by unprecedented levels of innovation and collaboration in the life science sector, leading to breakthrough successes achieved at great speed, with the rapid rollout of new inventions capable of testing, treating, and vaccinating populations, particularly in the world's wealthiest nations. This success has been underpinned by robust patent systems that have enabled life science companies to claim ownership and to licence out their inventions, in most cases before patent applications for the relevant technologies have even been published or examined, let alone the patents granted. However, whereas life science companies have necessarily prioritised the inventive process, problems of manufacturing and supply, particularly for mRNA vaccines, persist. Existing TRIPS flexibilities, particularly compulsory licences, have not proved to be an effective mechanism capable of achieving a fairer and more just allocation of vaccines. In the light of the systematic failure of existing TRIPS safeguards, this paper argues that a key lesson from the Covid-19 response is that new pragmatic solutions are needed to ensure an equitable balance between patents and the public interest. Using the European patent system as an example, this paper will investigate how Covid-19 can act as a disrupter capable of stimulating a new, progressive approach to patent law reform, providing a model of good practice that can assist with the current Covid-19 response and planning for future pandemic preparedness. In the light of lessons learnt from the Covid-19 response, the paper examines the prospects for incremental improvements to the European patent system that could help to ensure greater transparency, address information deficiencies, better inform the public policy debate, and help to rebuild confidence that the patent system is fit for purpose in the post-pandemic world. The paper considers whether there are lessons for the European patent system that could be learnt from the Covid-19 pandemic in terms of (1) facilitating early publication of European patent applications under Article 93 EPC, (2) raising the bar for patent disclosure requirements under Article 83 EPC, and (3) revoking, where necessary, European patents in the public interest under Article 138 EPC.