Some Considerations on Intellectual Property, Innovation, Access and COVID-19

Executive Summary

The main challenge *at the present time* is not access to vaccines, treatments or cures for COVID-19, but the absence of any approved vaccines, treatments or cures to have access to. The policy focus of governments at this stage should therefore be on supporting science and innovation that will produce a vaccine, treatments or cures.

In respect of access, the first task is to identify the barriers to access. Many barriers to access exist, such as the lack of manufacturing capacity for vital medical supplies or equipment, impediments to the movement of such supplies and equipment across borders, import duties, lack of internal transportation and delivery mechanisms and lack of adequate health systems and infrastructure. These obstacles need to be addressed by governments. Intellectual property (IP) may also constitute a barrier to access, if innovation produces effective results and if countries are not able to obtain the innovation on appropriate and affordable terms. In this regard, provisions exist at the national and international levels to facilitate access where IP is a barrier. The application of these provisions should be targeted and time-bound, in other words, related specifically to demonstrated IP barriers to access in the course of the COVID-19 pandemic and bearing in mind that, without innovation, there will be nothing to have access to.

In the cultural and creative sector, exceptions and limitations exist in IP systems to facilitate access in certain circumstances and under certain conditions to books, publications and other creative content. Such creative content has a vital role to play in the distribution of data, information and knowledge that may be essential for innovation or for dealing with the adverse conditions of confinement and lock-down necessarily imposed in response to the COVID-19 crisis. The exercise of these flexibilities, in relation to the COVID-19 crisis, should again be targeted to demonstrated lack of access, and limited to the purpose of remedying any such lack of access for the duration of the crisis. It should be noted that many rights holders across the world have voluntarily taken steps, through innovative licensing arrangements and other measures, to provide free access to vast quantities of relevant content during the crisis.

Statement

1. In a global economy that is increasingly driven by technological advances, intellectual property (IP) plays an increasingly central role.

2. One of the main roles of IP is to provide an incentive framework in which innovation can be encouraged and provided with a safe passage through the many, often perilous, stages from invention to commercial product or service. Likewise, in the creative industries, IP is central to the business model that rewards, and facilitates relationships and transactions between, authors and composers, performers, publishers, music and audiovisual producers, broadcasters and distributors such as libraries or the various electronic distribution platforms.

3. Well-functioning IP systems seek to achieve a balance between the various competing interests that surround technological and business innovation and cultural creativity. In the area of technology, these interests include those of start-ups, research and development institutions, both public and private, universities and corporations, as well as the interests of financial backers, whether public or private, and of the general public, for whose ultimate benefit innovation takes place. In the area of the creative industries, the various interests include those of writers and journalists, composers of music, photographers, visual artists, musicians, actors, publishers, music and audiovisual producers, media, those authoring, developing and producing video games, broadcasters, libraries, archives, music and video platforms, and the consuming public.

4. The COVID-19 pandemic is causing widespread and profound suffering and misery across the world. The measures being undertaken by governments to fight the pandemic, to reduce suffering and to stop the further proliferation of the virus are also causing, as a necessary side effect, widespread economic disruption, which, in turn, is causing and will cause widespread suffering as businesses stall, global value chains cease to be able to function and employees and entrepreneurs and the many participants in the gig economy lose their livelihood.

5. The IP system recognizes at both the national and the international levels that emergencies and catastrophes may call for measures that may disrupt the normal functioning of the incentive framework upon which the IP system is based during the period of the emergency or catastrophe.

6. The policy measures that are available in international and national IP law to manage and to mitigate emergencies and catastrophes include compulsory licenses and licenses of right of patented technology embodied in vital medical supplies and medicines; and the use of exceptions in relation to cultural and educational works to ensure the availability of vital data, information and knowledge for the purposes of combatting and containing the virus, reducing the human suffering that it is causing and enabling disrupted institutions, such as schools and universities, to continue to carry out their missions in remote or virtual conditions. These measures, when deployed in a targeted and time-bound manner, may be useful or even vital when there is evidence of a need to which they may be addressed.

7. The assessment of the existence of lack of access and any policy measures are to be considered also in the light of the many voluntary actions being undertaken by organizations, corporations and other rights holders in the exercise of social responsibility during the COVID-19 crisis. In the technological field, these actions include innovative licensing arrangements, the publication of scientific data on a free-to-use basis, the publication of technical specifications of vital equipment, such as ventilators, to enable others to manufacture, and the renouncement of the enforcement of certain patents in certain jurisdictions. In the cultural sector, many rights holders have taken steps to make their works easily available to schools, universities, libraries, research institutions and the general public. These steps include innovative licensing arrangements, free access to research related to SARS-CoV-2, the virus strain that causes COVID-19, free access to newspaper and media articles about COVID-19, free access to many educational texts, online learning platforms and e-books and the free transmission of concerts, operas and other cultural works.

8. Policy measures and voluntary initiatives in relation to IP may complement measures being taken in other areas of economic policy that may affect technology and the products of technology, such as the requisitioning of manufacturing capacity, the use of public procurement or the injection of capital and the easing of credit for start-ups and small and medium enterprises to ensure the survival of much needed innovation during the economic recession that is setting in around the world.

9. The COVID-19 crisis is unfolding at an extremely rapid pace and information concerning it changes or becomes available at a similarly rapid speed. At the present time, it may be noted that there does not appear to be any evidence that IP is a barrier to access to vital medical preventive measures, such as vaccines, or to treatments or cures. The problem is, rather, that there is, as yet, no vaccine or scientifically proven and approved treatment or cures to have access to. Thus, at the present stage, the main policy challenge is to

encourage the innovation that may lead to a vaccine and treatments and cures, as well as innovation that assists in managing the crisis, such as the development of tracing applications based on data concerning the virus and its infection patterns or improvements in the manufacturing and performance of ventilators and other items of vital medical equipment. Focusing on access to non-existent vaccines, treatments or cures, rather than the encouragement of needed innovation, *at this stage*, may not only represent a misunderstanding of the sequencing of innovation and access, but also create a disincentive to investment in needed innovation.

10. As noted above, there are many other policy challenges in the management of the COVID-19 crisis that are not directly related to IP and innovation. It is important for governments first to identify the obstacles to the effective management of the crisis in the interests of health and human welfare and safety and to address these obstacles. As mentioned, these obstacles include the lack of relevant manufacturing capacity for needed medical equipment, such as ventilators and personal protective equipment; impediments to the movement or transportation of medical supplies and equipment; the lack of adequate medical facilities; the availability of health workers; lack of access to broadband; and the lack of adequate health systems and health infrastructure. None of these is a question of IP blocking access to vital medical vaccines, treatments or cures.

11. The innovation ecosystem is extremely complex and includes many different State and market actors and many different policies, programs and undertakings. The Global Innovation Index, for example, uses over 80 indicators to measure innovation capacity and performance, covering areas such as educational systems and institutions, research and development expenditure, scientific publications, IP applications, access to capital markets, regulatory frameworks and business and market sophistication. Given the drastic impact of the COVID-19 crisis on human health and welfare and on economic production and economic welfare, the world needs to deploy all available innovation strategies, incentives and systems in the pursuit of vaccines, treatments and cures. It would be a misreading of the complexity of innovation to focus on one single strategy or solution or to over-simplify the complexity of innovation systems. It is to be noted that, generally speaking, nearly 70% of research and development (R&D) is funded by the commercial sector, while around 30% is funded by the State. Around 70% of R&D is also performed by the commercial sector and 30% by the State. An effective strategy or approach to encouraging innovation must ensure that the right incentives are in place to encourage the major funders and performers of R&D to deliver results. IP is a central part of those incentives.

12. There are many measures that can be undertaken by governments and market actors to enhance innovation performance and, specifically, innovation outcomes that will contribute to the mitigation and, ultimately, the resolution of the COVID-19 crisis. Many persons, institutions and corporations across the world are working tirelessly to achieve such outcomes. Since the world came to know about SARS-Cov-2, there are more than 360 clinical trials are underway globally for potential treatments. Success will require the application of all available policy measures and business practices, including increased public research funding, scientific collaboration and the sharing of scientific results, public-private partnerships and the use of market incentives to attract investment in relevant innovation.

13. WIPO is available to any of its member States that so wish to provide advice and assistance on innovation policies, the targeted use of exceptions and limitations, the appropriate use of flexibilities to ensure access where there is evidence that IP is a barrier, and the modification of IP rules and regulations to mitigate the damage resulting from the COVID-19 crisis and its economic consequences. We believe that measures should be targeted to the crisis and to lack of access, where there is evidence that IP is the barrier, as opposed to other factors, such as lack of relevant manufacturing capacity or disrupted supply chains, which require different forms of action. We believe that the measures should also seek to alleviate suffering as a first priority, but bear in mind the needs of inventors, authors, creators, performers, start-ups and other economic agents in the cultural and technological communities which are distressed as a consequence of the necessary measures being taken to contain the virus. Their survival will be vital to the recovery and to the well being of the economy and society as we seek to come out of the crisis and to restore functioning economies and societies.

14. Measures that have been undertaken within WIPO to contribute to the innovation challenge include

- The establishment of a clearing-house or policy-tracker providing information on measures undertaken by IP offices to contribute to innovation by addressing distressed economic actors through the extension of deadlines and the establishment of grace periods for the payment of fees. In addition, the policy tracker will provide information on any policy measures available or enacted with respect to exceptions, limitations or compulsory licenses.

- The provision of a database, PATENTSCOPE, with over 80 million technology disclosures, multi-lingual search capabilities, an automatic translation system, and a specially developed COVID-19 search and retrieval facility dedicated to enhancing access to technological information disclosed in published patents with regard to inventions relating to the detection, prevention or treatment of COVID-19. This invaluable source of technological intelligence is widely used by hundreds of thousands of scientific and technological institutions and commercial enterprises around the world on a daily basis.

- The establishment of a partnership with scientific, medical and technical publishers, Access to Research and Development for Innovation (ARDI), which provides free online access to major scientific and technical journals to local not-for-profit institutions in least developed countries and access at a modest cost to institutions in middle income developing countries.

- The establishment of some 900 Technology and Innovation Support Centers worldwide to provide access to patent and scientific data and publications and ancillary facilities for researchers in least developed, developing and transition economies;

As the agency within the United Nations system responsible for IP services, policy, information and cooperation, WIPO is well equipped to address the issues arising for IP and innovation, with expertise and experience in the policy, economic and legal aspects of IP dating from its foundation in the 19th Century.

15. It is recognized that amongst the many effects of the COVID-19 crisis is the disruption of the normal processes by which policy is formulated at the international level. Those processes usually involve inclusive meetings of the full membership of the Organization, something that is practically impossible at this stage of the COVID-19 pandemic. This guidance is therefore issued under the responsibility of the Director General and cannot be considered to bind any Member State.