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Of Viruses and Licenses: Lessons from COVID-19 Vaccine Patent Debates

July 9, 2021 • By Mario Biagioli



FROM THE WHITE HOUSE to the World Trade Organization (WTO), heated debates have flared up around the compulsory licensing of COVID-19 vaccine technologies, producing a flurry of op-eds in all of the major US newspapers. Should patent protections, these op-eds ask, be temporarily relaxed to enable developing countries to produce and distribute cheaper shots to ensure timely global immunization? Can compulsory licenses actually achieve that goal, or would the efforts of developing countries be thwarted by other constraints, like limited production capacity, equipment, and skills? Conversely, would the granting of such licenses stymie medical innovation?

These exchanges provide a window onto today's patent politics and the chasm between the financial interests of the Global North and the health needs of the Global South. They also highlight the rhetorical dimensions of health policy discourse as it plays out in the media, not through scholarly articles and data sets but in compact op-eds. The constraints of the genre —

low word count, few references, no technical language — along with their venues' prestige enable these pieces to disseminate easily digestible and thus influential policy sound bites.

Taken together, some of the op-eds are creating a strikingly new discourse about the relationship between patents and medical innovation. Rather than being popularizations of policy wisdom, they function as policy discourse incubators — texts in which neoliberal assumptions, freed from the burden of evidence, become truths in less than 200 words.

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Central to this new narrative is the displacement of questions about the pros and cons of patents for medical innovation from the present into the future. Current intellectual property arrangements, we are told, are best left alone because attempts to relax them would hardly benefit those presently struggling to access vaccines while surely harming future medical innovation and care, which is what we should most aggressively be protecting. This present-to-future shift goes hand in hand with foregrounding the innovation ecosystem — described as complex and powerful, but also fragile — as patent policy's primary concern. The health we should really be concerned about, the new narrative suggests, is that of the innovation ecology itself because only such a patent-supported system can produce the health technologies that patients will need: “The system that built a coronavirus vaccine in record time relies on robust intellectual property protections,” and weakening that system by introducing compulsory licenses “would jeopardize *future* medical innovation, making us more vulnerable to *other* diseases.” [1]

This narrative is characterized by a discursive drift from results to potentials: from a traditional focus on patents as direct incentives for achieving *specific innovations* in the present to seeing them, instead, as providing the *conditions of possibility* for a vast pharmaceutical innovation ecology, which will, it is said, serve as our last line of defense against the many new emerging

and fast-spreading diseases associated with the global condition. We don't know what specific pharmaceutical innovation will keep us safe, but we do know that, once the need arises, we will need a solution, and fast. There thus seems to be a remarkable symbiosis between this new policy discourse and the nature of the current pandemic. The sudden and unexpected appearance of COVID-19, its rapid diffusion, and the narrow window for producing effective vaccines are in effect providing a paradigmatic example for the kind of health threat that only the thriving innovation ecosystem celebrated in these op-eds can handle. As they put it, “[t]he progress made over the last year is nothing short of incredible,” [2] and it takes something quite special to hand “the world a science-based miracle: multiple life-saving, pandemic-halting vaccines made in less than a year.” [3] Crucially, this unusually powerful innovation ecosystem is not presented as primarily driven by individual *entrepreneurs-inventors* with a nose for “disruptive” solutions but by an army of *investors* with plenty of capital to quickly carpet-bomb whatever new disease entity will come our way until “we’ve hunted the virus into extinction.”

[4] Property kills viruses.

Skeptics concerned with how the pandemic has sharpened the global health care disparity between the haves and have-nots argue that, on the contrary, this vast geopolitical problem can only be mitigated by weakening select pharmaceutical patents to allow for the local production of affordable vaccines where they are so desperately needed. For them, it is both the global scale of the emergency and the economic disparities it makes visible that justifies the compulsory licensing of vaccine patents. To be sure, those who oppose compulsory licensing don't deny that “[r]ich countries are inoculating millions of people, while poor countries wait in agony and anxiety.” [5] This evidence, however, is used to argue that the dire health needs of poorer Global South countries cannot be met with the sudden licensing of vaccine technology by the Global North.

The scarcity of vaccine doses in poor countries, they argue, is not an issue of medical innovation but a “negative externality” best addressed by other means. These op-eds define innovation as “the bringing to market” of effective, safe, and approved vaccines. Getting them into people’s arms is not the task of the innovation ecosystem. “Getting shots into arms” proves to be a rather skillful choice of words. Seeming unproblematically descriptive and straightforward, the phrase in fact conceals or at least distracts from the hugely complicated political process involved in getting COVID-19 vaccines to the Global South — tech-transfer, production, pricing, financing, distribution, storage, etc. Those calling for compulsory licenses see them as a means to “get shots into arms” on a global scale while those who oppose them insist on drawing a fundamental difference between what the innovation ecosystem does and the quite different arrangements needed for reaching arms. Creating this difference allows supporters of the patent-dependent pharmaceutical innovation ecosystem to have their cake and eat it too: they can simultaneously claim that property rights save lives (through patents) without having to confront the fact that the same financial interests may simultaneously end up costing lives in poorer countries.

This same distinction accounts for their frequently acknowledging that while innovation will benefit future patients, it will not benefit those who desperately need vaccines now. This is presented as a sad ecological fact, with those arguing against compulsory licensing stressing that we need to just accept it, and then negotiate as best as we can: “The trade-off between current distribution and future innovation is tough,” or “Make patents too strong and prices too high, and people are deprived of life-saving treatments; weaken them too much, and drive prices too low, and you lose the next generation of such treatments.” [6] The protection of the patients’ health is still presented as a much-sought-after “deliverable,” but we are asked to understand that the term “patients” should not be assumed to designate people living now, and that

“protection” can happen only if we respect and protect the ecology that will produce it, an ecology that sets the conceptual horizon for policy and political discussions.

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A comparison of three recent op-eds in *The Washington Post* highlights some of these discursive shifts. The first, by Georgetown Law scholars Madhavi Sunder and Matthew Kavanagh, makes the case for compulsory licensing. [7] The second is a rebuttal by John Stanford [8] — the executive director of Incubate, “a coalition of venture capital organizations representing the patient, corporate, and investment community [whose] primary aim is to educate the policymakers on the role of venture in bringing promising ideas to patients in need.” [9] The third is an opinion piece by *The Washington Post’s* own editorial board, which tries to sketch an intermediate position. [10]

Sunder and Kavanagh’s argument for compulsory licensing is specific and empirical in tone. It opens with a forecast that “without significant policy changes, poor countries may not be vaccinated against covid-19 until 2023 or 2024,” which, they argue, will be disastrous both for those countries and for the richer and vaccinated Global North that will then have to contend with new and more dangerous variants spreading from the unvaccinated South. And, they add, we need to learn from history so as not to repeat its mistakes: when compulsory licensing of HIV drugs to Global South generics producers was delayed by political concerns in the early 2000s, this resulted in five million preventable deaths. Also empirical is their argument for there being limited evidence that patents have played a crucial role in the remarkably quick development of COVID-19 vaccines (financed by more than 10 billion taxpayer dollars); that there are specific pharmaceutical companies in the Global South with the skills and capacity to meet the production challenges (especially of simpler viral vector vaccines like Johnson & Johnson, AstraZeneca, or Sputnik V); and that compulsory licensing would still provide patent

holders with appropriate royalties (as required by law). [11] Their point is that the job must and can be done, a claim they support with specific examples and evidence (which readers may accept or question) that illustrate the needs of specific people and the capabilities of specific actors, in specific places, now.

Stanford's rebuttal is written in a completely different discursive register. No countries are named, no figures quoted, and no dates given. Nor is any pharmaceutical company that might potentially be adversely affected by compulsory licensing named, nor are their presumed financial losses estimated or discussed. The difficult balance of interests that informs Sunder and Kavanaugh's call for compulsory licensing is unaddressed in Stanford's op-ed, which instead simply states that COVID-19 vaccines are "the product of a drug-development ecosystem that has taken shape over decades — and that ecosystem is built on IP protections." Consequently, "If [President Biden] follows [Kavanaugh and Sunder's] advice, he would cast serious doubt on the reliability of IP protections, making investors far less eager to risk their money developing *new* treatments and cures."

This rhetorical emphasis on the future is also shared by *The Washington Post's* editorial board. The editors agree with Stanford's point that "stripping away their intellectual property *now* could discourage *future* innovation," and that keeping patent protection firmly in place "will save lives *later*." [12] The difference is that, in their view, "later" is not a distant generic future but one or two years away. Their reason for compressing the timescale is that, unlike Stanford, the *Washington Post* editors can suggest a short-term fix: immediate lockdowns. People from the Global South don't need to die because of not having access to vaccines, nor do they need to demand compulsory licenses that will weaken the innovation ecology of the future. Political leaders can instead save their people by keeping them home long enough for the pharmaceutical companies and the leaders of rich countries to sort themselves out and then come to their

rescue with affordable vaccine doses. There's thus no need for the Global South to develop them itself; the Global North "will save lives later."

Compulsory licensing would fail to achieve that goal anyway, the editors argue; the lag time between patent licensing and vaccine delivery to the people in the Global South would take too long. And actually, it might never happen because, according to them, the Global South does not have the production and quality control skills to quickly complete the tech transfer process necessary for delivering vast quantities of safe shots. Shutdowns, the medicine of the poor, are the only way to avoid deaths, and they are the responsibility of the political leaders of the Global South, not of the pharmaceutical companies of the Global North. In short: No tech transfer, but responsibility transfer instead.

Compared to Stanford, the *Washington Post's* editors try to appear more empathetic to those calling for a "people's vaccine." [13] Still, the logic is virtually identical: don't touch patent protections unless you want to destabilize the medical innovation ecology, thereby risking the future. The stark, painful scenarios with which we are confronted in this pandemic are not, we are told, evidence of global health injustice caused by patent policy creating an unfair balance between the financial interests of patent holders and the medical needs of poorer nations. That unfairness has nothing to do with patents and everything to do with politicians: political leaders should be able to "make hard emergency decisions to stop viral transmission," but should leave patent protections alone because they "will save lives later."

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Traditionally, discussions about the pros and cons of patents have hinged on whether patent law and policy strike a just balance between the interests of the inventors and those of the public so as to achieve the "progress of science and useful arts," as the US Constitution puts it. It's

supposed to be a win-win situation. The temporary monopoly granted by the patent provides the inventor with sufficient financial incentive to invest their labor, funds, and ingenuity to pursue innovation that is hard to achieve but easy to copy. As for the public, it receives the knowledge of the invention (provided by the patent specification) and can then use the invention for free as soon as the patent expires, possibly producing more innovation. In those rare cases when the public interest is deemed clearly to surpass that of the inventor, the government can use the patent in the ways it sees fit to meet the public interest, while providing fair compensation to the patent holder. (Similar provisions are written into global trade agreements like the TRIPS.)

Notice that the balance that a patent seeks to strike concerns *specific inventions*. For instance, Moderna is granted a patent on some aspect of its mRNA vaccine technology as an incentive to develop and bring to market *that specific* technology written up in the patent application. The same applies to compulsory licenses. If it appears that terrorists are about to launch anthrax attacks in the United States, the government can, *in that context*, pressure Bayer (the producer of Ciprofloxacin, a standard treatment for anthrax) to keep in check the price of the antibiotic and produce enough of it to satisfy public health needs. If Bayer doesn't comply, then it risks seeing the government take over the production of Cipro. The rights and interests of the inventor and the public have to be evaluated symmetrically, *at one specific time in reference to a specific invention* so that an appropriate balance may be assessed.

Consequently, one would expect arguments against the compulsory licensing of COVID-19 patents to sound like this: "It is unjust to force Moderna to license its revolutionary and highly valuable vaccine patents from which the company has not yet been able to extract profits commensurate to the risks it took and the investments it made." Hypothetically, the government would weigh those financial arguments against its assessment of the public's need

for vaccines in order to determine whether to impose a compulsory license, and, if so, Moderna's compensation. But neither Stanford nor the other commentators ever claim that the financial interests of Pfizer, Moderna, or Johnson & Johnson should trump the health needs of the global public. Actually, an op-ed in *The Wall Street Journal* goes so far as to argue that "[t]he decision by the Biden administration to support a temporary waiver for Covid-19 vaccines might not end up costing the drug industry a dime," [14] while another in the same paper goes so far as to argue that the profit motive has nothing to do with opposing compulsory licenses: "J&J and AstraZeneca have agreed not to profit from Covid vaccines" and other companies oppose those licenses not out of deference for their bottom line but because the licenses would hamper their ability to invest in future innovation: "Companies won't continue to invest if they aren't allowed to make a profit." [15] Thanks to this clever rhetorical sleight of hand, the ecological argument against compulsory licensing can now be presented as a principled one: it is not about avoiding measurable *loss or revenue* by *specific companies* forced to license specific patents, but about the fact that the ecosystem should not be messed with because that would be dangerous *for everybody's health*. A *New York Times* op-ed by Thomas Cueni, the director general of the International Federation of Pharmaceutical Manufacturers and Associations, makes the point even more clear: "Companies can afford to license patents for free, or sell drugs at cost, precisely because they know that their intellectual property will be protected. That's not a flaw in the system; it's how the system ensures that pharmaceutical research will continue to be funded." [16] It's an issue of principle, not generosity. Pharmas will give drugs away for free if they see fit, but nobody should have the right to force them to license patents because that will harm future innovation against future diseases, which also happens to dovetail with future stock value.

Separating money as profit from money as investment allows these op-eds to argue that while "money as investment" is essential to medical innovation, "money as profit" is not (as shown by

the fact that pharmaceutical companies do not invoke their bottom lines when opposing compulsory licenses or when giving away drugs for free). They are fighting for future investments — the kind of “investment ecology” that saves future lives, and so they feel they can assert that: “[B]reaking vaccine patents is a bad precedent that would do no immediate good and substantial long-term harm,” [17] and it constitutes “a destructive precedent that will reduce pharmaceutical investment.” [18]

The conspicuous absence of arguments against compulsory licensing stemming from direct losses of revenue may, of course, also be informed by the media’s coverage of the pandemic with its countless images of suffering patients, bereaved relatives, and coffins stacked on top of each other awaiting burial. Not wanting to come across as uncaring or callous, the pharmaceutical industry and those speaking for it may hesitate to represent themselves as victimized by poor countries calling for compulsory licenses. And so it happens that images of a horrific all-too-present global health crisis that could be read as pitting the health needs of the poor against the financial interests of the rich are being radically but seamlessly replaced by narratives that cast the pharmaceutical industry as a solution, not a cause, of the suffering captured by those images. Pharmaceutical companies, in other words, oppose compulsory licenses not because they want to maximize their profits but because they don’t want a horrible crisis like the present one to repeat itself, harming future patients. As the editorial board of *The Washington Post* put it, compulsory licensing “would represent an abrupt change in the rules of the game under which the pharma companies succeeded in developing remarkably effective vaccines in record time.” [19] But not to worry: these scary future crises of the innovation ecology won’t come to pass, nor will a repeat of the present health tragedy happen, if we leave patents alone.

This same temporal displacement applies to patients and not just patents. The needs of the presently unvaccinated public are replaced by the alleged harms that may affect future generations of patients. If the current holders of vaccine patents were forced to license them in an irrational attempt to vaccinate everybody, then this would assuredly signal the undependable nature of IP rights. Venture capital would be scared away, which in turn would starve future medical innovation, rendering it unable to meet the needs of future publics: “The pandemic has demonstrated why the world can’t afford to take continued pharmaceutical innovation for granted. Now, more than ever, the system that enabled the rapid response to the coronavirus needs to be preserved and even strengthened.” Or, as *The Wall Street Journal* puts it, “If the Biden White House lets it happen, the wait for vaccines and treatments will be longer during the rest of this pandemic *and the next one.*” [20] In other words, people may die now because they cannot get shots in their arms, but more people may die in the future because of the perturbation that compulsory licenses would have caused to the innovation ecology. This also seems to imply that, in the absence of unnecessary demands for compulsory licenses, those who may be dying unvaccinated now will reduce the chance of other people dying in the future, either in this pandemic or in the next one. During early phases of the pandemic, an analogous logic framed discussions, especially in Sweden and the United Kingdom, about reaching herd immunity by letting the disease run its course rather than by aggressively focusing on vaccination or shutdowns. In this case though, it is not just a natural disease that is being allowed to run its course, but a socially constructed innovation ecology.

Conversely, today’s unvaccinated masses from the Global South or those who ask for compulsory licenses on their behalf are implicitly cast as a “special interest” group whose demands are “egotistic” (or “ideological”) in the sense that they do not understand or seem to care that their requests, if met, would harm the future health of many more people — the whole “world” as one op-ed puts it. [21] The conflict between poor publics and patent holders

is thus recast as being between the needs of actual patients in the present and generic patients in the future, of which there will be many more, facing ever new diseases. Unsurprisingly, these imaginary future patients are seen as having the same interests as today's investors and vaccine patent holders. Both constituencies are portrayed as benefiting from a strong innovation ecology based on strong IP rights, a system that is being threatened by those asking for compulsory licenses on behalf of the presently unvaccinated publics of the Global South. In other words, the discursive shift from the present to the future allows for the representation of patent holders and investors as victims of the inopportune demands of today's poor, with imaginary future unspecific patients mobilized as their stand-ins.

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What is being waged through these short op-eds are not just debates about specific compulsory licenses for specific COVID-19 vaccine patents. Rather, we are seeing an attempt to change the discourse of patent policy by making it look like “principle” is at stake. Maintaining the integrity of the pharmaceutical innovation ecosystem is stated as an unnegotiable *sine qua non*. But such a principle is nowhere to be found in patent law, which, as it happens, especially in the US is distinctly pragmatic in both logic and practice. Patents are not god-given rights but statutorily-constructed grants. They are tools that Congress has introduced to maximize innovation, with inventors' economic incentives being weighed and adjusted against the costs that those incentives have on the dissemination of knowledge. In a word, they are about balance, not principle.

These op-eds tell a very different story. They choose not to focus on patents needing to strike the most effective compromise between protected and free knowledge (the first being the temporary incentive and the latter being the ultimate goal), but to emphasize rather the role of private investment over any other factor. The new policy goal — cast as a principle — is not so

much to provide inventors with incentives to innovate but to make sure that investors are maximally financially incentivized to incentivize inventors. This is probably what the editorial board of *The Wall Street Journal* has in mind when it declares that “[t]he fabulous vaccine success should be a moment to celebrate U.S. property rights and innovation.” [22]

This shift in focus from the inventor’s inspiration and perspiration to the investor’s capital as the core of the innovation process is enabled by the specific nature of the COVID-19 pandemic. Represented as the result of an all-out war on a virus — a war where the stakes are life or death rather than, say, the development of a brighter computer screen — the development and patenting of vaccines do not in fact seem to have much to do with balance but rather with the sheer quantity of private investments and the weapon systems they could quickly make available. Except that more than 12 billion of those investments were taxpayers’ monies. [23]

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- [1] Thomas Cueni, “The Risk of Suspending Vaccine Patent Rules,” *The New York Times*, December 12, 2020. (emphasis mine).
- [2] “Letter to President Biden from 31 PhRMA Board Members,” March 5, 2021, at: <https://phrma.org/Public-Communication/Letter-to-President-Biden-from-31-PhRMA-Board-Members>.
- [3] Megan McArdle, “Waving Intellectual Property Rights is Popular Policy. It Won’t Get More Vaccines Into Arms,” *The Washington Post*, May 7, 2021.
- [4] Megan McArdle, “Waving Intellectual Property Rights is Popular Policy. It Won’t Get More Vaccines Into Arms,” *The Washington Post*, May 7, 2021.
- [5] Editorial Board, “A Patent-Free ‘People’s Vaccine’ Is Not the Best Way to Help Poor Countries,” *The Washington Post*, May 3, 2021.
- [6] Megan McArdle, “Waving Intellectual Property Rights is Popular Policy. It Won’t Get More Vaccines Into Arms,” *The Washington Post*, May 7, 2021.
- [7] Matthew Kavanagh and Madhavi Sunder, “Poor Countries May Not Be Vaccinated Until 2024. Here’s How to Prevent That,” *The Washington Post*, March 10, 2021.
- [8] John Stanford, “Intellectual Property Rights are Not Delaying Coronavirus Vaccines,” *The Washington Post*, March 15, 2021.
- [9] <https://www.incubatecoalition.org/>.

[10] Editorial Board, “A Patent-Free ‘People’s Vaccine’ Is Not the Best Way to Help Poor Countries,” *The Washington Post*, May 3, 2021.

[11] The patent holder is entitled to “the recovery of his reasonable and entire compensation,” 28 U.S.C. § 1498.

[12] My emphases.

[13] Editorial Board, “A Patent-Free ‘People’s Vaccine’ Is Not the Best Way to Help Poor Countries,” *The Washington Post*, May 3, 2021.

[14] Charley Grant, “Patent Waivers Deserve a Warning,” *The Wall Street Journal*, May 14, 2021.

[15] Editorial Board, “Watch Out for a Vaccine Patent Heist,” *The Wall Street Journal*, March 28, 2021.

[16] Thomas Cueni, “The Risk of Suspending Vaccine Patent Rules,” *The New York Times*, December 12, 2020.

[17] Luciana Borio and Scott Gottlieb, “Patent Busting Won’t Help Vaccinate the World Faster,” *The Wall Street Journal*, May 10, 2021.

[18] “Biden’s Vaccine IP Debacle; His Patent Heist Is A Blow to the Covid Fight and U.S. Biotech,” *The Wall Street Journal*, May 6, 2021.

[19] Editorial Board, “Biden Should Start Planning Now to Help the Rest of the World Get Vaccinated,” *The Washington Post*, March 22, 2021.

[20] Editorial Board, “Watch Out for a Vaccine Patent Heist”, *The Wall Street Journal*, March 28, 2021.

[21] “I think, frankly, that the world would suffer as a result,” Senator Chris Coons, quoted in “Sen. Coons vs. the Covid Vaccine Thieves,” *The Wall Street Journal*, April 23, 2021.

[22] Editorial Board, “Watch Out for a Vaccine Patent Heist,” *The Wall Street Journal*, March 28, 2021.

[23] Walden Bello, “The West Must Waive Drug Patents,” *The New York Times*, May 4, 2021.

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