



What is the COVID-19 Vaccine IP Waiver?

I have seen several articles in the news relating to the patent waivers for the COVID-19 vaccines. For example, one recent headline states “3 Million People Have Died of COVID Since Rich Nations Began Obstructing Vaccine Patent Waiver.” CNN stated that “US President Joe Biden’s administration said Wednesday it would support the easing of patent rules on COVID-19 vaccines, potentially expanding global supplies.” Apparently, these waivers were initially proposed by South Africa and India in May.

But is a patent waiver really what is being sought by South Africa and India? Potentially, but it is unlikely that patent protection is really what is keeping South Africa and India from getting the vaccine. It is more likely that the trade secrets required to manufacture the vaccines is what is keeping South Africa and India from getting the vaccine. Accordingly, some of the media coverage regarding vaccine waiver fails to recognize the most important IP rights involved in the COVID-19 vaccines.

Why is it unlikely that patent rights are keeping South Africa and India from getting the vaccine? It is because South Africa and India are sovereign nations that grant patent rights themselves. It is the South African government, not the United States Government, that decides whether to grant or enforce patent rights in South Africa. If they chose to, South Africa and India could deny any party patent rights for the COVID-19 vaccine in their countries. It is true that this could get South Africa and India into trouble with respect to some of their trade treaties, but the fallout from that seems insignificant compared to the ability to get the vaccine quickly. Additionally, the vaccine has only been recently developed, and it is unlikely that there is a patent covering any of the vaccines in South Africa or India. Normally, it takes at least 3-4 years, or potentially much longer, between the filing of a patent application in the US and the grant of a patent application in India or South Africa. I personally did a patent search in the United States Patent and Trademark Office’s database and did not find an issued US patent covering any of the COVID-19 vaccines (although it is possible that I missed it). Thus, it is my belief that a patent waiver is not really what

claimed invention. For a COVID-19 vaccine, this is not true. A person skilled in the art would need to be able to make and use the invention without undue experimentation. The information for a patent application is kept secret for 18 months, or until the patent is granted, whichever occurs first. Eighteen months after the patent is granted and COVID-19 was just becoming a pandemic. The patent application for the vaccine had not yet been filed. The vaccine had not yet been invented. More likely, the first patent application was likely filed about a year or so ago. Thus, it may be several months before the vaccine patent applications are granted. It may be that South Africa and India are seeking to get patent applications before they become publicly available.

Additionally, the COVID-19 vaccines are “biologics” which are a protein, an amino acid, or some other large molecule. These are notoriously difficult to copy, even with the information in a patent application. The little details around making the vaccine, which patent law would not require in a patent application, “can take months or years to work out. The details, also called “know how,” will be valuable trade secrets long after the patent applications or patents are published. It is likely that the “intellectual property rights” sought by South Africa and India include this know how.

As a patent attorney, I find headlines like “3 Million People Have Died of COVID Since Rich Nations Began Obstructing Vaccine Patent Waiver” troubling because they cast patent protection in a negative light. It is highly unlikely that patent rights have anything to do with keeping South Africa and India from getting the vaccine in South Africa or India at this point in time. The media should be saying that South Africa and India are seeking to get the WTO to compel Pfizer, Moderna, and other vaccine makers to disclose how to make the vaccine, and potentially provide the vaccine at no cost. Whether that is better or worse is a matter of opinion. There is no denying that what is being sought is very valuable. What is being reported by most media sources. I hope to