

Intellectual Property Rights (IPRs)

and Public-Private Partnerships Realising development objectives

Key Message: Dealing with the Achilles heel of Public-Private Partnerships (PPPs) will make them even stronger mechanisms for addressing global challenges such as food security and access to medicine for people in developing countries.

- PPPs can create powerful mechanisms for addressing social problems by leveraging the strengths of different partners to improve the public sector's ability to fulfil its mandate.
- Cooperation in PPPs, however, can become strained, particularly when intellectual property rights (IPRs) are involved.

By way of 17 specific recommendations, this policy brief advises PPPs, especially in the agricultural and medical sectors, to do the following:

- A Improve the management of IP among PPP partners
- B Strengthen the role of technology transfer offices (TTOs) within institutions and organisations
- C Secure freedom to operate (FTO) for humanitarian use
- D Focus on the common interest and responsibility of public and private partners

Public-Private Partnerships (PPPs)

The public sector's difficulty in providing efficient and effective services for the public good is attributable to a lack of resources and competencies, and inadequate infrastructure and human capacity. This failure is what gave rise to Public-Private Partnership (PPPs). The creation of PPPs – governmental agencies, academic institutions, the private industry and not-for-profit organisations – is being increasingly encouraged as part of a comprehensive socio-economic development framework. They are proving to be effective tools for addressing social problems because they leverage the strengths of different partners to improve the public sector's ability to fulfil its mandate. On the one hand, private sector partners can benefit the public by providing resources, technical and commercial expertise or outreach.

And on the other hand, cooperation with the public sector can reduce the investment risk associated with developing new genetic plant breeding technologies and materials, and drugs and vaccines for poor people.

Cooperation in PPPs, however, can become strained, particularly when intellectual property rights (IPRs) are involved. To begin with, PPPs can be very complex. Many PPPs, in particular the public partners, have difficulty handling the complexity of IP and, as a result, overlook the challenges presented by the IP landscape they operate in. Second, there is an inherent tension between the private sector's profit-making interests and the public sector's development goals.

RECOMMENDATIONS FOR DUTCH RESEARCH INSTITUTES AND RESEARCH FUNDING AGENCIES

A Improve the management of IP among PPP partners

PPPs, which may include governmental institutions and agencies, academic institutions, private industry and not-for-profit organizations, can be very complex to establish and manage. Many PPPs appear to have difficulty managing the complexity of the partners' IP in an equitable manner. PPPs that are seeking to minimise internal conflict about IP and ensure clarity in the handling of IP-related issues could consider the following practical recommendations.

Recommendations

- 1 All parties involved should be authorised signatories of all partnership agreements at all times and should ensure the correctness of all legal documents.
- 2 When a researcher has more than one employer, there needs to be a clear way to identify which employer will own and manage any given IP that this researcher develops.
- 3 The terminology used in defining terms and conditions should have the same scope and meaning, thereby making it consistent throughout all partnership agreements.
- 4 Partnership agreements should always include details on how research or laboratory notebooks are to be maintained, stored and shared to help determine the timing of inventions and identify potential inventors, which is critical to determining IP ownership.

B Strengthen the role of technology transfer offices

The role TTOs play in research institutions in both developed and developing countries has been identified as crucial to IP management. In particular, they facilitate the transfer of information from public and private partners to commercial partners within developing countries.

Recommendations

- 5 Invest in developing the capacity, legal expertise and in particular negotiation skills at institutional TTOs, both in developed and developing countries.
- 6 Increase knowledge of IP among TTOs, calling special attention to instruments that allow access to technology for development purposes, such as humanitarian use licenses (see box on last page), open access and a broad interpretation of research exemptions for medical and agricultural use.
- 7 Provide adequate funding and alleviate the pressure on TTOs to become self-sufficient. This will allow them to focus on broader social objectives rather than seeing IP rights primarily as institutional income generators.

FTO analysis

An FTO analysis can assess the limitations of existing patents and demonstrate the need for creating new IP that works around the inventions being claimed in the patents. These solutions may be based on the patent's geographical territory, its scope or its duration. IP owners make strategic decisions about the countries in which they will seek patent protection. This decision is largely influenced by where the main profitable markets for the technology are located. Often, it is not deemed worthwhile to patent in countries where the

commercialisation of a technology is unlikely to be profitable. If IP is patented elsewhere, then it becomes public domain information in countries where it is not patented. These countries usually do not need permission or a license from the patent owner to commercialise the product. Whether it is worth conducting FTO analyses in Africa, where levels of patenting are low, remains to be seen. However, this issue should not be neglected, as an increasing number of patents are being filed in South Africa, for example.

About the research project

What is the role of IPRs in the realisation of the Millennium Development Goals (MDGs) in developing countries, especially in Africa? This was the question that guided a pilot research project funded by the Netherlands Ministry of Foreign Affairs and NWO-WOTRO Science for Global Development. The project started in 2009 and was conducted by Tilburg University, Wageningen University and Research Centre, the Amsterdam Institute for Global Health and Development (University of Amsterdam) and the PharmAccess International Foundation, in collaboration with select African research institutes in Uganda (ACODE) and South Africa (Cape Town University). Coordinated by Willem van Genugten and Anna Meijknecht from Tilburg University, the pilot project focused on three main research topics. The first topic dealt with the development

and history of IPR law in general and identified the obstacles of IPR policies and laws standing in the way of development. The second research topic outlined the relationship between IPRs, agriculture and food security in sub-Saharan Africa (MDG 1c). The third research topic investigated the relationship between IPRs, the medical sector and the struggle against HIV/Aids, malaria and other diseases (MDG 6). The project report, entitled *Harnessing Intellectual Property Rights for Development Objectives: the Double Role of IPRs in the Context of Facilitating MDGs Nos. 1 and 6* is available online at <http://www.wolfpublishers.com/harnessingipr/>.

For more information about the project, please contact Anna Meijknecht (frw.eip.secretariaat@uvt.nl)

C Secure freedom to operate (FTO) for humanitarian use

The IP landscape in medical diagnostics, plant biotechnology and plant breeding is highly technical and complex. PPPs seeking research funding for technology development often overlook the need for – or do not have – resources to conduct a proper analysis of the FTO, which would map out an appropriate research path. To be able to exploit IP for development one needs FTO, so that new IP, technologies and materials will not infringe on other people's valid intellectual property rights. If the latter were to happen, then IP rights would need to be obtained to ensure FTO, which may not always be obtainable. So it is essential for technology development and transfer that PPPs develop a thorough understanding of the FTO at the very outset. At the same time, PPPs should realise that FTO searches are costly and time consuming, and that the costs of carrying out an FTO search will often exceed the economic benefit of licenses for humanitarian use (see box previous page).

Recommendations

- 8 Analyse and secure the freedom to operate at an early stage of a humanitarian and/or development-oriented research project.
- 9 Use and link up with worldwide initiatives, enabling quick and inexpensive patent searches. See, for instance, www.patentlens.net.
- 10 Urge the improvement of free patent search databases at the national and regional levels in Africa.

D Focus on the common interest and responsibility of public and private partners

PPP partners often have conflicting interests, which means there will not always be an equitable and fair balance between these interests. Currently, the IPR policies and practices of strong private partners can severely affect pro-development innovation projects. For instance, patents can be used in a strategic way to block competitors in a market or research area, rather than to commercialize the very invention that is being protected. The opposite is true too: many private partners hesitate using humanitarian licenses in a competitive product on the global market because they entail the risk of using a protected technology that is royalty-free for development purposes. Public research organizations fear that demanding the inclusion of such licenses may reduce their negotiating power with regard to co-funding, license fees or other conditions in research agreements. Moreover, pro-development PPP agreements often only cover research agreements and not the subsequent outreach and commercialisation of the invention.

It might be difficult to completely reconcile the public partner's development interests with the private partner's profit-making interest. However, global challenges – such as food security and health – have made it increasingly evident that there is a common interest and responsibility. By using the right legal tools for a specific technology and project partnership, humanitarian licences can mitigate risks and reduce transaction costs. This is an essential first step towards encouraging technology transfer to developing countries.

Recommendations

- 11 Include pro-development IP provisions in the partnership agreements.
- 12 Increase the knowledge among researchers and IP managers about IP instruments that secure the availability of protected technologies for development objectives, and create incentives for their application in developing territories.
- 13 Convince private research partners that humanitarian use licenses need not affect opportunities for commercial exploitation in developed territories.
- 14 Develop and use standardized non-exclusive licensing models to be used by all PPP partners.
- 15 Public partners should strengthen the capacity and in particular the negotiation skills of their technology transfer officers (see also recommendation B).
- 16 Develop a clear and transparent IP policy within public institutions in order to encourage good IP management and build a relationship of mutual trust with private research partners and companies. Increase awareness among researchers and IP managers of the potential impact IP could have on achieving international development objectives.
- 17 Make sure that pro-development PPP agreements are not limited to research agreements, but provide sufficient and equitable rights for pro-development outreach from the very start of the PPP.

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Humanitarian use licensing

Humanitarian use licensing, also called equitable access licensing, refers to all kinds of contract clauses and licensing forms that secure the possibility for inventors and technology suppliers to share their IP with people in need. Normally, they set the conditions for access to innovations on a royalty-free basis or at a reduced cost in specific countries or for specific groups or applications, for example in the form of field of use or territory licenses. These licenses can therefore ensure that knowledge, technologies and products remain available for humanitarian use, while maintaining the incentive function of exclusive IP rights.

Colophon

This policy brief is based on the research report *Harnessing Intellectual Property Rights for Development Objectives: The Double Role of IPRs in the Context of Facilitating MDGs Nos. 1 and 6*.
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