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Intellectual Property 101

This tool gives an overview of IP terminology and considerations in relation to MSF innovation. It is intended to be used at the start of projects in order to help frame later discussions.

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MSF SWEDEN INNOVATION UNIT

01 How to handle IP

Intellectual property (IP) can pose a great challenge to those working in innovation. The development of new products based on specific organisational or personal expertise will often include the creation or use of specialised designs or knowledge. Such knowledge is then often called IP. Broadly speaking, IP can be divided into foreground and background IP.

Background IP can roughly be defined as the intellectual expertise a party brings to the project based on their previous experience, while foreground IP will usually be the new creations/inventions to come out of the project.

It seems fair to say that within the NGO sector, IP and its related debates and questions are deemed

as mysterious and impossibly complex. While a cautious IP approach can be warranted in some projects to avoid certain implications (for example, legal fees), we would argue that excessive caution driven by a fear of the unknown often results in decisions that seem less than optimal in hindsight. As with most issues, decision-making will be made immeasurably simpler for MSFers when equipped with a basic understanding of the various terms and methods involved in IP.

In this document, we lay out some of the general terms and ideas related to IP, and suggest some extra points for consideration. It is important to note at this early stage that IP decisions should be made on a case-by-case basis.

3 Routes to handle IP

Patenting

Patenting grants the exclusive right to prevent third parties from commercially exploiting - making, using, offering for sale, selling or importing the invention, which is protected by patent for a limited period of time (generally 20 years). In return for this monopoly, the patent owner is required to disclose the technical information on the invention to allow other parties to pursue continued innovation and research based on it.

Defensive publication

When an invention is publicly disclosed it immediately enters into the state of the art. Consequently, no one else will be able to patent the same invention as the novelty requirement will be impeded.

Defensive publications can be used if a technology does not meet the patentability criteria or is not worth the price of a patent.

Secrecy

Instead of publishing or patenting, innovators can also keep their technology secret. This is mainly for those inventions that do not qualify for patent protection or have a very short life-cycle. Confidentiality is very suitable for new production processes, the end products of which give no clues about the innovation process and thus cannot be easily reverse-engineered.

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Glossary

■ License

An agreement to refrain from asserting a legal right. An intellectual property owner has exclusive rights to do certain things, but can license others to do what otherwise would be infringement of those exclusive rights. A license is usually governed by the choice of laws applicable to contracts and not to the law of the jurisdiction that conferred the IP rights at issue. It is important to specify the exclusionary rights the license is granted under.

■ Registered design

Design patents and registered designs are a form of IP protection that falls between patents and copyrights. These rights essentially protect the aesthetic aspects of product design rather than functional technical aspects.

■ Field of use

Owners of intellectual property can grant licenses limiting the use that the licensee can make of the IP to particular purposes or fields of use; for example, licensing an antibiotic for use in veterinary purposes, but not for humans. The term is most commonly used in patent licensing, although it can arise in trademarks.

■ Backward innovation

Developing a less sophisticated, de-featured version of a product for a less sophisticated market or to sell at a lower price.

■ Open source

Software for which the source code is made available to users so that it can be modified and customized. Open source software is usually subject to a simple “public license” or a disclaimer of intellectual property rights. One definition of open source understands it as disclosing source code –that would normally be kept confidential– to the public; open source software should not therefore be regarded as automatically subject to a public license or free.

■ Background intellectual property

A term usually used and defined in development agreements, especially referring to know-how, trade secrets, and business secret licenses, which describes the intellectual property the parties to the agreement owned or possessed prior to the agreement.

■ Resources available

There is a wealth of online resources available regarding IP. However, understanding how to relate them fully to the humanitarian sector can be confusing. Knowing whom to contact within MSF can help this, and we would suggest the innovation community is a good place to start. The IPP toolbox aims to expand to include more detailed advice on IP issues as the project continues.

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Considerations

■ Potential conflicts of interest

When taking decisions on IP, it is very important to consider how a particular strategy could affect the optics from donors' perspectives. It can look bad if MSF buys products in which it has stakes, as can owning a product that is used by an actor outside of MSF whose ethical outlook does not align with our own.

■ Enforcement

An aspect of IP worth considering is enforceability. Multinational corporations can spend millions on patent searches and the initial process of gaining IP, only to find out that there are existing designs which void an invention. MSF has minimal resources available to try to achieve similar ends. Furthermore, the contexts where MSF works are some of the hardest places to enforce patents taken out in Europe or the US. Finally, the question of whether it would be ethically justifiable to spend donor funds pursuing those that had violated an innovation project's IP is one that should be discussed rationally.

■ Pro-bono support

Dealing with IP can be very expensive due to the legal expertise often required to write the contracts that manage it. We strongly suggest the MSF sections look to implement pro-bono deals with larger law firms in their territories in order to save themselves such expenditure. Such deals can often be framed in the same way that the corporate fundraising team will offer a specific badge to a donor, in exchange for funds. In this instance, it would be prudent to ask the fundraising team to advise on what could be offered in exchange for a fixed number of hours throughout the year (perhaps starting with 200–300), and to offer this to the firm. To avoid confusion early on, it's important to lay out MSF's complex structure in advance, as well as our non-profit-driven motives when entering into innovation projects. The IPP tool '01: A briefing for partners' can help here, but really clarifying what we want out of a project internally is a key requirement to not waste resources.

■ Partners and IP

When entering projects with commercial or academic actors, it's important to understand that IP can be a significant motivating factor for them. Potentially producing a solution — which includes MSF's expertise — which is patentable can significantly improve MSF's leverage if it is prepared to offer it to a partner. However, this will not always be the right thing to do. In some instances, making a solution Open Source might seem more appropriate, and in fact the service provision element can be valuable for the company. Likewise, being first to market or Pre-Purchase Orders (PPOs) can have significant potential. Weigh up these options carefully before making a decision — there are also implications for short- vs. long-term savings for each approach. These savings could be in the form of fixed-price agreements for the humanitarian sector (see the FiND or DNDi approach) or even potentially in the form of a good-will donation to MSF, should the product be a success. Laying out what MSF wants out of a project is a significant influencing factor when selecting a partner also — we would argue that it is always better to clearly lay out your terms for engaging with a partner early on in order to avoid any disagreements further down the line. While this approach may not mean that everyone is willing to work with us, those that do are more likely to stay the duration.

■ Innovation vs. medical R&D implications

It's important to note here that there might be significantly different ethical considerations to take into account when dealing with innovation projects' IP decision making vs. medical R&D projects within MSF. Beyond the usually clear difference in scale (medical R&D projects will often stretch in to the tens of millions, whereas innovation projects are usually limited to a few hundred thousand), other actors' market motives can force MSF's hand. For medical trials, the Access Campaign has repeatedly had to deal with this through the pricing models used by the pharmaceutical industry. In many cases, responding by legally pursuing ownership of IP is MSF's strategy to protect our beneficiaries from unfairly high prices. This vividly illustrates the potential differences of approach vs. a smaller innovation project where the aim is to incentivise a commercial partner to ensure ongoing production of a project via offering IP.