

Open COVID Pledge: Part 2 Making and Using the Pledge

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Part 1 of this article introduced the Open COVID Pledge, and explained that intellectual property rights owners making the pledge can choose between several standard Open COVID Licenses. Owners also have the option of modifying one of the standard licenses or developing their own unique license, provided the license is compatible with the Open COVID Pledge. Part 2 provides an overview of the available standard licenses and discusses some considerations for those making a pledge and those using intellectual property under a pledge.

The Open COVID Pledge initiative offers three standard licenses, largely containing identical terms:

- a world-wide, non-exclusive, royalty-free license to use the licensor's intellectual property rights for the sole purpose of ending the COVID‑19 Pandemic and minimizing the impact of the disease, including the diagnosis, prevention, containment, and treatment of the COVID-19 Pandemic;
- the licensed rights are provided "as-is" without any express or implied warranty;
- the license is suspended if the licensee threatens or initiates suit against the licensor for intellectual property infringement arising from activity relating to the COVID-19 Pandemic (so-called "defensive suspension"); and
- the licensor agrees to refrain from asserting exclusivity under any regulatory framework (e.g., the FDA exclusivity period).

The standard licenses diverge in two aspects: scope and time. Two of the licenses cover both patents and copyrights, while one of the licenses is limited to patents. Two are more open-ended, terminating one-year after the World Health Organization officially declares the COVID-19 Pandemic has ended, while the other terminates on the earlier of such date or January 1, 2023.

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Notably, by continuing the license for one year *after* the COVID-19 Pandemic has ended, these Open COVID Licenses encourage licensors to make the pledge while also encouraging licensees to provide licensed goods and services. Licensors are encouraged by the prospect of negotiating with the licensee during the one-year period to convert the free license into a paid commercial license. Licensees know that they will have time to either negotiate a commercial license or wind-down the licensed activities in an orderly manner, rather than finding their license suddenly cut-off.

Intellectual property owners considering the pledge will want to examine their patent and copyright portfolios to determine whether to throw open the doors or hold back rights in certain categories or technology areas. Some owners may be comfortable granting a license of unknown length, while others will want assurance that the license will terminate by at least a certain date. Some may want to modify one of the standard licenses and others may want to create their own license, as Intel did.

Companies who wish to produce goods and services under the license will want to ensure they carefully review the terms of the applicable license as posted by the licensee and not assume the terms of the standard licenses apply. Licensors can not only select between the standard licenses but can also modify those terms or even develop their own licenses. Licensees should also keep in mind that the production and sale of a product or service may involve multiple patents and copyrights, some of which may be available for use under an Open COVID License while other patents or copyrights are not.

In conclusion, the Open COVID Pledge is a salutary undertaking, though not without complications. Seek advice from experienced counsel before making the pledge or using the pledge. For more information, please contact Connie Lindman or any attorney in Frost Brown Todd's Intellectual Property Practice Group.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a Coronavirus Response Team. Our attorneys are on hand to answer your questions and provide guidance on

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how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

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