SHODH SAMAGAM

ISSN : 2581-6918 (Online), 2582-1792 (PRINT)

Intellectual Property Rights and Sustainable Development

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ORIGINAL ARTICLE

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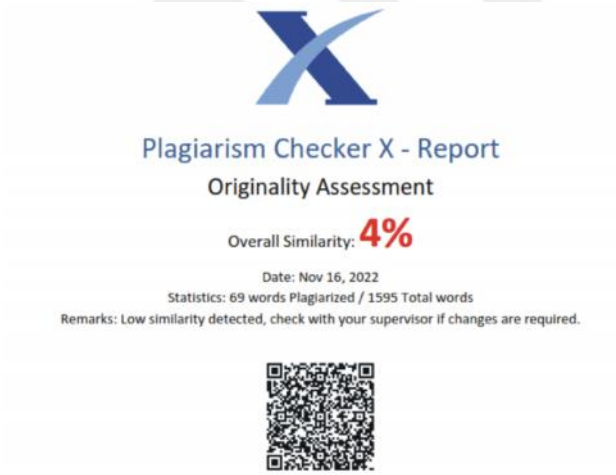
Received on : 16/11/2022
Revised on : -----
Accepted on : 23/11/2022
Plagiarism : 04% on 16/10/2022



ABSTRACT

As sustainable development becomes a strategy for companies to gain competitive advantage, the question of how to profit from sustainable development becomes central. Surprisingly, little research exists on the appropriation strategies of companies engaged in sustainable development and the few studies are poorly connected. This research paper focuses on intellectual property rights (IPRs), the formal tools available to companies to protect their intangible assets. I link the three main types of IPRs to common archetypes of sustainable development and I discuss the motives why companies might file patents, trademarks or design rights or instead choose not to. I conclude by discussing how IPRs might act as incentives, barriers or be simply neglected by sustainable developers.

KEY WORDS

Intellectual Property Rights, Sustainability, Development.

INTRODUCTION

First, the use of Intellectual Property Rights itself may conflict with core values that are considered legitimate in relation to sustainability. The profit logic behind appropriation strategies can clash with the moral and social value logic that is expected to come with embracing sustainability. Sustainable developers can use alternative solutions that are almost independent of IPR, for example by using open innovation solutions (Ahn et al., 2019). Alternatively, sustainable developers may approach intellectual property rights with very specific motives. For example, they might care about to claim ownership with the idea of facilitating access through licensing,

or with a view to control the responsible use of their innovation (Eppinger et al., 2019).

Second, sustainable development usually involves a commitment to sustainability throughout the value chain (Jolink and Niesten, 2015). Such engagement will encourage sustainable developers to interact intensively with all types of partners, especially suppliers but also retailers to align sustainability promises along the value chain. Some executives may even choose for keeping the entire value chain in-house to claim full control (see Tesla's case), but for most companies, the reliance upon other organizations will be a critical element of their sustainable business model. Intellectual Property Rights as ownership rights can act as a coordination mechanism but must be consistent with other more informal and trust-based governance mechanisms.

Taken together, these two specific questions might prompt rather original solutions to be observed for companies looking at sustainable development, and rather unique set of motives for relying or not on intellectual property rights. For example, a number of areas of sustainable technology are experiencing the phenomenon of 'patents commons', collection of patents that can be freely shared by key players in the field (Hall and Helmers, 2013). Building legitimacy for new technologies and creating momentum by enabling their timely use can be more relevant to sustainable development than encapsulating ideas with proprietary rights. However, these initiatives have not been wholly successful in promoting knowledge transfer, suggesting that individual firms' motives and their strategies need to be better understood (Contreras et al., 2018).

This paper aims to discuss the relationship between sustainable development and intellectual property rights, starting with the motives that sustainable developers might have either to leverage or not to leverage intellectual property rights in their strategies. This discussion is particularly relevant in light of the current academic and policy debate about the social impact of the IPR system. Critical observers have raised serious concerns about whether intellectual property rights really serve society to facilitate innovation (Heller, 2010). There is mounting evidence of strategic practices of IPR filing in which large companies erect barriers to entry for new entrants and block sustainable progress in many ways (Bessen et al., 2008; Shiva, 2001). At the same time, intellectual property offices around the world are trying to link their work to the Sustainable Development Goals (see for example https://www.wipo.int/sdgs/en/story.html). It remains unclear which (legal or strategic) sustainable developers need to deal with IPR in their particular way, for example by filing for IPRs but then sharing or making it available in their own ways.

Archetypes of Sustainable Development

"Sustainable development" is a very broad term associated with many different definitions. The sustainability element of the label usually relates to the three dimensions of environmental, social and economic sustainability, with a focus in the literature primarily on the former but increasingly on the latter (Calabrese et al, 2018). To identify the innovation element of the definition, I will consider three broad categories of sustainable development: product, process and service innovation. Sustainable product innovation takes the form of tangible products that can be adopted by consumers to move towards sustainable consumption or by companies to implement sustainable production. Examples are LED lighting and solar panels for the environmental and economic dimensions, but also products such as Dutch Fair Phone, which aims to contribute to the environmental and social dimensions of sustainability (https://www.fairphone.com/en/story/).

Innovation in sustainable processes refers to changes in production and organizational processes towards making these processes more sustainable. An example is the shift towards increasing energy efficiency, but also rethinking the value chain as in circular economy initiatives, including recycling and upcycling. Process innovation is usually developed and implemented within the same organization, but sustainable process innovation is more often associated with systems and multiple organizations linked in the value chain.

Finally, innovations in sustainable services tend to be more intangible, as they are new solutions provided to meet specific user needs. Often these service innovations are part of a new business model that challenges the existing way for companies to perform certain functions, called a sustainable business model (Bocken et

al., 2014). A clear example is mobility service and the shift to a shared rather than proprietary model. Other retail examples include new solutions for more sustainable logistics. In the Netherlands the BewustBezorgd's initiative (loosely translated as "responsibly delivered") combines the online shopping system of a major online retailer with a menu where buyers can consider different shipping options after being informed of their respective environmental impacts (https:/ /bewustbezorgd.thuiswinkel.org/).

IPRs Applicable to Sustainable Development

I focus here on the three most used formal IPRs: Patents, Trademarks and Design Rights.

A patent "describes an invention and creates a legal situation in which a patented invention can only be exploited (produced, used, sold, imported) with the consent of the patentee" (WIPO, 2004, p.17). Invention is defined as a solution to a specific technical problem. Patents are filed after meeting stringent requirements that are often difficult to prove: the invention must relate to patentable material, it must be industrially applicable, it must be new and non-obvious, and the information needed to make the invention must be disclosed in the patent description. It should be possible for someone skilled in the field to make and apply a patented invention, which means that issuing a patent is essentially releasing usable knowledge. Of course, actual use is controlled by the patenting company, but inventors may choose to license the technology for use by others for a number of reasons. This does not mean that all patents are actually used, due to the fact that most patents remain unused, which is a widely discussed topic in the public debate about the patent system (Jaffe and Lerner, 2011).

A trademark is "any mark that individualizes the goods of a company and distinguishes them from those of its competitors" (WIPO, 2004, p. 54). The main reason behind trademark system is to facilitate the functioning of the market and avoid market failures due to information asymmetry between buyers and sellers. Thus, trademarks function as information signal intended to reduce transaction costs in the market. On the seller's side, trademarks serve to identify the origin of products and services and thus enable differentiation strategies. They are a way for companies to demonstrate the quality of their offerings and as such are also key to build a reputational asset. Firms have a strong incentive to maintain the informational value of their brand, so they will take steps to strengthen the signal (through complimentary advertisement and marketing investment) and protect it from dilution (through product recall campaigns in the event of negative publicity, but also legal trademark enforcement against competing trademarks). On the buyer's side, trademarks are expected to reduce search costs by enabling better differentiation between competing offerings in the marketplace. They also offer weapons of retaliation against low-quality sellers. Trademarks are used in all areas of business because they can be used in all markets, from products to services. They will be part of the company's innovative market strategy.

Design rights "protect the original ornamental and non-functional characteristics of industrial objects or products resulting from design activities" (WIPO, 2004). In the United States, design rights are protected through a patent system with so-called designs patents, which differ from the utility patents, while design rights in Europe are administered by the same office that handles trademark registration, the EUIPO. Design registration requires proof of novelty in the sense of originality.

CONCLUSION

There seems to be sufficient reason to believe that intellectual property rights can ideally support sustainable development by providing rights that enable innovators to achieve multiple goals. Profit making is one end, but social impact can also in principle be reconciled with a well-designed IPR strategy, for example through selective licensing. Yet, we see many examples where intellectual property rights seem to be more of a barrier than an incentive.

While the literature appears to focus either on positive or negative impacts, little attention is paid to the consideration that most companies committed to sustainable development ignore intellectual property rights

and that may be fine unless they engage in litigation, which they do not. In fact, we lack systematic evidence on the actual practices of using IPR by sustainable developers and their desirability from a community perspective.

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