UiO : Department of Private Law
University of Oslo

Intellectual Property and Sustainable Markets

Professor Ole-Andreas Rognstad
Professor Inger B. Ørstavik

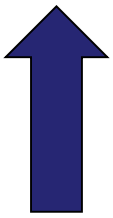
Background of the book project

- A joint initiative taken by the research groups Market Innovation Competition, Companies Markets Sustainability and Natural Resources at the University of Oslo to host a workshop on IP and Sustainability
- The workshop held on 15 June 2018 in Oslo
- Decided to publish a book based on the contributions
- Book proposal was submitted to Edward Elgar Publishing in the summer of 2018
- After the publisher's review, decided to (re-)name the book 'Intellectual Property and Sustainable Markets
- Most contributors to the workshop remained in the project, but some replacements
- The book published in July 2021

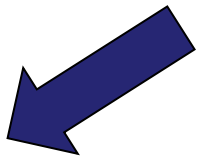
Sustainability

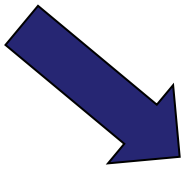
- Brundtland report 1987: «Development that meets the needs of the present without compromising hte ability of future generations to meet their own needs»
- Griggs et al 2013: «development that meets the needs of the present while safeguarding Earth's life-support system, on which the welfare of current and future generations depends»


SUSTAINABLE DEVELOPMENT GOALS
1 NO POVERTY
2 ZERO HUNGER
3 GOOD HEALTH AND WELL-BEING
4 QUALITY EDUCATION
5 GENDER EQUALITY
6 CLEAN WATER AND SANITATION
7 AFFORDABLE AND CLEAN ENERGY
8 DECENT WORK AND ECONOMIC GROWTH
9 INDUSTRY, INNOVATION AND INFRASTRUCTURE
10 REDUCED INEQUALITIES
11 SUSTAINABLE CITIES AND COMMUNITIES
12 RESPONSIBLE CONSUMPTION AND PRODUCTION
13 CLIMATE ACTION
14 LIFE BELOW WATER
15 LIFE ON LAND
16 PEACE, JUSTICE AND STRONG INSTITUTIONS
17 PARTNERSHIPS FOR THE GOALS
SUSTAINABLE DEVELOPMENT GOALS



Innovation
But no IPRs?





The concept: IP in context

- IPRs provide incentives for private investment in innovation and creation
- IPRs are «technology neutral»
- International regulatory regime
  - Resilient to radical changes
  - Resilient to technological and societal changes
- The role of IPRs in tackling the UN sustainable development goals: a multifaceted and diverse topic
- IPRs are market based

Perspectives for the IP-sustainability interface

- The traditional divide between IP/innovation policy and sustainability as environmental or development policy
- Market dynamics form a factual context for IPRs
- The role of IPRs is affected by societal trends and social innovation

Contributors and Contributions

- Professors Ole-Andreas Rognstad and Inger B. Ørstavik, University of Oslo, Norway
  - Editors
  - Chapter 1 (both): Introduction
  - Chapter 6 (Rognstad): Revisiting the concept of ‘Trade Mark Piracy’ in light of sustainable development goals: a discussion of the Norwegian ‘Apple Case’
  - Chapter 8 (Ørstavik): Intellectual property rights, technology development and market dynamics in the renewable energy sector
- Professor Hans Morten Haugen, VID Specialized University, Norway
  - Chapter 2: Why are intellectual property hardly visible in the United Nations Sustainable Development Goals

Contributors and Contributions

- Professor Peter K. Yu, Texas A&M University, United States
  - Chapter 3: Realigning TRIPS-plus negotiations with UN Sustainable Development Goals,
- Professor Daniel J. Gervais, Vanderbilt University, United States
  - Chapter 4: Disrupted creativity: cultural sustainability in peril
- Professor Taina Pihlajarinne, University of Helsinki, Finland
  - Chapter 5: Repairing and re-using from an exclusive rights perspective: towards sustainable lifespan as part of a new normal?

Contributors and Contributions

- Ass. Professor Janice Denoncourt, Nottingham Trent University, United Kingdom
  - Chapter 7: A modern role for intellectual property rights in sustainable finance, prudential banking and capital adequacy regulation
- Professors Joel B. Eisen and Kristen Jacobsen Osenga, University of Richmond, United States
  - Chapter 9: Smart Grid standards development and patent protection in the United States: striking the balance between dramatic overhaul of the electric grid and encouragement of innovation
- Ass. Professor Catherine Banet, University of Oslo, Norway
  - Chapter 10: The treatment of intellectual property rights in open innovation models: new business models for the energy transition

Three main themes and two additional topics

- Theme 1: The north/south divide and the IP challenges to the FN's SDGs (Chapters 2 and 3)
- Theme 2: IP in the circular economy (Chapters 5 and 6)
- Theme 3: IP and energy markets (Chapters 8-10)
- + Cultural sustainability (Chapter 4) and IP and sustainable financing (Chapter 7)

Chapters 2 and 3 (Haugen and Yu)

- Deal with the challenges that international IP represent to the SDGs, in particular the North/South divide and the conflict between developed and developing countries' interests

- Haugen's main point: Although this has been discussed in various international fora and is of utmost importance to the SDGs (eg. access to medicines), IP issues were more or less absent in the 2015 'Transforming Our world resolution', which introduced the 17 SDGs
  - Reasons: (i) Complexity of IP; (ii) Compartmentalisation of IP issues in the UN; (iii) strength of NGO campaigns (explains the one reference)
  - The one reference: Using flexibilities to protect public health as allowed for in TRIPS

Chapter 3 (Yu)

- Discusses the various TRIPS plus initiatives that have been taken in order to strengthen IPRs (eg. ACTA, TPP, CPTPP, RCEP) and how they challenge various SDGs

- Proposes six strategies to help developing countries realign their IP negotiations with the SDGs

  - (i) Enhance TRIPS and TRIPS plus flexibilities; (ii) Advance pro-development proposals; (iii) Facilitate mutual supportiveness with pro-development international agreements; (iv) Ensure a transparent process; (v) Introduce complementary measures; (vi) Enable selective adoptation

Chapter 4 (Gervais)

- Raises the issue of cultual sustainability and how to achieve it
- The SDGs contain several references to culture
  - Eg. Promotion of creativity and innovation under Goal 8 Decent work and economic growth (target 8.3); increase access to information and communications technology and strive to provide universal and affordable access to the Internet under Goal 9 Industries, Innovation and Infrastructure (target 9C)
- The concept of cultural sustainability has been criticized, but the critique is not considered insurmountable

Chapter 4 (Gervais)

- Emphasized that cultural sustainability is about the empowerment to develop and propagate values in a given society, including via art, literature and information

- Two vehicles that can contribute to human progress are discussed
  - (i) the creation, dissemination and a availability of Socially Responsible News (SRN)
  - (ii) literary and artistic creations

- The continued role of those two vehicles is in serious peril, in that their very existence depends on factors wrongly taken for granted
  - the existence of professional creators, including journalists
  - organizations that support them such as publishers and news organizations, on the other

- Reform proposals

Chapter 5 and 6 (Pihlajarinne and Rognstad)

- Both contributions: Discusses the role of IP in the circular economy from the perspective of environmental sustainability

- Pihlajarinne: Two examples of the negative effects of a strong property rights approach on the circular economy
  - (i) Repairing activities and patents. The current idea of the 'normal lifespan' of a product
  - (ii) Upcycling activites and trade mark rights as potential hinder for such activites

- Rognstad: Scrutinizes the Norwegian Supreme Court decision of June 2020 (HR-2020-1142-A) regarding importation of iphones screens from Hong Kong to Norway

Chapter 5 (Pihlajarinne)

- Points out the distinction between ‘weak’ and ‘strong’ sustainability (*Roome* 2012)
  - ‘weak sustainability’: brings environmental concerns into existing structures and systems
  - ‘strong sustainability’: aims at integrating business into environmental system sby challenging existing structures

- Legal bases for both in the EU
  - Article 3(3) TFEU
  - Article 11 TFEU
  - Article 37 Charter of Fundamental Rights

Chapter 5 (Pihlajarinne)

- Circular economy
  - Aims to reduce waste annd optimize the use of resources
  - Opposed to ‘take, make, waste’ it is based on ‘reuse, repair, recycling, etc-’

- How can the aims of IPRs be reconciled with sustainability concerns and aims of the circular economy

Chapter 5 (Pihlajarinne)

- Example 1: The notion of ‘normal’ lifespan inherent in the principle of exhaustion of patent rights
  - A purchaser is allowed to use a product within its intended use and repair within the ‘normal lifespan’ of the product
  - Circular economy perspective: The distinction between (permitted) repair and (unpermitted) reconstruction is problematic

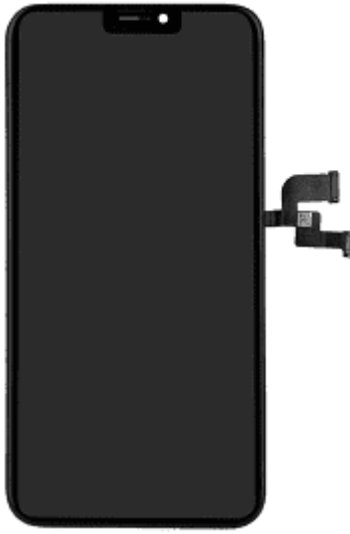
- Example 2: Upcycling og trade mark products
  - Is current trade mark law flexible enough to deal with the problem? ‘Grey area’ of TM law

Chapter 5 (Pihlajarinne)

- Remedies:
  - Recasting the ‘lifespan idea’ from what the lifespan of a product *is* to what it *should be*
  - Where the ultimate focus of trade mark use is not on the badge of origin type of purpose and the use is considered feasible from a sustainable point of view, it should be out of the scope of trade mark rights

- In other words:
  - Structural bias should primarily be corrected by formulating exclusive rights so that sustainable lifespan defines the scope of the rights

Chapter 6 (Rognstad)



- In the same vein as Pihlajarinne's article the Norwegian 'Apple case' is discussed in order to challenge traditional trade mark thinking
- The Supreme Court Court rejected the relevance of sustainability arguments where iPhone screens were imported from Hong Kong to Norway for repair purposes
  - screens were originally provided with Apple logos affixed without the consent of Apple Inc. but were de-branded with a removable ink marker prior to import into Norway.

Chapter 6 (Rognstad)

- My opinion: the Court's reasoning is based on postulates rather than any real assessment of harm to the trade mark, making the rejection of the relevance of sustainability arguments off target

- The chapter points out that there is potential inherent in the doctrine of trade mark functions to take sustainability concerns into consideration, provided that more solid evidence is required for finding that these functions are harmed.

Chapter 7 (Denoncourt)

- IPRs as objects of security, their efficiency to secure investments in innovation
- Finance regulation: The Basel Accords framework for banks to calculate capital adequacy ratios
- Tangible property is becoming less attractive as security as it is vulnerable to climate change induced damage
- Green finance and blue finance depend on innovation
- Argues for a revision of the regulations for registered IPRs

Chapter 8 (Ørstavik)

- Solar PV industry: How policy measures can be more effective if aligned with the rationales of patent law
  - Incentive to innovate
- Patent law is technology neutral and does not favor inventions in low carbon energy technologies over high carbon technologies.
- Example 1: Feed-in-tariffs reduce the risks of investment in innovation relating to demand

Chapter 8 (Ørstavik) ctd.

- Example 2: Production of solar panels is highly dependent on coal power
  - To incentivize choices supporting the energy transition in upstream markets, measures increasing the reward in the end market are less effective
  - Measures must attach consequences to choices in upstream market, such as carbon footprint requirements.
- Example 3: Green-tech policy initiatives and the incentive to commercialize
  - WIPO Green database
  - EPO CCMT tagging

Chapter 9 (Eisenberg/Osenga)

- Standardization of technology has been necessary to enable the overhaul of the electric grid in the US – the Smart Grid
- Interoperability in many aspects: various grid owners, many energy sources, two-way operation (prosumers), etc.
- Fast-track process to develop and approve interoperability standards in cooperation with Standards Developing Organizations
- Patenting and standard setting are complementary

Chapter 9 (Eisenberg/Osenga) ctd.

- SDOs require FRAND commitments, disclosure of SEPs and licensing.
- State involvement in the approval procedure
- Better compliance with FRAND obligations?

Chapter 10 (Banet)

- Open Innovation (OI) models in the energy ecosystem
- Long tradition of R&D cooperation
- OI within a formalized and structured approach to IP
  - Inventorship, exploitation of co-owned IP
- Increasing dynamics around ideas
- Open up for access to results to bring innovation to society