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IP Question - What is the role of intellectual property in sustainability?

International Rapporteur
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- What legal instruments (e.g. IP, technology transfer agreements, open source, other, a combination thereof) or other measures have been taken/proposed to incentivise innovation, in what fields, and how do they work? Which of these appear to be the most efficient or promising at a local (national/regional) level?

Background

Sustainability is an important subject with ill-defined boundaries. In modern usage, the term ‘sustainability’ is typically understood to refer to at least *environmental* sustainability, and sometimes *economic* and *social* sustainability as well: see [Wikipedia](#). There is a degree of tension between the first of these three aspects and the latter two.

Environmental sustainability covers various domains. These include at least:

- Energy production.
- Water utilization and treatment.
- Farming or agricultural practices.
- Pollutant chemicals (including medicines).
- Mining and other resource extraction.
- Materials usage.
- Travel and tourism.
- Business practices (e.g. logistics).

Economic sustainability includes considerations such as the efficiency of economic productivity measured by the level of resources required for a certain output. Social sustainability is not well defined but includes considerations such as poverty reduction and progress in social justice.

The various IP rights that are well recognized internationally, for example in the TRIPS agreement, may interact with sustainability concepts in different ways.

For example, patents – being concerned with technological innovation – may be directly relevant to technology with a bearing on environmental or certain aspects of economic sustainability. Patents may be granted for technology for producing energy without (or with reduced) production of carbon dioxide, for recyclable plastics, for lower-fuel consumption aeroplane engines, etc.

Trade secrets (which for this purpose we may regard as an intellectual property right) likewise may protect technological innovations but may also protect information of a more commercial nature that may be relevant to sustainability – efficient business practices, or practices affecting social sustainability.

Trademarks, being concerned with consumer recognition of goods or services and businesses, have a different role. Consumer behaviour, in choosing to buy goods or services that are (or are perceived to be) sustainable, or from businesses that operate in a sustainable way, may be influenced by trademarks. Other rights

available under some legal systems, such as unfair competition, that are not strictly IP rights also serve similar purposes.

What is clear, however, is that IP rights are intrinsically neutral on the issue of sustainability: technological innovation is often performed (and patented) in unsustainable technologies, trademarks protect strong brand recognition for businesses operating unsustainability, etc.

Equally it is clear that whether something is “sustainable” is often a complex question. Considering some examples:

- new technology may require new raw materials that have an adverse impact (for example, lithium mining for batteries, or palm oil to replace butter in western foods).
- consideration of the overall replacement costs (in energy and materials rather than purely in economic terms) for improved technology is often ignored yet by the same token more sustainable technology solutions cannot be achieved by a quantum leap: most innovation is incremental in nature;
- successful innovation may create new sustainability challenges (for example, innovation in consumer products produces larger numbers of electronic products consuming power but may also make each such product more energy efficient).

International agreements

The international agreements to be taken into consideration when answering the questions include *inter alia* the following main instruments:

- Paris Convention for the Protection of Industrial Property, 1883, last amended 28 September 1979;
- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), adopted in Marrakesh on 15 April 1994.

The wording of the question

The question, as adopted by the LIDC, reads as follows:

“What is the role of intellectual property in sustainability?”

The following subtext was also provided:

“What legal instruments (e.g. IP, technology transfer agreements, open source, other, a combination thereof) or other measures have been taken/proposed to incentivise innovation, in what fields, and how do they work? Which of these appear to be the most efficient or promising at a local (national/regional) level?”

I understand, therefore, that there are certain key points to be addressed, which I have endeavored to explore in greater detail through the questions set out in the next section:

- A. Does IP have a role in sustainability?
- B. If so, what is its role? If not, should it have a role?
- C. Is IP achieving its role in sustainability?
- D. If not, how could IP systems be modified to remedy this?

Questions to National Rapporteurs

In addressing the issues raised by the LIDC, the national rapporteurs are kindly invited to answer the following questions. National rapporteurs should not feel constrained to answer only these questions if they have additional comments on the role of IP in sustainability which they wish to communicate to the international group.

National rapporteurs should consider not only those rights that fall within the strict definition of intellectual property (such as patents, trademarks and the like) but other rights in their national systems that regulate commercial behaviour related to innovation and imitation – confidential information, unfair competition and passing off, comparative advertising regimes, etc.

A. Whether IP has a role in sustainability

1. Do you consider that IP currently has a role in sustainability? Please consider and explain:

- a. What you see the role to be, including by reference to different roles for different IP rights, if applicable.
- b. Whether the role is positive (enhancing or increasing sustainability) or negative (detracting from or decreasing sustainability).
- c. Whether the role differs depending on how an IP right is used by its owner or controller (e.g. exclusive licensor).

B. The role IP should play in sustainability

- 2. Irrespective of your answer to question 1, do you consider IP should have a role in sustainability?**
- 3. What should its role be, including by reference to roles for different IP rights, if applicable?**
- 4. Should the role be directed to supporting sustainable innovation or refraining from supporting unsustainable innovation? Or both?**

5. How should this role be pursued? Please consider:
- a. The *acquisition* of IP, including the examination procedures and fees for registered IP and any incentivization schemes, such as tax incentives, for carrying out innovation in your country that leads to IP rights;
 - b. The *conditions* for IP rights to subsist, such as patentability conditions;
 - c. The *types* of IP rights available – should further rights be created to support sustainability?
 - d. The *enforcement* of IP rights against third parties – does enforcement affect sustainability because of its effect on market competition and innovation? Does this depend on which rights are enforced and how, and or whether it is viable for those rights to be licensed instead?

C. The success of IP in its role for sustainability

6. Do you consider that the current IP rights in your country support the role you have identified in section B? Please explain and discuss.
7. Do the IP registering authorities in your country provide information about registered IP rights that enable assessment of how IP is supporting sustainability in your country?
8. Do you consider the procedures and fees of the IP right granting authorities in your country support the role you have identified in section B? Please explain and discuss.
9. Do you consider that IP incentivization schemes offer in your country support the role you have identified in section B? Please explain and discuss.
10. Do you consider that the IP enforcement systems and/or authorities in your country support the role you have identified in section B? Please explain and discuss?

D. Improving the success of IP's role in sustainability

11. Having regard to your answers in section C, how could the IP system in your country be improved in order to better deliver IP rights or authorities that would fulfill the role for IP in sustainability that you have identified in section B?
12. Could this be achieved at a national level or would it required international cooperation in order to be effective?
13. Do you consider that any of the existing international treaties regulating IP rights and their grant require modification in order to improve the success of IP in its role for sustainability? If so, what modifications do you consider are required and why?

E. Conclusion

14. Please add any additional comments you have about the role of IP in sustainability based on matters arising in your country or internationally.

Please send your National Reports to the International Rapporteur, the Secretariat of the League, the General Rapporteur and his Deputy and the Chairman of Question B no later than **15 July 2022**.