SVENSKT NÄRINGSLIV
SWEDISH ENTERPRISE

Globalisation in the knowledge economy

IP AS BOTH AN ENABLER AND A CHALLENGE
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Innehåll

Preface

In the highly globalised economy of today, many companies are part of complex global value chains. To some companies this is evident and has been the case for decades, while others might not give it much thought. In any case, the parts of the value chains representing most of the value creation are linked to the knowledge-based assets. The world today is a global, knowledge-based economy.

Some companies do consider themselves as being born global. Their perception and business model is to be active not just in one country or one part of the world, they see their market as truly global.

But at the same time as globalisation is a part of all international business life, the rules on intellectual property and other knowledge-based assets are however linked to different countries and regions.

In a time where competitiveness competes with protectionism and an increasing focus on security in the public debate, an open and trade dependent country like Sweden can be in a vulnerable position. But it is utmost a true European challenge – it is evident that the EU needs to act in order to stay competitive in the knowledge economy of today.

This report, written by Christina Wainikka, policy expert intellectual property at the Confederation of Swedish Enterprise, points out the necessary policy decisions for today and tomorrow.

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1. A new world

1.1 Globalisation and Intellectual Property

Few doubt that we live in a knowledge economy. Even fewer doubt that we live in a global economy. This has consequences when it comes to intellectual property.

This means that challenges that used to be acknowledged are still there, but in new ways. For example, companies are almost always part of global value chains. At the same time when intellectual property rights are becoming increasingly important, these rights are linked to a principle of territoriality. Even for those not working with intellectual property, it becomes evident there must be challenges linked to this development.

The aim of this report is to highlight some of these challenges and to also come with proposals for how these challenges could be addressed.

1.2 The most important asset in the knowledge economy

When the Confederation of Swedish Enterprise was to put a title for its strategy on intellectual property, the title was self-given:

"The most important asset in the knowledge economy".

If we consider ourselves living in a knowledge economy, the knowledge-based assets are the way to capitalise of knowledge.

For some, a report like this could be expected to focus on the notion "intellectual property" rather than on the notion "knowledge-based assets". The notion of knowledge-based asset is however chosen for several reasons. First of all, intellectual property is limited to intellectual property rights that create an exclusive right. This is true for patent, trademarks and copyright.[1] Today, not only these types of exclusive rights are important to companies. Also business secrets, know-how, data are important. These are not intellectual property rights, but they are intangible (knowledge-based) assets.

1 In this report it has been chosen to write trademark rather than trade mark. Trademark is what is used by WIPO and trade mark is what is used by EUIPO.

The second reason for talking about knowledge-based assets is a perspective on why they are important. If the focus lies on the "property" side, the focus is rather just to create monopolies. If the focus lies on the "asset" side, the business perspective of creating value is emphasised.

There are also other facts that can be seen as evidence of the importance of knowledge-based assets. When the EU-Commission presented their Patent Package in April 2023 they for example emphasised the importance patents play in trade. Companies holding patents stand for 90 % of EU:s trade to third countries and 76 % of trade within the single market.[2]

The growing importance of knowledge-based assets in trade can be easily understood when looking at the so called "Smile Curve". In a time where almost all companies are involved in global value chains it is interesting to see where in the value chain most value is created. This is described in part 2 of this report.

1.3 The international character of the knowledge-based assets

Intellectual property has for more than a century had a very international dimension. Already in 1883 came the Paris Convention on industrial rights and in 1886 the Berne Convention on copyright.

The development of intellectual property is to a large extent linked to the development of free competition and more open markets. This was a wave of reform that took Europe by storm in the middle of the 19th century. At first, these freedoms lead to immense innovation. However, after this first period of innovation, lack of possibilities to protect investments done in innovation lead to a period of stagnation. Why invest in innovation when you can copy others instead?

This is one important reason for developing rules on intellectual property. It also very early became evident that there was a need for harmonised rules on this topic. If the rules are to be very different between different countries, trade would be made difficult. To facilitate trade and to grant the same type of protections to inventors and other creators, international conventions were developed.

These international conventions have served us well. Today, the Paris Convention has 179 countries as signatories whereas the Berne Convention has 181 countries as signatories. These both conventions are administered by World Intellectual Property Organization, that is a Union Nation body.

Even if it is undisputable that intellectual property has had an international dimension since the start, it is not as easy as that all rules across the signatory states are the same. The conventions contain to a large extent minimum rules which leads

2 https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2454

to an opening for national (and regional) solutions. In the conventions, the legal differences between different parts of the world are handled through a principle of territoriality.

The principle of territoriality means that in Sweden we apply Swedish copyright rules, whereas Germany apply German rules and so on. The consequence is that rules on intellectual property can hinder cross border trade.

To conclude: The knowledge-based assets are crucial for value creation and are a key factor behind competitiveness. Almost all companies are today involved in global value chains and we even see more and more companies aiming at being born global. At the same time rules on intellectual property are based on a principle of territoriality. Things handled across borders must be put in relationship to different rules in all countries in the value chain.

There is a solution to this dilemma. That solution is harmonisation. Issues on harmonisation is discussed in part 3 of this report.

1.4 The traditional superpowers

Traditionally the world has seen different superpowers when it comes to innovation and to intellectual property. Many of the rules on knowledge-based assets have their foundation in European rules. This can for example be seen in the fact that the first international conventions to a large extent were created in a European context.

In an international context it is often described as if rules on intellectual property are only of importance to some countries in the global north. It is also described as if all innovation takes place in these parts of the world.

Sweden is a country that traditionally has been a very successful country when it comes to innovation. This is true not only for technical inventions. It is also true for service innovations that for example H&M and IKEA have introduced to large parts of the world.

One way to see which countries that consider themselves as traditional superpowers is to look at positions they take in trade negotiations or in the debate about sovereignty. The United States and Europe do consider themselves as superpowers of intellectual property. The rules are there to protect their innovations. This may be a perspective that needs to be up-dated.

1.5 A new world – new balances

During the last decades the world map of intellectual property has been changed in so many ways. There are several reasons why we should talk about a new world.

One reason is actually based on an awakening on the importance of international rules on intellectual property. When a new structure for international trade was discussed some decades ago it was realised that it was necessary also with international rules within this context. Hence the TRIPS-agreement.

The TRIPS-agreement is a part of the system developed for free trade, via the World Trade Organization (WTO). If countries desire to be part of the WTO they also have to adopt and follow the TRIPS-agreement. Since the WTO has 164 countries as members it means that 164 countries also have to have national rules in place that are in line with what the TRIPS-agreement says. By making it part of the WTO it became evident that in order to sell goods to other parts of the world it was necessary to also implement rules on intellectual property.

Another reason for the world of intellectual property to change is the fact that more parts of the world discover that they might have knowledge-based assets that can serve as a base of value creation. Even in situations where the product is low tech, agricultural product value creation can be improved by working with different intellectual property rights. This is for example demonstrated by the use of trademarks in relation to coffee from Ethiopia.[3]

In many parts of the world, governments have developed strategies on how to use intellectual property rights to create value from research and innovation. In countries like Singapore and South Korea this has certainly paid off. In a country like Japan, they developed patenting strategies decades ago that sent shock waves through the patent systems of the world.

For Europe the new world of intellectual property should be a cause for concern. In 1990, Europe had three countries in top 5 of the PCT statistics. In 2022 Asia had three countries, and the only remaining European country in top 5 was Germany.[4] At the same time Sweden has gone from a position just outside top 5 to position 9.

The perspective that innovation takes place in only a few countries of the world was not really correct at any time. It is however even less accurate today. Innovation happens everywhere and more countries have understood the importance of linking a national innovation agenda and the research policy to a strategy on intellectual property.

3 https://www.wipo.int/ipadvantage/en/details.jsp?id=2621

4 https://www.wipo.int/publications/en/series/index.jsp?id=35

1.6 The importance of having an up-dated view of the world

In order to take the right measures to enhance the European competitiveness it is necessary that the decisions are based on the situation as it is today, not some decades ago. Europe is losing ground in the field of innovation. Europe is falling behind when it comes to competitiveness. Poor handling of (potential) intellectual property rights is a part of the problem.

In many situations, the EU has emphasised the problems of piracy and the need for a level playfield. This is true, but only focusing on that does not solve Europe's problems.

One example on where the EU takes wrong turns can be seen in the Innovation Agenda from 2022. It is pointed out in the Innovation Agenda that in order to promote innovation in the EU, innovation procurement is a good solution. That may sound like a good idea to promote innovation. However, the consequences of more innovation procurement have been overlooked.

In a study from the Confederation of Swedish Enterprise it was established that in almost 94 % of the studied contracts of public procurement relating to intellectual property, the public authorities demanded to acquire ownership of all intellectual property rights.[5] That means that innovators and entrepreneurs in Europe will lose the right to commercialise and even use innovations that they have created. If the behavior of acquiring all intellectual rights is not changed, more innovation procurement will not promote innovation. It would rather lead to lock-in effects.

5 Hausel Heldahl, Ellen and Wainikka, Christina, Immaterialrätt i offentlig upphandling (Intellectual Property in Public Procurement), Norstedts Juridik 2022.

2. IP and competitiveness

2.1 The importance of competitiveness

During the last years more and more people have started to talk about competitiveness.[6] Policymakers and politicians have started to understand that without a competitive Europe our wealth is at risk. In order to keep our way of life we have to stay competitive.

Competitiveness can be seen from many perspectives. In the old days, having natural resources were often seen as a key to a wealthy nation. Today, competitiveness often comes from other factors than natural resources. Many countries that are ranked high when it comes to competitiveness have achieved this position not through selling raw materials but rather from innovation.

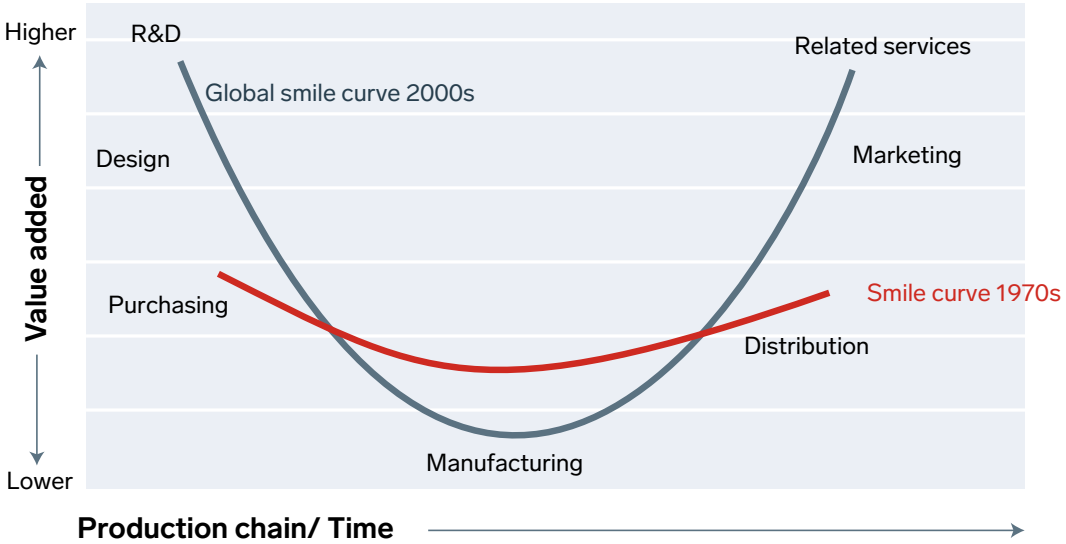
2.2 The conditions of the knowledge economy

As mentioned, few would doubt that we live in a knowledge economy. Where owning land or owning the means of production previously were key factors in creating wealth, it is now having knowledge and making the most of this knowledge that is key.

This can be analysed in different ways. The "Smile Curve" that was mentioned above is providing a clear view on value creation in the knowledge economy. Research and development is a key to value creation, as is design. Branding and establishing a relationship to the market is an important part of value creation.

It is also evident that these parts of the value chain provide more and more value in the value chain. Those parts linked to different intellectual property rights are becoming increasingly important to value creation.

6 See for example Ursula van der Leyens State of the Union in September 2023. https://ec.europa.eu/commission/presscorner/detail/en/speech_23_4426



What is not as important is the part of the value chain linked to actual production. For decades we have seen how production has been moved to countries with low costs for production. With the increased use of additive manufacturing production costs may decrease even more and it is even discussed if more and more production is moving back to Europe.[7]

2.3 How IP contributes to competitiveness

Value creation in the knowledge economy is to a large extent linked to handling of intellectual property rights. That also means that these intangible assets are crucial in building competitiveness. This is easily demonstrated in the numbers of intellectual property and trade.

Statistics have shown that companies with registered rights represent more than 90 % of EUs exports.[8] In the period 2017-2019, nearly 76 % of intra-EU trade was generated by patent-intensive industries.[9]

Use of intellectual property rights also have a large impact on enterprises themselves. For enterprises that have taken the step to register rights, their revenues increase by 20 % per employee on average. For SMEs the effect is even greater. For them their revenues increase by staggering 68 % per employee.[10]

7 See for example this paper, already from 2018. https://reshoring.eurofound.europa.eu/reference-material/reshoring-and-additive-manufacturing

8 https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2454

9 Ibid.

10 https://www.euipo.europa.eu/sv/publications/high-growth-firms-and-intellectual-property-rights-ipr-profile-of-high-potential-smes-in-europe

The conclusion of this is that handling of IP is a key to competitiveness. It does have an impact on companies. It does have a greater impact on the economy at large. In a recently published report, the Confederation of Swedish Enterprise linked better use of intellectual property rights to productivity.[11] The link between competitiveness and IP is very strong.

2.4 The EU is lagging behind

Even if the EU has had a focus on an Intellectual Property Action Plan, the EU is lagging behind.[12] There are several ways to describe this.

One way to describe how EU is lagging is the development of international patent applications from different countries, via the PCT statistics. In 1990, three European countries were in top 5. Today only Germany remains in top 5. Since this regards international patent applications it shows that the innovative leadership that Europe once had is being lost.

Another way to look at how the EU is lagging behind is the number of major platforms that come from Europe. The last couple of years, there have been several legislative initiatives on how to handle platforms that are dominant on different markets.[13] One reason for these initiatives is the fact that the platform economy seems to be dominated by actors from different continents, but not from our own. One reason for Europe's problems to be the home market for platforms is the lack of a single market in the digital economy.

A third way to examine how Europe is doing in an international perspective is to look at the applications for EU trademarks via EUIPO. So far in 2023, most applications for trademarks have come from China.[14] In 2022 most applications came from Germany, followed by China. Third country in applying for EU trademarks is the same for 2022 and the first nine months of 2023, namely the US. To conclude, in our home market companies from China and the US are better at using the EU trademark.

The last couple of years, there is more and more talk about innovation and competitiveness at EU-level. This is very positive, but there is a cause for concern. In these discussions, there is no real analysis on why the EU is lagging behind. There is even less discussion on solutions.

11 https://www.svensktnaringsliv.se/sakomraden/immaterialratt/darfor-ar-svenska-foretag-mindre-produktiva-an-tyska_1202024.html

12 The implementation of the Intellectual Property Action Plan can be found here: https://single-market-economy.ec.europa.eu/industry/strategy/intellectual-property/intellectual-property-action-plan-implementation_en

13 Within intellectual property, Article 17 of the DSM-directive (2019/790) stands out. Other legislative initiatives are the Digital Markets Act and the Digital Services Act.

14 https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_euipo/the_office/statistics-of-european-union-trade-marks_en.pdf

2.5 The non-existing Single Market

The success of the Single Market

In 2023, the Single Market celebrates its first 30 years.[15] The Single Market is well worth celebrating, since it has the potential to create a bigger home market for companies within the EU. The fragmented markets of the past were a problem, not the least due to transaction costs when doing trade between countries. The creation of the Single Market is one of the EU's main accomplishments so far. However, in several areas the Single Market has not been finalised. Many of these areas are linked to intellectual property but also till important parts of modern economy.

Free movement of services?

One area where the Single Market is not fully functioning is services. Apart from living in a knowledge economy, we also have been living in a service economy for decades. Service industries account for almost 75 % of the total value added in the EU.[16]

It has been pointed out on many occasions that efforts to create a Single Market has focused on goods rather than services. From the Confederation of Swedish Enterprise, the problems caused by not having a Single Market when it comes to services have been pointed out at several occasions. This was for example one of the key priorities set out for the Swedish EU presidency in 2023.[17]

The Jewels in the Crown are too few

The importance of harmonising rules on intellectual property became a priority for the European collaboration. One reason for this is of course that exclusive rights that are protected in one Member State and not in others may hinder the free movement of goods.

One area where the Single Market is functioning very will is trademarks. It is even possible to say that trademarks are the jewel of the Single Market crown. The creation of an EU trademark helps companies to act in all of the EU and not only in fragmented parts. The effect of giving enterprises the opportunity to easily obtaining a trademark that can be used in all of EU is that thresholds are removed. The transaction costs are lowered by not having to use different trademarks for different European markets.

The possibility to register designs through the EUIPO has the same effect regarding designs.[18] Even for SMEs it has been possible to obtain design protection in all of the EU at a low cost. The rules on design protection have however not been fully harmo-

15 https://single-market-economy.ec.europa.eu/single-market/30th-anniversary_en

16 The numbers in this report may be outdated, but the trends are clear. https://www.iapmei.pt/getattachment/PRODUTOS-E-SERVICOS/Industria-e-Sustentabilidade/2_eu_ind_struc07_539.pdf.aspx

17 https://www.svensktnaringsliv.se/english/publications/priorities-for-swedens-eu-presidency-in-2023_1191861.html

18 https://www.euipo.europa.eu/en/designs

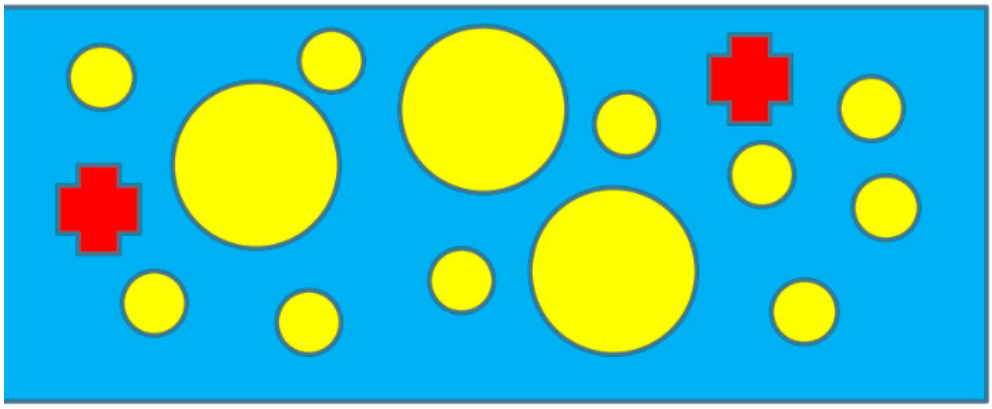
nised, which is a reason for the new proposals on design protection presented by the EU Commission.[19] All in all, there are too few jewels in the Single Market crown.

No Single Market in Copyright

The Single Market does not exist for all intellectual property rights. One example where we are not even close to a Single Market is copyright. For those not working specifically with copyright this may come as a surprise. Aren't there several directives on copyright?

There are several directives on different aspects of copyright and also some regulations.[20] Some of these directives came in the beginning of trying to create a single market, some are from the last decade.[21] The aim of the directives has of course been to harmonise legislation in the Member States. None of the directives cover the entire copyright legislation.

This can be illustrated by a picture. The blue parts are the national rules, like the Swedish Copyright Act. Rules in the Swedish Act have been altered due to implementation of several different directives shown in the picture as yellow dots. When reading the Swedish Copyright Act it is impossible to see what is national legislation and what is implementation of an EU Directive.



That is however not enough. The European Court of Justice has had to handle copyright issues that are not directly covered by the different directives. This is show as the red crosses. There are many more cases that concern copyright protection than just two.[22]

19 https://single-market-economy.ec.europa.eu/industry/strategy/intellectual-property/industrial-design-protection_en

20 https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation

21 Among the early directives are the Satellite and Cable Directive from 1993 (93/83/EC) and the Database Directive from 1996 (96/9/EC). Among the most recent is the DSM Directive (2019/790).

22 Some examples are: C-5/08 (Infopaq I), C-145/10 (Painer), C-201/13 (Deckmyn), C-310/17 (Levola Hengelo) and C-833/18 (Brompton)

The consequence is that issues are being moved from national legislation to EU Law, without the national legislator being involved. In total, this means that we have some more than a dozen directives implemented in 27 different ways and national legislation that has to be re-interpreted due to decisions from the European Court of Justice. Complex? Indeed!

Previously, some of these obstacles could be overcome by use of contracts and agreements. The contracts and agreements between different parties could be used to overbridge the differences in national legislation. Due to the implementation of the so-called DSM-directive, this is no longer possible in the same way.[23]

The DSM-directive aimed at creating a single market concerning copyright which is evident already from the title 'Directive on copyright and related rights in the Digital Single Market'. The effect of this directive was however quite the opposite, resulting in a situation that is complex enough for lawyers but nearly impossible for creators and companies.

No Single Market on Patents

The possibilities to patent in Europe have undergone a revolution the last year, due to the enter into force by the Unitary Patent.[24] Having seen that enter into force might lead to a conclusion that all is well in the field of patents.

This is not the case. There is a complex situation on who is in the driver seat when it comes to patent legislation in Europe. The complexity starts with the European patent Convention.[25] The Convention recently celebrated 50 years and has 39 countries as signatory states.[26] In Europe, the European Patent Convention is the most important legislative initiative in the field of patents. That also means that the European Patent Organization has a decisive power in the field of patents.

The unitary patent, that could be seen as a strive to achieve what has been done in the field of trademarks and designs, does not cover the entire EU. To date, 17 countries are part of the unitary patent system. Consequently, 10 EU Member States are not part of the unitary patent system.

With 39 countries being part of the European Patent Convention and 17 countries being part of the unitary patent system it is evident that the EU has a difficult position when it comes to patent legislation.

In situations where the EU has decided to take initiatives in the field of patents, there is a complication due to the fact that EPO is not an EU institution. In one specific technical field this has been made especially clear, namely biotechnology.

23 This concerns the implementation of Articles 18-22.

24 https://www.epo.org/en/applying/european/unitary/unitary-patent

25 https://www.epo.org/en/legal/epc

26 https://www.epo.org/en/about-us/50-epc-anniversary/official-celebrations

In 1998, the EU decided upon a directive on the legal protection of biotechnological inventions.[27] There were several reasons for this. It was highlighted in the preamble that biotechnology is playing an increasingly important role in a broad range of industries. It was also noted that effective and hamonised protection throughout the Member States is essential in order to maintain and encourage investment in the field of biotechnology.

So how did that work out? Well. It did not. When a question came before the board of appeal in the EPO, the EPO declared their independence.[28] The EPO does not have to follow the Biotech Directive and decided not to interpret the patentability according to anything else than the European Patent Convention.

As a result, it is evident that when it comes to developing patent law in Europe we have no one in the driver seat. The situation cannot be described in any other way than that it is a legislative mess. There is no Single Market in the field of patents, even if the EU Commission keeps talking about how important patents are.

No Single Market concerning Who Owns What

Research and innovation are not tasks only for academia or enterprises. Collaboration between the two is crucial, as well as it is crucial that results from academia can be put to use by entrepreneurs. Therefore, it is necessary to have clear rules on who owns what concerning the different intellectual property rights.

There are different ways to handle this within the EU. In Sweden, there is still a teacher's exemption concerning patentable inventions. Therefore, researchers within academia are themselves responsible for patenting and commercialising their inventions. Sweden is one of very few countries in the world that has kept this solution for patentable inventions.

There are other solutions when it comes to copyright. In Finland, there is a teacher's exemption regarding copyright protected computer software. That means that in Finland, researchers in academia are themselves responsible for commercialising the computer programs in digital innovations.

In a world where more collaboration is desired this lack of harmonisation is far from ideal. To facilitate collaboration, harmonisation of these rules should at least be discussed.

27 Directive 98/44/EC. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31998L0044

28 https://www.epo.org/en/news-events/in-focus/biotechnology-patents

3. The importance of harmonisation

3.1 Globalisation and trade

Already Adam Smith pointed out the importance of division of labor.[29] Every person, every city, every country does not have to do everything themselves. Specialisation and trade have been important factors in the economic development in of the world.

Almost all companies are part of global value chains, even companies that consider themselves mainly active at a local market. Their supplies might come from totally different countries.

During the last couple of years there has been discussions about globalisation moving backwards, that the world is becoming less globalised. Examples given often refer to for example effects of the covid 19 pandemic or the increased actions of protectionist character.

On the whole, globalisation has not stopped. It is taking other turns, but the importance of trade is not diminishing. Trade is still an important part of building global wealth.

3.2 Born global vs principle of territoriality

Many startups today refer to themselves as being born global. They are simply aiming at an international market right from the start. This is especially true when it comes to companies based on digital innovation. The barriers that exist for other types of companies, such as logistics and having goods transported cross borders, don't exist in the same way for digital innovations.

So, there are today many companies active in markets that do not know of national borders. Or perhaps, so they think.

In a world of digital innovations there is a principle within intellectual property that can create obstacles, namely the principle of territoriality.[30] All legislation on

29 In the Wealth of Nations from 1776.

30 The principle of territoriality and its effect on intellectual property is elaborated in Lundstedt, Lydia, Territoriality in Intellectual Property Law (2016).

intellectual property follows the principle of territoriality. The effect of that principle is that the legislation is bound to a certain geographic area, such as a country or even the EU.

This principle is important to safeguard sovereignty. On the other hand, it is not very much in line with globalised markets. The different rules on intellectual property in different countries may lead to high transaction costs.[31] When a company decides to enter a new market, it is often necessary to start to investigate what the rules are in that country regarding for example copyright.

3.3 The international foundations of IP

When the economic freedom spread some 150 years ago it spurred innovation. Before economic freedom was introduced, innovation was not as common not the least because there was no freedom of competition. With the economic freedom came freedom of competition which was used not only to compete with lower prices but also with better products.

However, after the first period of innovation companies soon realised that it was difficult to get a return on investment when it came to innovation. This is when rules on intellectual property started to emerge. With intellectual property, such as patents, investing in innovation is reasonable. Without intellectual property it will be wiser to just copy innovations made by others.

From the start, it also became evident that rules on intellectual property need to have an international foundation. Therefore, international conventions came about. The Paris Convention, on industrial rights was adopted in 1883 and the Berne Convention on copyright in 1886. It is fair to say that intellectual property may be based on a principle of territoriality, but it has always had a very international character.

However, this international character did not go all the way. It was for example possible for a country to sign a convention and at the same time not at all implement the rules into national legislation.

This is an important background for the TRIPS agreement. Being a part of international trade, as it is connected to membership in World Trade Organization, sanctions can be put upon countries not fulfilling its obligations in the field of intellectual property. The TRIPS agreement does not only provide rules on intellectual property, it also comes with a system to handle international disputes.

When WTO was created, globalisation might have been seen as the only way forward. More and more countries became part of the international trade, more and more countries aligned their legislation to the international framework.

31 The effects of high transaction costs are described in the Coase Theorem, attributed to Ronald Coase.

Since then, there are forces in many countries wowing for another world. When listening to some politicians it may seem as if Adam Smith never did publish his work. It may seem as if mercantilism is still the most fruitful way to act for different countries.

3.4 The need of further harmonisation

When there are legal differences between countries, the transaction costs for trade are increased.[32] For companies operating in global value chains on global markets, these transaction costs may be very high.

Harmonisation of rules in intellectual property has served us well. One example is the community trade mark for the EU. With harmonised rules came a possibility to register trade marks through a one stop shop, namely EUIPO.[33] For companies entering a new country within the EU, the new transaction costs linked to trademarks are almost nonexistent.

There are still many areas where harmonisation has not come as far. When it comes to for example copyright, there is not even a far-reaching harmonisation within the EU. There is simply no single market. Harmonisation internationally should be on top of every agenda on competitiveness.

With new technical possibilities comes a need for modernisation of the legislation. Today, this is often handled outside the international context. The EU has for example come with several directives concerning modernisation of different intellectual property rights.

For a globalised world, it would be better if modernisation was done in an international context. This is however made difficult by geopolitical issues, often linked to conflicts north-south, east-west.

Another area for improvement is a need for simplified ways to enforce rights internationally.[34] For companies operating in several markets, enforcing their rights might be quite a challenge. Without possibility to enforce rights, there is no level playfield.

Efforts to make enforcing rights internationally easier should be on top of the agenda when it comes to international collaboration.

32 According to the Coase Theorem.

33 Initially the OHIM.

34 Addressed at EU Level through several different actions. https://single-market-economy.ec.europa.eu/industry/strategy/intellectual-property/enforcement-intellectual-property-rights_en

4. IP and trade policy

4.1 The importance of trade

There are many ways to describe the importance of trade. Historically, there are clear evidence that trade builds wealth. Free trade has the potential to not only build wealth for a country selling goods, but also for all other parties involved in the value chain. For some countries, like Sweden, it is evident that trade is what builds wealth – not only exports.

During a period of time there has been a discussion about reshoring. More protectionism is one part of this, as well as discussion about effects of the covid 19 pandemic. It has also been discussed as an effect of lower production costs linked to increased use of additive manufacturing.

Trade is however still a key to prosperity. Reality has still not proven the theories of Adam Smith wrong.

4.2 IP and trade

Way back, wealth was to a large extent built on access to land and natural resources. With industrialisation new resources came in focus, the owning of means of production but also innovation. Already in the early years of industrialisation it became evident that intellectual property and trade was closely linked together. That is an important background to the international conventions, such as the Paris Convention on industrial rights.

Today, we live in a knowledge economy. That means that knowledge is the core of value creation. Intellectual property rights and other knowledge-based assets are important tools to create value based on knowledge. Trade is therefore today to a large extent linked to intellectual property.

There are numbers to back up this claim. IP-intensive industries account for over 90 % of all EU export.[35] That means that from a trade perspective it is impossible to talk about trade without looking into the dimensions of the knowledge-based assets.

35 https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/joint-report-published-epo-euipo-ipr-intensive-industries-and-economic-performance-eu-2022-10-14_en

The importance of IP in trade has been growing, but already some 30 years ago it was identified that trade agreements definitely do need to include writings on intellectual property. This is for example the background behind the TRIPS agreement.[36]

During the last decades, the parts of trade agreements covering these rights, including geographical indications, have grown in importance to all those who negotiate them.

4.3 The dangers of protectionism

In different parts of the world there are tendencies to act in ways that cannot be described in any other way than protectionism. These tendencies are of course not always described in that way, but when analysing different situations it is difficult to find other explanations.

One example is how the World Trade Organization is being handled by some countries.[37] The ideals that lead to creating WTO seem far gone, with countries even acting to obstruct processes. As a consequence, WTO is not functioning as well as it could. It also means that the rules on intellectual property in the TRIPS agreement cannot be modernised in a way that is necessary due to digitalisation.

Increased protectionism also has as a consequence that other work on harmonisation of different rules on intellectual property is blocked. Instead of having international legal development in place, intellectual property rights are handled in free trade agreements. These agreements may themselves be relevant for the parties, but they lead to less harmonisation on a totality. Rules on intellectual property is now internationally getting more and more fragmentised due to these agreements.

One area where this is especially evident is patent legislation. Simplified, there are three different patent systems in the world. The American, the Japanese and the European. In a globalised world, harmonising these systems would be very beneficial for inventors and companies. The attempts that have been done within the World Intellectual Property Organization have failed.[38]

For several years, there has been an industrial trilateral trying to find solutions to substantial patent law harmonisation (SPLH). BusinessEurope is the European representative. One reason for this work is to make sure that patent law is to be harmonised at an international level rather than subject to negotiation in free trade negotiations.

From a patent perspective, free trade negotiations are not always handled in the interests of innovation. Geographical indications to agricultural products have often been in focus. When reading free trade agreements, the parts on which geographical

36 https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm

37 https://www.svensktnaringsliv.se/english/global-trade-faces-headwinds_1203677.html

38 https://www.epo.org/en/law-practice/harmonisation

indications that are to be respected cover several pages. It is even said sometimes that important parts on protecting patents are not included in some free trade agreements because the negotiators preferred to protect yet another cheese.

Currently, a protection for non-agricultural geographical indications is on the way in EU.[39] Apart from being a bad idea as such, this may also be seen as an act of protectionism. It can be expected that this will influence what is to be considered as important in negotiating free trade agreements. Will even more important parts of intellectual property be sacrificed?

39 https://single-market-economy.ec.europa.eu/industry/strategy/intellectual-property/geographical-indications-craft-and-industrial-products_en

5. The new battlefields

5.1 Level of conflict

No one can doubt that we are living in a world of geopolitical tensions. These geopolitical tensions do also affect intellectual property. Instead of looking at the advantages that free trade does bring to the world, more protectionism is promoted. Instead of working together, different parts of the world seem to only think of their own interests.

One part of this is the perception that others are just copying inventions or even acting as monopolists. From European perspective it is often considered that innovations come from Europe and that they are later copied in other parts of the world. This is not as true as it might have been once. Other parts of the world are just as good, or even better, at innovation as Europe.[40]

At the same time, there are concerns that some countries in the world do strive to obtain intangible assets from other countries. What is sometimes referred to as cybercrime is often foreign countries not only spying on military facilities but also on companies.[41]

Other areas that indicate a different level of conflict is use of forced technology/knowledge transfer or forced collaborations/joint ventures. These types of sharing are important to promote development, different actors sharing can help all of them to reach further than otherwise possible.[42] However, if it is forced rather than voluntary it may be not necessarily be in the interests of everyone.

5.2 Protectionism

There are so many examples on how trade has served as well. There are also so many examples on how international collaboration has helped mankind. However, when crisis strike different parts of the world seem to act as if protectionism is a savior.

40 One example of this is the platform economy, where almost none of the large international platforms actually come from Europe.

41 In Sweden there are several court cases regarding espionage against companies such as Ericsson.

42 https://www.wipo.int/technology-transfer/en/

There are many examples of protectionism striking in times of crisis. Some of these are linked to the Covid 19 pandemic. Some of them are more linked to specific technologies, such as the Chips Act.[43]

To make sure that Europe is competitive, to make sure that the benefits of international trade comes to all protectionism is a bad idea.[44] This is also the case when the EU comes with specific rules aimed at platforms from other parts of the world, like Article 17 of the DSM Directive.

5.3 IP as part of the battlefield

Modern warfare is not only on just one battlefield. There are also parts of the battlefield linked to intellectual property. When Russia started the war in the Ukraine in 2022 it did have an immediate effect on how companies operated in Russia. Several companies decided to leave the Russian markets as soon as possible. There were also reports on trademarks applications imitating well known trademarks from for example Sweden.

There are also examples of how some companies are being boycotted by customers because of decisions they have made in relation to certain markets. This happens even in situations where their actions are legitimate.

In the political sphere there are also populistic interventions linked to intellectual property, sometimes without baring in the actual situation. This is for example the situation when there are accusations of plagiarism without mentioning actual cases.

43 https://www.svensktnaringsliv.se/english/new-chips-act-risks-state-aid-race_1185869.html

44 https://www.svensktnaringsliv.se/english/eu-need-to-put-competitiveness-high-up-on-the-agenda_1189830.html

6. Policy proposals

6.1 IP as a part of trade policy

In the knowledge economy the knowledged-based assets are the most important assets. That also means that we cannot talk about trade without talking about intellectual property. Aspects of intellectual property must be acknowledged as a key factor in trade policy. This cannot only mean GIs, but must focus on the more innovative parts of IP as well.

6.2 The importance of harmonisation

Non-harmonised rules on intellectual property creates barriers to trade, not the least through high transaction costs. It is crucial that harmonisation is reached in the EU, thus creating a true Single Market for the knowledge economy. It is also important that the EU keeps working at harmonising rules internationally, which can be done in Free Trade Agreements or in other suitable fora. The EU should strive for "TRIPS plus" in this endeavor, i.e going beyond the present agreement in the WTO.

6.3 Less protectionism

Protectionism is not a fruitful way forward. International cooperation is. Therefore, it is crucial that the EU, and its Member States, aim at minimising protectionism. Mercantilism should be a theory of the past, it is not there we can find prosperity and competitiveness for the future.

Furthermore, we must avoid weaponisation of IP policy. In the new EU Anti-coercion instrument (ACI) and the updated enforcement regulation, withdrawn IP rights are listed as potential tools to use in a trade conflict. This is highly inadvisable as it sends the signal that property rights in the EU are not necessarily safe.

6.4 Start running!

Sweden should start running. Sweden as a country is behaving like a marathon runner leading the race at 40 km. Happy with being the leader, Sweden has stopped to even make an effort. Other parts of the world are however continuing forward, and complacency will take Sweden nowhere. The same goes for the EU. Instead of, for example, creating legislation to make it more difficult for platforms to operate within the EU there should be efforts put into making Europe competitive.

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