Nordic Version of the OECD Report “Intellectual Assets and Innovation The SME Dimension”

Nordic Version of the OECD Report “Intellectual Assets and Innovation The SME Dimension”

Christina Wainikka

Nordic Version of the OECD Report "Intellectual Assets and Innovation The SME Dimension"

Christina Wainikka

ISBN 978-92-893-4247-6 (PRINT)

ISBN 978-92-893-4248-3 (PDF)

ISBN 978-92-893-4283-4 (EPUB)

<http://dx.doi.org/10.6027/TN2015-551>

TemaNord 2015:551

ISSN 0908-6692

© Nordic Council of Ministers 2015

Layout: Hanne Lebech

Cover photo: ImageSelect

Print: Rosendahls-Schultz Grafisk

Printed in Denmark

This publication has been published with financial support by the Nordic Council of Ministers. However, the contents of this publication do not necessarily reflect the views, policies or recommendations of the Nordic Council of Ministers.

www.norden.org/nordpub

Nordic co-operation

Nordic co-operation is one of the world's most extensive forms of regional collaboration, involving Denmark, Finland, Iceland, Norway, Sweden, and the Faroe Islands, Greenland, and Åland.

Nordic co-operation has firm traditions in politics, the economy, and culture. It plays an important role in European and international collaboration, and aims at creating a strong Nordic community in a strong Europe.

Nordic co-operation seeks to safeguard Nordic and regional interests and principles in the global community. Common Nordic values help the region solidify its position as one of the world's most innovative and competitive.

Nordic Council of Ministers

Ved Stranden 18

DK-1061 Copenhagen K

Phone (+45) 3396 0200

www.norden.org

Contents

Foreword.....	7
Summary.....	9
1. The Nordic cooperation in the field of IPR.....	11
1.1 A long tradition of Nordic cooperation.....	11
1.2 Regulatory cooperation.....	11
1.3 Cooperation in the field of legal research.....	12
1.4 Cooperation between organizations.....	12
2. IPR in the Nordic countries – a comparison	13
2.1 Similarities but still some national differences	13
2.2 Patents.....	13
2.3 Trade marks.....	14
2.4 Copyright.....	14
2.5 Design protection	16
2.6 Utility models	16
2.7 Domain names	17
2.8 Unfair competition.....	17
2.9 Counterfeiting	17
3. Why IPR?.....	19
3.1 Different reasons to use IPR.....	19
3.2 Protection against imitation	19
3.3 Create something to capitalize.....	20
3.4 Communication	20
4. What could be subject of IPR?	21
4.1 Different protection for different reasons.....	21
4.2 Different aspects to protect in different parts of the creative industry	22
4.3 An innovative product – technical solution	22
4.4 An innovative product – design.....	23
4.5 An innovative service	24
4.6 An innovative business model	25
4.7 An innovative way to communicate	25
4.8 And all of the above... ..	26
5. Core questions in the project.....	27
5.1 The OECD project.....	27
5.2 The core questions.....	27

6. Identified problems	29
6.1 Several identified problems	29
6.2 Lack of knowledge	29
6.3 Lack of resources	30
6.4 Lack of resources to acquire knowledge.....	30
6.5 Lack of understanding for the strategic implications of different choices	30
6.6 Lack of understanding for how to use contracts and agreements.....	31
6.7 Difficulties to protect for example service innovations.....	31
6.8 Difficulty to enforce IPR.....	32
6.9 Imbalances in the innovation systems	32
7. Who could/should do what? – examples and recommendations	35
8. The legislators	37
8.1 The role of the legislator	37
8.2 Innovations are not just technical solutions!	37
8.3 Enforcement.....	38
8.4 A system of rights – not islands of rules.....	38
9. The policy makers	39
9.1 The role of the policy makers	39
9.2 The idea of innovations	39
9.3 Information on IPR	40
9.4 Lifting the importance of contracts and agreements	42
9.5 Acting as a role model	42
9.6 Positive examples.....	43
10. The companies.....	45
Sammenfatning.....	47

Foreword

This report was produced by Dr. Christina Wainikka for KreaNord in 2011, and represents the Nordic contribution to the OECD project “Intellectual Assets and Innovation: The SME Dimension, OECD Studies on SMEs and Entrepreneurship”.¹

KreaNord was launched in 2008 as part of the Nordic Council of Ministers’ globalization initiative, aiming to develop and promote the Nordic region as leading within cultural and creative industries. KreaNord have since established cross-sectoral policy cooperation between the culture and business authorities in the Nordic countries, produced a range of reports and mappings, as well as having launched several projects, for instance about entrepreneurship in artistic educations and about financing opportunities for the creative industries. The KreaNord program ended in 2015.

Following the end of KreaNord, this report was republished in 2015 along with several other KreaNord-reports.

¹ OECD (2011). *Intellectual Assets and Innovation: The SME Dimension*. OECD Studies on SMEs and Entrepreneurship. OECD Publishing, Paris. DOI: <http://dx.doi.org/10.1787/9789264118263-en>

Summary

This report aims at handling valuable information on intellectual property rights (IPRs) in the cultural and creative industries that came out as a result of the OECD project “Intellectual Assets and Innovation: The SME Dimension, OECD Studies on SMEs and Entrepreneurship” in 2011. The report has a Nordic point of view and present insights that are not to be found in the main OECD report.

Firstly a mapping of the Nordic regulatory cooperation in the field of IPRs is presented. It shows how regulatory cooperation has changed over time, and accounts for the high level of cooperation in the field of legal research between the Nordic countries.

Secondly the report compares the levels of protection provided for IPRs in the different Nordic countries. It accounts for the similarities as well as national differences that exist, and puts IPRs into a historical perspective. Patents, trade marks, copyright, design protection, and other topics, are discussed in a Nordic as well as European context.

Thirdly a discussion of how IPRs can serve firms within the cultural and creative industries is presented. There can be different reasons for why the creative industries use IPRs, and the importance of creating something on which to capitalize and build a business venture on is stressed.

Fourthly the report accounts for what can be protected under IPRs and how to achieve the desired protection and rights for building a business. For firms within the creative industries, it is important to identify the reason for obtaining an exclusive right or protection, in order to ensure the long term viability of the business venture, including its products and services. Innovations of different types can require more than one intellectual property right, which can make it difficult for SMEs to navigate the IPRs landscape.

The report concludes on the identified problems that SMEs within the creative industries encounter. There are obstacles, among others, related to the lack of knowledge, resources, and understanding of how to apply IPRs strategically. Legal enforcement is another issue that exists in Europe when discussing how SMEs can improve innovations and protections within the creative industries. The final section of the report points to three groups of actors that can play an important role in improving the situation for SMEs within the Nordic creative industries: the legislators, the policy makers, and the companies.

1. The Nordic cooperation in the field of IPR

1.1 A long tradition of Nordic cooperation

Traditionally IP regulation in the Nordic countries has been characterized by cooperation.² This cooperation has been seen on many different levels and seems to have different backgrounds. There has been cooperation concerning legal development, research and also between different organizations.

1.2 Regulatory cooperation

Legal development has in many cases been done in close cooperation between the Nordic countries. One example is the former regulation on trademarks that was developed jointly by several Nordic countries.³

This has to some extent changed. Some of the Nordic countries are today members of the European Union (EU) (Denmark, Sweden, Finland), and some are not (Norway, Iceland). Norway and Iceland are however members of the European Economic Area.⁴

Since the European Union has been very active in the field of IP regulation, the development of some IPRs has now been different in the Nordic countries. It is also worth noting that even when it comes to implementation of EU-directives the Nordic countries sometimes have chosen not to implement them in the same way.⁵

² The cooperation in the field of IPR is presented by Koktvedgaard in Copyright 1998 pp. 348.

³ These trade marks acts came into force in the late 1950s and early 1960s.

⁴ <http://www.efta.int/eea.aspx>

⁵ This is for example the case when it comes to the implementation of the directives 2001/29/EEG of the 22.5.2001 (INFOSOC) and 2004/48/EG of the 29.4.2004 (IPRED).

1.3 Cooperation in the field of legal research

When it comes to the IPR field there is also a lot of cooperation at other levels than the regulatory. The main universities in the IPR field have for several years had a close cooperation.

There are joint conferences held once a year for researchers in the field of IPR. These researchers often use this network that is established to discuss their research and to present papers. Many researchers in the field of IPR also establish a good Nordic network when spending time at Max Planck Institute for patent law in Munich.

One result of this Nordic cooperation is also a legal review in the field of IPR. This review, *Nordiskt Immateriellt Rättsskydd*, presents articles written by researchers in all Nordic countries. It also publishes information on recent court cases. This legal review is the leading review in the field of IPR, as there are no national reviews in the same field that has the same high standard. This means that all experts on IPR regularly have the opportunity to also get an overview of the legal development in the other Nordic countries.

1.4 Cooperation between organizations

There is also Nordic cooperation in the field of IPR between different organizations. The confederations of enterprises in the Nordic countries also have a close cooperation in the field of IPR.

This cooperation concerns among other things sharing of experiences and policy development. Normally the IPR experts from these organizations meet at least once a year for a joint conference.

In the field of IPR, there are different international organizations. The two most important are AIPPI, for the industrial rights, and ALAI, for copyright. These organizations organize conferences on a regular basis. It has been tradition for the participants from the Nordic countries to use this opportunity to meet with colleagues from the Nordic countries.

2. IPR in the Nordic countries – a comparison

2.1 Similarities but still some national differences

The field of IPR is a legal field depending on international conventions, such as the Berne Convention, the Paris Convention, and the TRIPs agreement. For the Nordic countries, there has also been a lot of cooperation to establish similar – yet not identical – legal constructions. However, even if there has been a lot of cooperation between the Nordic countries in the field of IPR, there are some differences between the Nordic countries worth mentioning.

2.2 Patents

The regulation of patents is similar between the Nordic countries. All the Nordic countries are members of the European Patent Organization.⁶

Sweden was the first Nordic country to become member of the European Patent Organization, in 1978. Norway was the last Nordic country to become member of the European Patent Organization when they became member in 2008. Denmark became member in 1990, Finland in 1996, and Iceland in 2004.

All the Nordic countries are also members of the PCT.⁷ The Swedish Patent Office has been an ISA (International Searching Authority) and an IPEA (International Patent Examination Authority) within the PCT system for several years.⁸

⁶ <http://www.epo.org/about-us/epo/member-states.html>

⁷ <http://www.wipo.int/pct/en/texts/index.html>

⁸ Since 1978, Förordning (1978:218) om patent- och registreringsverkets verksamhet enligt konventionen om patentsamarbete.

2.3 Trade marks

Traditionally the trade mark protection has been very similar in the Nordic countries. In the 1950s and 1960s, a Nordic cooperation led to new, harmonized legislation in the Nordic countries.⁹

Since Norway and Iceland are not members of the European Union the trade mark protection in these two countries is now different than for the other Nordic countries. Norway and Iceland are members of EEA, so therefore their legislation has been harmonized with the trade mark regulations within the European Union. However, the main difference is that the countries within the European Union have the community trade mark. Of course companies outside the European Union also can apply for the community trade mark, but they also have to apply for a national trade mark in order to have trade mark protection for domestic markets.

All the Nordic countries are contracting partners of the Madrid Protocol.¹⁰ The Madrid Arrangement is important for the possibilities to make international registrations of trade marks. The Protocol came to force 1st December 1995 in Sweden (in practice from the 1st April 1996), 13th February 1996 in Denmark, 29th March 1996 in Norway, 1st April 1996 in Finland and 17th of April 1997 in Iceland. Since 2004, the European Union is also a contracting party (since 1st October 2004). Since that date, OHIM accepts international applications with the European Union as designated "country".

Regarding the national regulation of trade mark protection there has been cooperation between Finland, Norway, and Sweden to create new legislation. The results of this cooperation were presented in 2001.¹¹

2.4 Copyright

The legal regulation of copyright protection is similar between the Nordic countries. The Nordic countries have followed the legal view on copyright established in French and German law. The copyright law accord-

⁹ The legislation that was a result of the cooperation came into force in 1959 in Denmark, 1960 in Sweden, 1961 in Norway and 1964 in Finland.

¹⁰ http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=8

¹¹ In Norway the new legislation came into force on the 1st July 2010. In Sweden the regulation has not yet been passed by parliament.

ing in this legal tradition is quite different compared to American copyright law.

Even though the legal regulation of copyright protection is quite similar, there are some national differences. For example, the implementation of the EU-directives on IPR in the last couple of years has been done differently in the Nordic countries. The consequence is, for example, that there are differences when it comes to the possibilities to interfere with copyright infringement.

Another area where there are significant differences between the different Nordic countries is the field of contracts and agreements on copyright. In recent years there have been work done in some of the Nordic countries to develop the legal regulation in the field of contracts and agreements regarding copyright.¹²

In the Nordic legal tradition, copyright always emerges from the actual, physical person who creates the work. That means that anyone who wants to use the work, including an employer, must have a contract or agreement to obtain that right. Traditionally, these contracts and agreements are limited to only specific use of the work. However, there are differences in how this is handled in the different Nordic countries. This means that companies within the creative industries that are operating in more than one Nordic country often will have to make different contracts and agreements on copyright in the different countries.¹³

One thing worth mentioning is also that the Nordic countries have a rather strong protection for the moral rights. This is one effect of the fact that the Nordic countries have followed the view of copyright established in French and German law. There are also in the Nordic countries strict rules on how these moral rights can be handled through contracts and agreements.¹⁴

In the Nordic countries a model of collective licences has been developed. The use of this model has been studied and it seems as if it has been rather successful in finding the balance between the interests of the copyright holders and the users of protected works.¹⁵

¹² In Denmark it was presented in 1197/1990 and 148/2006. However it has not led to new legislation. In Finland a suggestion of new legislation was presented some years ago, but it has not led to any new legislation yet. In Sweden a proposal for new regulation was presented in spring 2010 (SOU 2010:24).

¹³ There are however specific rules on computer programmes developed by employees, due to the directive 91/250/EEG.

¹⁴ This is for example clearly stated established in a case from the Swedish Supreme Court, NJA 2008 p. 309.

¹⁵ See for example SOU 2010:56 (Sweden).

2.5 Design protection

The design protection in the Nordic countries has to a large extent been influenced by the patent protection. The construction of the protection has been done in a similar way as the patent protection. The influence from the patent law has to some extent been diminished in recent years.

Since 2003 there is a community design for the European Union, which has led to significant differences in the design protection between the countries that are members and the countries that are not members of the European Union.¹⁶

For Denmark, Sweden and Finland the community design means that design protection can be obtained for the entire European Union, including the domestic market, with only one application. For companies in Norway and Iceland, this is not possible. If they want a protection for the European Union market as well as the domestic market they will have to make two applications.

2.6 Utility models

Not all Nordic countries have a protection for utility models. In Sweden there has been a long debate about establishing a protection for utility models, but there still is no such protection. In this debate it has been pointed out that protection of utility models would be useful for SMEs. However, it also seems as if there is no direct demand for this protection from the organizations or companies.

Iceland and Norway also do not have a protection for utility models. Finland and Denmark have a protection for utility models. The protection is handled through their patent offices.

¹⁶ Regulation no 6/2002. There is also a directive on design protection, 98/71/EG.

2.7 Domain names

Domain names are not considered as an IPR, however they are in many cases equally important for many companies. There are different rules on domain names in the Nordic countries, when it comes to the national top domains.

One difference worth noting is that it is not possible to obtain the right to a domain name under the national top domain in all Nordic countries before the company is established enough to be officially registered. One expert pointed this out as a problem for entrepreneurs on their way to establish a business.

2.8 Unfair competition

One legal field that is related to the field of IPR is the rules on unfair competition. For companies in the creative industries working with design, it might be useful to claim unfair competition instead of claiming copyright infringement.

In most of the Nordic countries, the field of unfair competition is not as well established as in many other European countries. The regulations in recent years have been reconstructed due to directives on unfair commercial practices coming from the European Union.

2.9 Counterfeiting

There are differences in how the Nordic countries handle counterfeiting and counterfeited goods. Much of the rules on counterfeiting are based on rules set up by the European Union, but there are still some national differences.

These differences have practical implications for any company wanting to stop counterfeited goods.

3. Why IPR?

3.1 Different reasons to use IPR

IPR could be used for different purposes, and there are several different reasons to use IPR. IPR does give a monopoly, an exclusive right. However, this exclusive right could lead to very different opportunities.

The one reason that is often discussed is the importance to protect innovations from imitation. If someone has an IPR, no competitors can imitate the innovation. However, this is not the only reason for acquiring IPR.

One reason for acquiring an IPR is to create something to capitalize. If there is a patent, for example, many investors believe it to be safer to invest. The mere existence of an IPR is very useful for start-ups in their process to build up a business.

Another reason to use IPR is to use it for communication purposes. When having an IPR, it can be communicated in different ways, for example in marketing. This communication often aims at trying to establish an image of being at the edge of technology or design.

3.2 Protection against imitation

IPR gives the right holder a monopoly, however this monopoly is not the same for the different rights. For example, if something (even a design) is protected under trade mark protection, it is allowed to refer to the trade mark and even to make a painting of the trade mark. However, if something is protected under copyright law it is not allowed to make copies. Under copyright protection it is not allowed to make a painting of someone else's creation.

Therefore, the protection of imitation is an important reason to use IPR, but this protection is not the same for all IPRs.

It is also important to remember that the protection against imitation works in two different ways. The existence of an IPR makes many actors reluctant to imitate. The competitors do keep an eye on what the competitors are registering as patents, designs or trade marks, and choose not to imitate as long as the protection lasts.

The other part of the protection against imitation is that the protection gives a possibility to enforce the right in case of imitation. It is possible to use the court system to prohibit the imitator to continue and to get economic compensation for the infringement.

3.3 Create something to capitalize

By many IPR experts the use of IPR to create something to capitalize is definitely underestimated. For many entrepreneurs the existence of an IPR makes it possible to build a business venture.

One example is that many investors actively ask if there are any patents. The existence of a patent could be a key factor in attracting risk capital. Therefore applying for a patent is one important first step in building a business.

However, other IPRs could serve similar purposes. For example, the existence of a trade mark is often required in order to capitalize a service innovation through for example franchising. The core of the franchise agreement is often a trade mark, and in some cases business secrets regarding how to perform the service.

Today, we often discuss the value of open innovation and open source. However, the construction of solutions for open innovation and open source often depend on the existence of a trade mark. The actual construction of open source is often constructed as a trade mark license. The trade mark becomes the core of the venture.

3.4 Communication

Companies often use references to IPRs in their marketing. They could for example communicate how many patents they have applied for the last couple of years, in order to establish that they invest in R&D.

Some other companies also market that formulas are kept as business secrets, in order to establish that “we know something that our competitors do not know.”

In some cases even reference to other companies IPR is an important part of communication. Some stores give for example reference to trade marks of their suppliers, in order to give credibility to their own business.

4. What could be subject of IPR?

4.1 Different protection for different reasons...

There are several different kinds of IPR, and they do serve different purposes. A patent does not protect the same thing as a registered trade mark. Some companies work with just one IPR, perhaps copyright. The culture in their industry might lead them to believe that copyright protection is the only protection they need. Other companies work with a wide range of different protections, balancing copyright protection with trade mark protection and even patent protection.

Beside the exclusive rights there are also semi-formal rights, such as for example protection of business secrets. The protection of business secrets does not mean that the information becomes a “property” or that the company gets an exclusive right to use the information. The protection only gives the holder a protection against certain behavior. The reasons for protecting business secrets may vary. For some companies the protection of business secrets is vital before applying for a patent. For other companies none of the registered rights protect their innovation, they must rely on protection of business secrets.

In many cases, IPR is described from the perspective of the legal constructions. In order to describe what innovations that companies will try to protect and to capitalize it is more useful to put the innovation in focus. Therefore there is a description here on what different innovations could be and how these innovations can be protected. This perspective makes it possible to also analyze untraditional innovations, such as service innovations.

4.2 Different aspects to protect in different parts of the creative industry

The creative industry is not just one industry with one kind of innovation. For some parts of the creative industry, the innovations are creative works such as film, music or art. For other parts of the creative industry the innovations are a mix of creative works and services.

Since the creative industry consists of activities with a wide range of innovations, they also have different needs of IPR. In many situations however, there is a focus just on copyright protection when discussing IPR within the creative industry.

For some companies, the copyright protection is the most important. The copyright protection enables them to prevent copies to be spread and also enables them to control how their work is being used. However, for many companies, their innovations are more complex and their needs are not met by just using copyright protection. To just focus on copyright protection might lead to a too narrow view on the conditions for the creative industry.

4.3 An innovative product – technical solution

If someone comes up with an innovative product that has a new technical function, it is a technical solution to a problem. In many situations this is the kind of situation we think of when we hear the word “innovation”.

In this situation, it might be possible to apply for a patent. If the patent is granted, the right holder may license the innovation or may prevent others from using the innovation.

In some situations patent protection is used in combination with protection for business secrets. Some parts of an innovation may be patented and some parts may be kept as business secrets. That is also why patent licenses often are combined with know-how licenses.

In order to be able to establish the innovation as a product on the market, even other IPRs might be useful. A trade mark protection might for example be valuable to protect the name under which the product is sold.

4.4 An innovative product – design

An innovative product may be innovative in other ways than just a new technical function. A product may have an innovative design. This design may be just esthetic, just to make something look “nice”.

However, design is often used in other ways as well. Design is today a useful tool in communication. Through design it is possible to communicate to customers and others. Design is also used to combine function and esthetics.

If someone has a desire to protect design, there are several different options. There is a possibility to rely on the copyright protection, granted to works that are original. In all the Nordic countries, copyright is not a registered right.

It is also possible to apply for a design protection, either a national protection or a community protection. The protection granted is a registered right. The construction of the registered design protection is to a large extent the same as the patent protection, a part from what is protected. The design protection does not focus on function, as the patent, but on the appearance.

Design may also be protected through trade mark protection. This is often used for design made to communicate with the customer, in different ways. One design that most people recognize as a trade mark is the Coca-Cola bottle. The trade mark protection is not the same as the copyright protection and the design protection.

If a design is being copied, it is also possible to use another legal construction, namely rules on marketing and/or unfair protection.

Design is often based on an idea, or even strategy. This strategy is often important to protect, since that is often the core of an entire business venture. The protection for these strategies is to keep them secret and therefore make them business secrets.

These simple examples clearly demonstrate that from a business perspective, not just one IPR is in focus. The focus is the innovative design, and the purpose of the design might lead to very different conclusions regarding the protection. When discussing creative industries working with design, not just one IPR should be discussed.

4.5 An innovative service

Today, many innovations are not at all linked to products. Many innovations are so called service innovations. Service innovations are new and innovative ways to perform services. In the field of creative industries there are several different types of innovative services. Some are digital, of course, and can be found on the Internet.¹⁷ Some services are however just new services and not at all connected to the digital reality.¹⁸

Innovative services can not be directly protected under any IPR, at least under the laws of the Nordic countries. If someone has created an innovative service, the innovation cannot be protected. However, it is possible to use different IPRs to create some kind of protection. It does not lead to a direct protection of the innovation itself, but creates some kind of IPR to use in different ways.

One protection often used when there is a desire to protect an innovative service is trade mark protection. When capitalizing an innovative service the structure of franchising is often chosen. Franchising is very much an advanced variety of a trade mark license. However, trade mark protection could also be used in other ways. One example is the Suzuki Method that uses the trade mark protection to create ways to ensure that the teachers have the right training.¹⁹

When constructing a service, or even a television format, different kinds of instructions are often put on paper. These written instructions are protected under copyright law. If they are kept secret, they may also be protected as business secrets.

Service innovations relying on digital solutions might be constructed with a computer program as a core. Computer programs are protected under copyright protection.

Service innovations may not be directly protected, however, there are IPRs that might be very helpful. However, it is important to recognize that these protections do not protect the actual innovation. The trade mark that is protected is not the innovation itself, rather it is just a way to communicate.

¹⁷ For example: www.mapmyrun.com

¹⁸ For example: <http://www.korforalla.se>, <http://www.helianthus.se/MobilForskola.htm>

¹⁹ <http://suzukiassociation.org/>

4.6 An innovative business model

Innovations may consist of not just a new service, but a new type of business model. An innovative business model could serve the purpose of balancing different types of earnings.

The digital revolution has shown that the most innovative parts of a new business could be the actual business model. Before Spotify, there were legal ways to listen to music using the Internet, but Spotify has a new way to make money. Skype, Google, World of Warcraft and Facebook are other examples of new business models.

In the same way as it is not possible to protect innovative services in the Nordic countries, it is not possible to protect innovative business models in the Nordic countries. If a company has a desire to protect a new business model, they will have to rely on trade mark protection and other indirect protection.

In order to protect the construction of business models, such as margins for different parts of the business, protection of business secrets could be of great importance.

4.7 An innovative way to communicate

Some companies focus on the way to communicate with the market. Their innovation is mainly a new way to communicate, finding new customer groups or making old customers spending more. Today, these new ways to communicate are often linked to web-pages or apps. However, new ways to communicate is not just to use new technology – it could also be to find a new message to communicate.

These new ways to communicate could be of great importance. The core in the communication is often a trade mark, a brand. The protection for the trade mark does to some extent also cover the communication, but not entirely. Rules on marketing and/or unfair competition could also be important, even if they do not grant an exclusive right in the way that trade mark law does.

The strategies behind the innovative way to communicate could be protected as a business secret.

4.8 And all of the above...

Many innovations are complex. They consist of new services and innovative design. Or they consist of a new service that is depending on a new technical solution, being sold by using a new business model.

The result is that the IPR landscape is being looked upon in new ways. The result is also that it might be very difficult for SMEs to navigate in the IPR landscape.

5. Core questions in the project

5.1 The OECD project

Within the description of the OECD project there was a clear focus on certain questions. These questions were the same for all of the national projects, even if the choice of industry to study is very influential on the results.

5.2 The core questions

The core questions in the OECD project boil down to these:

- How do SMEs in the creative industries use IPR?
The question led to investigating how SMEs actually use IPR.
- What influences their use of IPR?
The question led to investigating why SMEs do what they do when it comes to IPR.
- Is it possible for SMEs to enforce their rights?
Some SMEs do have different IPR. Do they find it possible to enforce these rights in case of infringement?
- National differences?
What national differences exist? Are there any positive examples from the different countries worth examining?

6. Identified problems

6.1 Several identified problems

The report highlights several identified problems when it comes to SMEs use of IPR. These identified problems, or in some cases obstacles, are of different kinds. Some are easy to understand, and maybe even to resolve, others are more complicated.

6.2 Lack of knowledge

All of the interviewed experts point out that the main problem is lack of knowledge. The point being that a majority of SMEs in the creative field do not know what rights they could obtain and how to obtain them. Some rights are only to be obtained from registration. In order to obtain these rights SMEs have to make active choices on where and how to protect their innovations. In a situation where they lack knowledge of the IP system, they do not obtain protection that might be useful for them to develop their business.

Lack of knowledge also concerns semi-formal protection, through for example use of non-competition clauses and non-disclosure clauses. In some companies it seems as the level of knowledge of these instruments is higher than that of the knowledge of IPR. The reason for this could be that the semi-formal protection often is linked to labor law. Knowledge of labor law is often considered as required in order to run any business. It seems as the situation is not the same when it comes to knowledge of IPR.

The experts also point out that many SMEs are not aware of IP protection that they already have. Copyright protection is obtained without registration, which means that SMEs within the creative industries often have a lot of copyright, they are however not always aware the extent of the protection. That also means that these companies often are not able to make the most of the rights they actually have.

According to the result of the survey, however, 20.3% of the respondents have tried to assess how much their intellectual property is worth.

6.3 Lack of resources

SMEs often have a lack of resources when it comes to consulting lawyers, patent attorneys and other consultants. They find it too expensive to get that kind of help. According to the interviews, SMEs often find it too expensive to get help to acquire rights but also to get help when infringements have occurred.

6.4 Lack of resources to acquire knowledge

Some experts point out that SMEs also often lack the resources to acquire knowledge of IPR. Most SMEs do not have in-house lawyers and/or IPR experts. The consequence is that they consult IPR lawyers and/or patent attorneys when they themselves see the need. Since they lack knowledge of the IPR system they often do not consult experts as often as they perhaps should.

One problem is also that when SMEs do consult IPR lawyers and/or patent attorneys, they often do not have the financial resources to discuss strategic implications. They often come with a direct question (i.e. “is this patentable?”) and that is all the IPR lawyer and/or patent attorney answers. The SMEs seldom have financial resources to also discuss when in the innovation process an invention should be patented or how to balance semi-formal protection with the registered rights.

It seems as if SMEs often lack resources to acquire knowledge of IPR. The lack of resources concerns both the financial situation of many SMEs and the competence they have in the field of IPR. It seems as if SMEs lack knowledge even of what questions to ask.

6.5 Lack of understanding for the strategic implications of different choices

One factor that the experts emphasize is that SMEs often lack an understanding for the strategic implications of IPR. This is of course linked to the lack of knowledge of IPR. However, even SMEs with some knowledge of IPR seldom see how IPR could be used in a strategic way. The consequence, as the experts see it, is that SMEs seldom get the full potential out of their innovations.

Some experts mentioned that there are some examples on how IPR is balanced with open innovation in a very strategic way, also by SMEs. They did point out that these examples are to be seen as exceptions.

According to the survey, 33.8% of the respondents have an overall IP strategy. 71% of the companies having an overall IP strategy have explained or distributed it to staff. However, at the same time over 73% of the respondents do not have a person specifically charged with managing IPR.

6.6 Lack of understanding for how to use contracts and agreements

Since SMEs seldom have the understanding on how to handle IPR from a strategic point of view, they also often lack an understanding on how to use contracts and agreements as strategic instruments. Some experts state that SMEs biggest problem regarding IPR is not to obtain or enforce IPRs it is to be able to write the most useful contracts and agreements. In order to do so, SMEs would often need to get support by lawyers.

However, the law firms that have the competence to help companies with these complicated matters are often very expensive. Some experts claim that SMEs often find it too expensive to get help from law firms with broad competence. In situations where SMEs are doing business with larger corporations, that both have in-house lawyers and resources to buy services from major law firms, the contracts and agreements created are often not in favor of the SMEs.

6.7 Difficulties to protect for example service innovations

Within the creative industries, most innovations are not technical innovations. Technical innovations can be directly protected through the patent system. The innovations from SMEs within the creative industries could be service innovations, communication innovations or perhaps television formats and entire concepts. These kinds of innovations are often difficult to protect through the IPR system.

It is often possible to protect different aspects of these innovations, through for example trade mark protection or design protection. However, experts claim that many companies within the creative industries find it difficult to obtain protection for their kind of innovations. In some

cases the only knowledge of IPR that SMEs have concerns patents. Since they recognize that their innovations are not patentable, they do not investigate if there are any other IPRs available.

6.8 Difficulty to enforce IPR

During the last couple of years there have been several legislative changes done in order to make it easier for right holders to enforce their rights. Some of these changes have their background in the TRIPS agreement; others are a result of EU-directives. The experts claim, in spite of these changes, that SMEs often find it difficult to enforce their IPR.

There are several factors that the experts point out as difficulties when it comes to enforcing rights. One important factor is the cost. It is often very expensive to enforce IPR through the court system.

Another factor is that SMEs often do not find it possible to foresee how the courts will rule in a specific case. Some of the experts point out that IPR cases are to a large extent handled by the ordinary courts. Within these courts there are seldom lawyers with knowledge and experience in IPR. The experts claim that this uncertainty is affecting SMEs' use of the court system.

In Finland it has been suggested that all cases on IPR are to be handled by the Market Court. The aim is to find a dispute settlement system that is easier to supervise and with expertise. However, an expert from another Nordic country claims that specialized courts could lead to centralization, especially when it comes to community rights. From his point of view centralization could mean that SMEs find it harder to use the court system.

According to the survey, 45% of the respondents find the costs of enforcement as an obstacle to using IPR.

6.9 Imbalances in the innovation systems

All Nordic countries have well-developed innovation systems, concerning advice and financing for start-ups. For SMEs within the creative industries these innovation systems are often not very helpful. The innovation systems, whether public or private, are often focusing on patentable inventions. The innovation systems often link financing to patents. For companies relying on other protections for their innovations, the innovation systems in the Nordic countries do not meet their needs.

In the last couple of years there have been some positive changes. In some Nordic countries the importance of design has been widely recognized. However, the protection of design is somewhat more complicated than the protection of inventions. It is for example possible to protect design through copyright, design protection and trade mark protection. The balancing of these rights is a complicated matter for most SMEs, and the innovation systems are not very supporting in these issues.

The innovation systems often have a focus on informing SMEs of IPR. However, the information handled is often focused only on the right itself. In some cases it is emphasized that the innovation systems often have too much focus on patents. Start ups often get the question of whether or not they have a patent – companies that do not have patents are not seen as having the same potential. Strategic issues, for example on how to make the most of a right through strategic use of contracts and agreements, are not handled.

7. Who could/should do what? – examples and recommendations

According to the report there are several identified problems when it comes to SMEs use of IPR. It seems as if the creative industry may not use its full potential, due to difficulties to handle IPR issues in a strategic way.

However, there is not one actor that should take the entire responsibility to improve the situation. There are at least three different actors that could play an important role in improving the situation for SMEs within the creative industry:

- The legislators.
- The policy makers.
- The companies.

8. The legislators

8.1 The role of the legislator

The field of IPR is not just a matter for the national legislators. There are several layers of international agreements (such as TRIPs), international conventions, EU-directives and so on. The national legislators may claim that the frame work is so regulated that the possibilities to even investigate how to improve the situation for SMEs within the creative industries are miniscule.

The international agreements, international conventions and community rules on IPR do not mean that there is no room for national solutions. As described above there are national differences between the Nordic countries regarding several IPR. The consequence is that the legislators in the Nordic countries have the possibility to act.

8.2 Innovations are not just technical solutions!

One responsibility for the legislator is to make sure that legislation regarding innovations does not just focus on new technical solutions. When recognizing that innovations could also be a service innovation or a new design this should not only be considered in the field of IPR, but also in other fields.²⁰

From the legislators point of view it could also be important to follow how SMEs actually use IPR. What are, for example, the effects of the fact that design can be protected in very many ways? What are the consequences for the trade mark protection when it is used to protect service innovations?

²⁰ Even when it comes to public procurement, see SOU 2010:56.

8.3 Enforcement

The legislator is responsible for making enforcement work. If the legislator is providing an IPR, whether it is a registered right or not, it is vital that it is possible to actually enforce the right in case of infringement.

There are some positive examples on how to improve the situation. In Denmark there are improved ways to go through the administrative system rather than the court system regarding some disputes on trade marks. It seems as if Sweden will follow this example.

The courts do often not have good knowledge of IPR and also do not understand the creative industries and their innovations. The legislator must recognize this lack of knowledge and do something to improve the situation.

8.4 A system of rights – not islands of rules

The legislator must make sure that the IPR rules function as a system, not islands of rules. Today, the same innovation can be protected in different ways, such as design. Other innovations, such as service innovations, are not possible to protect directly – but indirectly.

This situation makes it difficult to understand and overview for SMEs, but also for others. The effect, for example when it comes to balancing IPR and competition, is also difficult to analyze.

The legislator should in all legislative work in the field of IPR take the entire field into consideration, not just the one in focus at the moment.

9. The policy makers

9.1 The role of the policy makers

Policy makers are important to create the path to follow. If policy makers recognize a need for improvement, it is very likely that legislators and others eventually have to make this improvement a reality.

When it comes to the creative industries, it is important that policy makers really establish that they actually are industries. They need to be able to access financing – therefore financing should not be linked to the existence of a patent. It should be considered that the rules on accounting may influence the view on companies in the creative industries. Their investments in innovations are not treated in the same ways as investments in traditional R&D.

9.2 The idea of innovations

The innovation systems do not fully recognize the importance of IPR. In some parts of the innovation system the focus is on technical inventions leading to patents. When recognizing that innovations are not just technical innovations it is important to improve the innovation systems so that other IPR than patents are pointed out as important. The ways to finance innovative businesses have to be connected to something else than just the existence of a patent.

When innovations are being discussed there is too often a focus on technical innovations that can lead to a patent. Within the creative industries there are a lot of innovations, but they are seldom technical innovations. It is important for all policymakers to recognize that for example service innovations are just as important as technical innovations. That also means that policymakers have to realize that patents are not the only way that innovations could, or should, be protected through the IPR-system.

In Finland the recognition of different kinds of innovations has led to the creation of Alvar Aalto University.²¹ In Denmark, CKO has been established in order to recognize the importance of creative industries as just industries.²² In Sweden the government has presented a strategy on service innovation.²³

However, in the work to recognize these innovations, IPR is often mentioned as a problem. Even the legislator steps back from handling these issues. The issues are mentioned, but no solutions are presented.²⁴

9.3 Information on IPR

The lack of knowledge of IPR is something that influences the SMEs' possibilities to develop their businesses and to grow. The case studies also show that SMEs do not use IPR even in situations where it is easy accessible, and the reason for this is mainly lack of knowledge. This is a matter that should be handled by policy makers. The improvement of the SMEs' knowledge of IPR could be handled in different ways, at several different levels. For example:

- *Making IPR a part of all higher educations within the creative field*
All students within the creative field should get some education regarding IPR. It is important that the education is linked to their actual education. A designer and a musician do not need the same education when it comes to IPR. It is important that the education not only concerns the actual IPRs that could come in question. The education should also emphasize different ways to handle IPRs from a strategic point of view. The students should, for example, get an understanding for open innovation and the balancing between protection and non-protection. In order to do so, the education in IPR should also consider issues on contracts and agreements on IPR. It is often through the contracts that the IPR strategies become reality. An education in IPR without handling issues regarding contracts and agreements would not be very helpful. The Alvar Aalto University may be one way to create education that can address these issues.

²¹ <http://www.aalto.fi/en/about/>

²² www.cko.dk

²³ <http://naringsdepartementet.ning.com/>

²⁴ This is evident in both the Swedish service innovation strategy and in for example SOU 2010:56.

Students participating in education within the creative field do to a large extent end up being entrepreneurs.

- *Improve the spreading of information on IPR*

The public authorities working with IPR, for example the patent offices, often have an assignment to spread information on IPR. There is, for example, cooperation between different patent offices within the European Union regarding SMEs use of IPR. This project is called "IPEuropAWARE". However, these authorities have a focus on registered rights. Their focus is also on giving information on the right as such, not on the use of the right within a business reality through different kinds of contracts. This focus also leads to the information not to handle the strategic use of the right. The role of these public authorities should be discussed and maybe they should be given a responsibility for covering the entire field of IPR, including for example copyright. Another thing to discuss is spreading of information regarding semi-formal protection.

- *Information for start-ups*

Public authorities in the Nordic countries perform different kinds of efforts to help start-ups, since entrepreneurship is an important factor in the economic growth. These efforts seldom include help regarding use of IPR. In situations where IPR issues are handled, there is often a focus on patents. For many start-ups in the creative industries there is no qualified help.

- *Alliances*

Since there are different actors working with different rights and help SMEs in different ways. Several of these actors are either public authorities or are funded by public authorities. Since lack of knowledge is recognized as one of the major factors behind SMEs' use of IPR, it is very likely that these actors do not emphasize IPR enough. In order to improve this situation, alliances between different actors could/should become a reality. The national patent offices could be one actor in such alliances.

9.4 Lifting the importance of contracts and agreements

Contracts and agreements are important for SMEs since they are used to acquire IPR from others and to let others use their IPR. There is much to be done in this field. Some examples on what could be done:

- *Identifying the importance*
It is vital that the importance of contracts and agreements is highlighted. In situations where SMEs do not understand the full implication of contracts and agreements, they might not make the most of their potential. All actors should therefore highlight this importance.
- *Comparative studies*
There are significant differences when it comes to how IPR is handled in contracts and agreements, even between the Nordic countries. These differences should be subject to comparative studies, in order to help SMEs finding information on what to consider when engaging in cross-border commerce.
- *Information*
When information is provided on IPR, information regarding the handle of contracts and agreements also should be provided.

9.5 Acting as a role model

Policy makers should take responsibility to help SMEs in the creative industries to become aware of how to handle IPR issues. Today – the patent offices are working actively, but only regarding the registered rights (IPEuropAware). How to protect television formats by mixing trade mark protection, protection of business secrets and copyright is not easy to find information on.

The policy makers should also take a responsibility to make sure that all public authorities serve as role models when it comes to handle IPR in contracts and agreements. That is not the case today.

9.6 Positive examples

Policy makers should also play an active role in finding and showing positive examples of SMEs working with IPR in a way that is successful. Those cases could be important to help SMEs understanding why they should put more effort into working with IPR issues.

10. The companies

There is quite a lot that companies themselves could do, as they are responsible for their business venture. There are however some things that could be said on how they could improve their situation. For example:

- *They must recognise their own responsibility*
Protection of IPR is only granted those who do act. If you do not do anything you will not have a useful protection. If a design protection could be important – you must act to register your right.
- *They must recognise consequences*
To make the most of their potential, companies should make choices fully aware of what the consequences are. They may say that they decline of an IPR, but that choice should be inline with the rest of their strategic choices. This responsibility should be emphasized.

Sammenfatning

Denne rapport har til formål at præsentere værdifuld information om immaterialret (IPR) inden for de kulturelle og kreative industrier som er blevet indsamlet i OECD-projektet "Intellectual Assets and Innovation: The SME Dimension, OECD Studies on SMEs and Entrepreneurship" i 2011. Rapporten er udarbejdet ud fra en nordisk synsvinkel og præsenterer viden som ikke fremgår i den overordnede OECD rapport.

I første del beskrives det nordiske lovsamarbejde inden for IPR. Den viser hvordan lovsamarbejdet har ændret sig over tid, og peger på et godt juridisk forskningssamarbejde mellem de nordiske lande.

I anden del sammenlignes de forskellige niveauer af beskyttelse under immaterialret i de nordiske lande. Rapporten viser ligheder og nationale forskelligheder, og sætter IPR i et historisk perspektiv. Patenter, trade marks, copyright, design beskyttelse, samt andre emner, diskuteres i en nordisk så vel som europæisk kontekst.

I tredje del diskuteres hvordan immaterialret kan tjene firmaer fra de kulturelle og kreative industrier. Der kan være flere grunde til hvorfor de kreative industrier anvender IPR, og vigtigheden af at finde noget som man kan kapitalisere på og bygge virksomheden op omkring understreges.

I fjerde del fremlægges det hvad man kan opnå beskyttelse for under immaterialret og hvordan det ønskede niveau af rettigheder kan sikres for at kunne bygge sin virksomhed. For firmaer fra de kreative industrier er det vigtigt at identificere hvorfor man vil opnå beskyttelse med henblik på at kunne sikre sin virksomhed, produkter og tjenester i det lange løb. Forskellige typer af innovationer kan kræve mere end en form for IPR, hvilket kan gøre det svært for små-til-middelstore-virksomheder (SMEs) at navigere IPR-landskabet.

Rapporten konkluderer på de identificerede problemer som SMEs fra de kreative industrier står overfor. Der er blandt andet forhindringer relateret til mangel på viden, ressourcer og forståelse for hvordan immaterialret kan anvendes strategisk. Retslig håndhævelse er et yderligere problem som eksisterer i Europa når det diskuteres hvordan SMEs kan forbedre innovationer og opnå beskyttelse inden for de kreative industrier. Afslutningsvis peger rapporten på tre grupper af aktører som kan spille en vigtig rolle for at forbedre situationen for SMEs inden for de nordiske kulturelle og kreative industrier: lovgivere, politiske beslutningstagere og virksomheder.

Nordic Version of the OECD Report “Intellectual Assets and Innovation The SME Dimension”

This report, created by Dr. Christina Wainikka for KreaNord in 2011, is part of the OECD initiative, “Intellectual Assets and Innovation: The SME Dimension. OECD Studies on SMEs and Entrepreneurship.” It conveys research on IPRs from the creative industries that came out as a result of the Nordic initiative. In addition to the results from the OECD, the following insights can be found in the Nordic version: “What purposes IPR could serve within the creative industries?”, “What could be protected – and how?”, and “Conclusions regarding who could/should do what in the field of IPRs.”

Republished in 2015 following the end of KreaNord, the Nordic Council of Ministers’ initiative on cultural and creative industries (2008–2015).

TemaNord 2015:551
ISBN 978-92-893-4247-6 (PRINT)
ISBN 978-92-893-4248-3 (PDF)
ISBN 978-92-893-4283-4 (EPUB)
ISSN 0908-6692

9 789289 342476