Intellectual Property and the Human Right to a Healthy Environment

Edited by
Elena Izyumenko

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Elena Izyumenko

Intellectual Property and the Human Right to a Healthy Environment

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Elena Izyumenko

Intellectual Property and the Human Right to a Healthy Environment

An Introduction

As the detrimental effects of climate change continue to escalate,[1] there has been a notable increase in discussions about the, at first glance, not obvious impact of intellectual property (IP) protection (such as trademarks, copyright, or patents) on environmental sustainability.[2] Central to these discussions are concerns regarding the potential barriers posed by strong IP rights to environmentally sustainable practices, such as upcycling (consisting of repurposing used garments and other objects), restoration, and repair of products bearing trademarked logos or copyright-protected designs. Additionally, questions have arisen about whether IP infringement remedies, such as the destruction of even genuine IP-infringing goods should be reconsidered in favour of more environmentally conscious alternatives.[3]

At the same time, environmental sustainability is not the only important trend in contemporary IP law discussions. Considerations of human and fundamental rights in the context of IP protection are increasingly shaping the discourse within the European Union since, at least, 2009, which marked the year when the EU Charter of Fundamental Rights adopted in 2000 became legally binding.[4] This shift is particularly evident in the substantial body of case law from the Court of Justice of the European Union (CJEU) produced since then, where the relationship between IP rights and human rights has garnered significant attention.[5]

Given these two major trends in IP law – growing attention to environmental sustainability and the need to assess IP laws in light of human and fundamental rights – it seems that the time is ripe to explore what the human right to a healthy environment (HR2HE) might mean for intellectual property. It is

with this goal in mind that this book was conceived and now comes to meet its readers.

Book structure

The book features twelve concise yet highly informative contributions that capture the essence of the relationship between the HR2HE and IP. These contributions are divided into two main parts.

Part I lays the essential groundwork for the subsequent discussion on the relationship between IP and the HR2HE by explaining what this human right entails in practice as well as addressing the question of whether environmental protection qualifies as a human right at all within the current international and European legal frameworks. It also explores the role of environmental human rights in promoting sustainability and sustainable economies. The contributions to Part I are prepared by leading human rights and constitutional law experts, who have devoted substantial portions of their distinguished careers to studying the various aspects of this still relatively "new" right in the human rights law family.[6]

Part II shifts the focus to the IP aspect of the discussion, featuring renowned experts in IP law who examine various conflicts at the intersection of IP, sustainability, and the HR2HE. Topics include the chilling effects of EU and U.S. trademark laws on the rapidly growing upcycling businesses that focus on repurposing waste materials into new products, as well as the question of whether similar issues arise from copyright law's economic and moral rights protection. The discussion also addresses whether patent law serves as a hindrance or rather a stimulus for green innovation, explores the role of sustainability

in remedies for IP infringements, and, finally, considers practical legal strategies for reconciling IP protection with the HR2HE.

Part I - Laying the foundation: The human right to a healthy environment in international and European legal orders

The book begins with a contribution by **Otto Spijkers**, who examines whether the right to a clean, healthy, and sustainable environment is already part of customary international law. The discussion covers resolutions from the Human Rights Council and the UN General Assembly, which some view as recognising this right as a new, autonomous human right. Others, such as the United States, argue that it does not yet exist under customary law and represents, at most, only a call for a "green" interpretation of existing human rights.

The analysis of the meaning and scope of the HR2HE on the international level is followed by a contribution by **Jasper Krommendijk**, who explains the protection of the HR2HE within the EU legal order. There, in contrast to the Council of Europe's European Convention on Human Rights (ECHR),[7] the fundamental right to environmental protection is (already) explicitly incorporated in Article 37 of the EU Charter of Fundamental Rights. It is argued that despite the EU's growing role in climate and environmental protection, the CJEU has not yet fully embraced human rights in environmental litigation – a fact that may be explained by strict standing requirements and reliance on secondary EU law. However, recent case law developments may signal a shift toward a more explicit recognition of human rights in environmental cases.

Luísa Netto next explores the meaning and relevance of the reference to the interests of future generations in the definitions of the HR2HE. She argues that invoking rights for future generations in climate litigation may be problematic due to legal inconsistencies and the vagueness of this category. This approach risks diverting attention from immediate climate action, reinforcing existing inequalities, and overlooking the structural causes of environmental issues. Hence, it is argued that a more sustainable and equitable approach may need to be adopted, emphasising present-day solutions over the somewhat idealised notion of future generations' rights.

Part I of the book concludes with a contribution from **Eva Meyermans Spelmans**, who examines the role of environmental human rights in building circular economies, thereby providing a smooth transition to the next, IP law-oriented part of the book. The contribution focuses particularly on the environmental challenges of the textile industry, highlighting its significant contribution to global pollution and climate change, and emphasising the need for a transition to a sustainable and circular model, with the EU Strategy for Sustainable and Circular Textiles serving as a key legal framework. Additionally, it calls for stronger action to reduce the industry's environmental footprint and advocates for legislation that aligns production and consumption with planetary boundaries.

Part II - Intellectual property and the human right to a healthy environment: Conflicts and potential solutions

Part II of the book, which focuses on narrowing the general discussion of the HR2HE to its specific relevance in IP law,

begins with a contribution from **Martin Senftleben**, who examines the legal challenges faced by fashion upcyclers under EU trademark law. It is demonstrated that these challenges can create barriers when reworked garments retain original brand insignia, and that existing defences, such as exhaustion and referential use, may prove insufficient due to restrictive CJEU interpretations, leading to legal uncertainty that discourages upcycling. The discussion then calls for consideration of possible solutions, which could include, as suggested, a presumption of permissible use, along with additional labelling or disclaimers to clarify the origin of upcycled products.

The exploration of the tension between trademark protection and upcycling continues with **Irene Calboli**, who examines similar trademark issues for upcyclers in the U.S. context. It is demonstrated that luxury brands in the U.S. increasingly claim that upcycled goods made from their products cause consumer confusion and trademark dilution. While most of these disputes have so far ended in a settlement, they have failed to establish clear legal precedents, thus reinforcing legal uncertainty for upcyclers. This, in turn, points to the need for solutions, which could include U.S. courts applying the first sale doctrine to upcycling, introducing disclaimers, or recognising upcycling as fair use.

The discussion on the hot topic of upcycling and its importance for the realisation of the HR2HE then shifts to the tension, similar to that in trademark law, between this sustainability-oriented practice and copyright law protection. **Péter Mezei** argues in this context that upcycling intersects with copyright law's exclusive rights of reproduction, distribution, and adaptation, further emphasising the need for legal flexibility and advocating for a sustainability-oriented interpretation of

exhaustion to facilitate sustainable reuse and prevent the monopolisation of discarded materials by copyright law.

The contribution by **Heidi Härkönen** next discusses a largely unexplored but highly relevant question regarding the implications of copyright law's moral rights in upcycling. She argues that, while moral rights in copyright law – especially attribution and integrity – can enhance environmental and cultural sustainability by promoting transparency and respect for creative works, they can also, in theory, be used to block circular reuse. It is further demonstrated, however, that in practice, authors rarely oppose upcycling, and corporate rightsholders, as holders of economic rights rather than moral rights, are the main opponents. It is also shown that attribution issues can be easily resolved, whereas integrity rights only restrict upcycling in rare cases where modifications clearly damage the author's artistic reputation in an objectively significant way.

After examining the tensions at the intersection of trademark and copyright protection with sustainability, the book shifts focus to patent law's relationship with the HR2HE, featuring a contribution by **Léon Dijkman**. He argues that, while patents are often criticised for hindering sustainable innovation, they play a critical role in driving technological development and the commercialisation of environmentally progressive technologies. It is also contended that patent law's impact on environmental concerns should not be overstated, as other factors, such as lifestyle changes and broader policy interventions, are also crucial, urging caution in limiting patent protection without fully understanding its contribution to green innovation and diffusion.

The next contribution by **Charlotte Vrendenbarg** addresses the highly topical issue of sustainability and the HR2HE considerations in the enforcement of intellectual property rights. It demonstrates that the often-prioritised destruction of IP-infringing goods as a remedy for IP infringement frequently leads to environmental harm, including waste and pollution. This calls for urgent consideration by judges of more sustainable alternatives, such as donating goods, debranding, or recycling. It is emphasised that legal frameworks under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the EU's IP Enforcement Directive allow for proportionality in remedies, thereby permitting environmentally friendly options.

The book concludes with a contribution by **Elena Izyumenko**. Using the example of the tension between copyright law and upcycling, she demonstrates, first, how – internally, i.e., through the interpretation of copyright law's own mechanisms (such as the exhaustion doctrine and exceptions for quotation and pastiche) in light of the HR2HE – these mechanisms can support environmentally sustainable upcycling. Second, the contribution explores whether the HR2HE could be invoked as an "external" defence against IP infringement allegations and how courts might respond to such claims.

Looking ahead

It is the shared belief of all the contributors to this book that the role and importance of the human right to a healthy environment in broader discussions on intellectual property and sustainability is a timely and significant topic that must continue to be explored. They hope that their collective effort to

contribute to this investigation will mark a humble step toward advancing this issue, as well as toward creating a "greener" society, including through a sustainability-oriented approach to protecting humanity's innovation and creativity at the heart of intellectual property protection.

Enjoy the read!

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Otto Spijkers

The Status of the Right to a Clean, Healthy, and Sustainable Environment under Customary International Law

Is the right to a clean, healthy, and sustainable environment already part of general customary international law? While many argue it enjoys near-universal recognition, some insist it does not exist at all. This contribution dives into that ongoing debate, shedding light on the right's current status under general customary international law, which needs to be distinguished from its status under treaty law, such as under the European Convention on Human Rights or International Covenant on Civil and Political Rights; or its status under regional, national, or sub-national law. These areas of law are explored in other contributions in this book.

General customary international law refers to a body of international legal rules that arise from the consistent and general practices of states, accompanied by *opinio juris*, being the belief that such practices are legally required. Resolutions adopted by organs of international organisations, including the Human Rights Council (HRC) and the United Nations General Assembly (UNGA) can, in certain circumstances, provide evidence important for establishing the emergence of an *opinio juris*. In the past, such resolutions have provided fertile ground for emerging general customary international law. Think of the UNGA's universal declaration of human rights of 1948,[1] or the Rio declaration on environment and development, adopted at the 1992 United Nations conference on environment and development.[2] As the International Court of Justice (ICJ) noted in its Advisory Opinion on the legality of the threat or use of nuclear weapons, it all depends on the resolution's content and the conditions of its adoption.[3] The question is whether the HRC's and UNGA's resolutions on the right to a clean, healthy, and sustainable environment, to be discussed below, constitute

evidence important for establishing the emergence of an *opinio juris*.

Evidence of *opinio juris* and state practice can also be found elsewhere. One commonly cited example in the present context is the regional and/or domestic recognition of the right to a healthy environment. In a comment on the blog version of this contribution, David Boyd – UN Special Rapporteur on the human right to a clean, healthy, and sustainable environment from 2018 to 2024 – reminded me that this right is already recognised in the domestic law of over 160 UN Member States, and that the right has been referenced in thousands of court decisions over the past fifty years, at regional, national, and sub-national levels.[4] Whether all of these regional, national, and sub-national expressions of the right indeed amount to confirmation of its status under general customary international law is dependent on various circumstances, which differ from case to case.

Human Rights Council

On 8 October 2021, the Human Rights Council recognised "the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights".[5] This somewhat ambiguous phrase leaves unclear whether a clean, healthy, and sustainable environment is important for the enjoyment of already existing human rights, or constitutes a new autonomous human right, or perhaps both. The resolution recognising this right passed with 43 votes in favour and four abstentions, with no HRC member state voting against it.

To see if the HRC resolution helped to establish the emergence of an *opinio juris*, we need to look not only at the resolution's content but also at the conditions of its adoption and the reaction to the resolution more generally. Illustrative is the reaction of the United States. Not a member of the HRC at the time, the U.S. issued a statement on 13 October 2021, saying it:

> *"Recognize[d] that climate change and environmental degradation impact the enjoyment of human rights and affirm that when taking action to address environmental challenges and climate change, states should respect their respective human rights obligations. Nevertheless, the United States has consistently reiterated that there are no universally recognized human rights specifically related to the environment, and we do not believe there is a basis in international law to recognize a 'right to a clean, healthy, and sustainable environment', either as an independent right or a right derived from existing rights."*[6]

UN General Assembly

On 28 July 2022, the UN General Assembly recognised "the right to a clean, healthy and sustainable environment as a human right".[7] This straightforward formulation was an improvement, as it eliminated the ambiguity present in the HRC resolution.

The resolution passed with 161 states in favour, none opposed, and eight abstentions. To better understand what these votes mean, the explanations of vote by countries are very instructive. For some states voting in favour, the right to a healthy environment was not yet part of human rights law, until

it was proclaimed in a treaty. The United Kingdom, New Zealand, Norway, India and others therefore saw the UNGA resolution as a political statement only, and did not believe the resolution itself was capable of creating new human rights and corresponding duties for States under general customary international law.[8]

The U.S. is again a good illustration. It voted in favour and expressed support for the resolution. However, the U.S. also reiterated that:

> *"A right to a clean, healthy, and sustainable environment has not yet been established as a matter of customary international law; treaty law does not yet provide for such a right; and there is no legal relationship between such a right and existing international law. And, in voting 'YES' on this resolution the United States does not recognize any change in the current state of conventional or customary international law."*[9]

Is there a right to a clean, healthy and sustainable environment under customary international law?

If the HRC and UNGA resolutions have helped to establish a new right under general customary international law, then the focus should now shift from its recognition to its implementation. This is indeed what some institutions have done. Monitoring and encouraging the implementation of this right is one of the key responsibilities of the UN Special Rapporteur on the human right to a clean, healthy and sustainable environment.[10] Established by the HRC in 2012, this mandate initially concentrated on gaining recognition for the right. The first two mandate hold-

ers, John Knox and David Boyd, prioritised this goal. However, following the 2022 UNGA resolution, the mandate transitioned to implementation. The current Special Rapporteur, Astrid Puentes Riaño, has emphasised this shift. While one of her latest reports briefly reiterated the universal recognition of the right, it primarily addressed implementation issues.[11]

Not everyone agrees that the HRC and UNGA resolutions have firmly established a new autonomous right under general customary international law. On 2 December 2024, oral hearings began at the Peace Palace in The Hague on the International Court of Justice (ICJ)'s Advisory Opinion regarding state obligations in respect of climate change.[12] In its resolution requesting this Advisory Opinion, the UNGA referenced its earlier resolution on the human right to a clean, healthy, and sustainable environment, suggesting its legal significance in the crystallisation of general customary international law.[13]

In his comment on the blog version of this contribution, already referred to above, David Boyd brought another important point to my attention.[14] He noted that during the ICJ's Advisory Opinion process, sixty-five states had endorsed the relevance and importance of the right to a healthy environment. In addition, he noted that eight international organisations had also expressed their support for this right, including the European Union, the African Union, and the Organisation of African, Caribbean and Pacific States. Together, the Member States of these organisations represent well over 100 countries. In contrast, Boyd saw that only eleven states had directly challenged the right's status during this ICJ's Advisory Opinion process.

Professor Andreas Zimmermann, Director of the Potsdam Centre of Human Rights, representing Germany, stated:

> *"Let me start by stating the obvious, namely that an individual self-standing right to a clean, healthy and sustainable environment does not yet form part and parcel of current customary international law. The right to a healthy environment has been recognized politically by a General Assembly resolution in 2022, and I note in passing that Germany was an active supporter of this very resolution. The said 2022 General Assembly resolution on the right to a clean, healthy and sustainable environment recognizes that this right 'is related to other rights and existing international law'. Put otherwise, such right was perceived in this legally non-binding instrument as constituting a specific manifestation of other previously established human rights. The right was understood as deriving from, and inherent in, already existing international human rights obligations. What is more [...] the resolution recognizes [...] the need to interpret environment-related human rights obligations in line with general international environmental law. It affirmed, as you see, 'that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements'."*[15]

Essentially, Zimmermann suggested that the 2022 UNGA resolution encourages us to embrace an environmental perspective on existing human rights rather than introducing a new autonomous human right under general customary international law.

In its Advisory Opinion of 23 July 2025 on obligations of states in respect of climate change, the ICJ devoted an entire section to the right to a clean, healthy and sustainable environment.[16] First, the Court "consider[ed] that the effective enjoy-

ment of a number of human rights cannot be fully realised if those who hold them are unable to live in a clean, healthy and sustainable environment".[17] The Court then looked more closely at the evidence supporting the existence of a right to a clean, healthy and sustainable environment under customary international law, and reached the following conclusions:

> *"The Court is of the view that a clean, healthy and sustainable environment is a precondition for the enjoyment of many human rights, such as the right to life, the right to health and the right to an adequate standard of living, including access to water, food and housing. The right to a clean, healthy and sustainable environment results from the interdependence between human rights and the protection of the environment. Consequently, in so far as States parties to human rights treaties are required to guarantee the effective enjoyment of such rights, it is difficult to see how these obligations can be fulfilled without at the same time ensuring the protection of the right to a clean, healthy and sustainable environment as a human right. The human right to a clean, healthy and sustainable environment is therefore inherent in the enjoyment of other human rights. The Court thus concludes that, under international law, the human right to a clean, healthy and sustainable environment is essential for the enjoyment of other human rights."*[18]

Did the Court acknowledge the existence of a self-standing human right to a clean, healthy and sustainable environment under customary international law, or not?[19] If we look at the Separate Opinions, we see that the judges were divided on this

issue. In her Separate Opinion, the Australian Judge Hilary Charlesworth came to the conclusion that, "in its Opinion, the Court confirm[ed] the existence of a human right to a clean and healthy environment",[20] and then she provided some details about its substantive and procedural contents, something the Court itself had not done.

But other judges were less persuaded. In his Separate Opinion, Judge Dalveer Bhandari from India noted that, "with respect to the right to a clean, healthy and sustainable environment, it remains unclear whether the Court ultimately affirmed the existence of this right as a distinct norm of customary international law". He personally took the view that "the Opinion recognises the existence of this right under customary international law, yet it stops short of articulating its normative content or distinguishing it from the broader proposition that climate change adversely affects the enjoyment of various human rights."[21]

A more detailed commentary is provided in the Separate Opinion of the Romanian Judge Bogdan Lucian Aurescu. He clearly and unequivocally expressed his disappointment about the ambiguity of the Court's conclusions, quoted above, labelling them as "insufficient and incomplete".[22] He "regret[ted] that the Court, while accepting the existence of the human right to a clean, healthy and sustainable environment, was again excessively cautious even in front of compelling evidence, and fell short of explicitly finding that the right to a clean, healthy and sustainable environment is already a norm of customary international law". According to him, this was unfortunate, because, in his view, "the customary character of this right is induced from the obvious existence of uniform and widespread State practice and *opinio juris*".[23] He then provided us with this evidence.[24]

In his Separate Opinion, the South-African Judge Dire Tladi came to the conclusion that there really was no ambiguity in the ICJ's Advisory Opinion at all. He started by noting that, after a superficial reading, one might be inclined to conclude that the Court seemed unable to differentiate or choose between (1) recognising a self-standing human right to a clean and healthy environment, and (2) acknowledging that the failure to protect the environment can impact certain other substantive human rights, including the right to life, the right to dignity, and so on.[25] But he disagreed with those who claimed the Court's approach was conflating the two approaches, leading to ambiguity. According to Tladi, there was really no need to choose between these two approaches. This was because the fact "that a right can exist as a self-standing right and, at the same, be essential for the achievement of other rights, is not only possible but quite normal". What cleared up all ambiguities, according to Tladi, was that "the Court explicitly refer[red] to *a right* to a clean and healthy environment as a precondition for the enjoyment of other rights, which is different to saying that a clean and healthy environment is a precondition for the protection of human rights – the latter is an empirical statement" (emphasis in the original).[26] He then claimed that those who remained unconvinced about the existence of a self-standing human right to a clean and healthy environment under customary international law do so for policy reasons. Such persons will, in his view, probably never be satisfied that enough evidence of state practice and *opinio juris* has been provided.[27]

Conclusion

To conclude, no one denies that a clean, healthy and sustainable environment is a favourable and even necessary condition for the full enjoyment of human rights. However, some differences remain regarding whether the right to a clean, healthy, and sustainable environment has been universally recognised as a new autonomous human right under general customary international law or whether it merely calls for a "green" interpretation of already existing human rights.

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Jasper Krommendijk

The Human Right to a Healthy Environment from an EU Charter Perspective

There has been a veritable "turn to rights" in environmental and climate litigation,[1] especially in the last five years. The EU has in the same period taken an "increasingly prominent role" in relation to climate change and adopted "a considerable amount of new climate legislation" (as observed by The Hague Court of Appeal in *Shell/Milieudefensie*).[2] Think of the European Climate Law,[3] the Corporate Sustainability Reporting Directive (CSRD),[4] the Corporate Sustainability Due Diligence Directive (CSDDD)[5] and the EU Emissions Trading System 2 (ETS 2).[6]

This warrants the question of whether there has been a similar turn to human rights before the Court of Justice of the EU (CJEU). I answered this question in a publication with Sanderink on the basis of an analysis of the CJEU case law until December 2022.[7] This chapter serves as a timely opportunity to reflect on these findings. It will be argued that there is still no turn to rights in Luxembourg, except for the noteworthy Grand Chamber judgment in *Ilva*.[8] This is perhaps surprising considering the existence of a self-standing "principle" in the EU Charter on environmental protection: Article 37. After an overview of relevant developments before the CJEU, this chapter will offer some explanations for the absence of a rights turn and critically reflect on the strict *locus standi* requirements before the CJEU.

Article 37 CFR as a self-standing "principle"

The relatively recent EU bill of rights is noteworthy for its inclusion of a self-standing provision on environmental protection. Article 37 of the Charter stipulates: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union

and ensured in accordance with the principle of sustainable development." Other regional and international human rights treaties lack a self-standing provision.[9] Note, however, that various national constitutions as well as some regional treaties such as the Aarhus Convention and the African Charter contain an explicit right to a healthy environment (R2HE).[10]

The obvious limitation of Article 37 of the Charter is that it is formulated as a "principle" instead of a "right" in the sense of Article 52(5) of the Charter. This means that principles "shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality".[11] In addition, the formulation of Article 37 does not differ considerably from Article 11 TFEU and Article 191(2) TFEU, laid down in the Parts of the Treaty with EU principles and Union actions, respectively.

No rights turn: Shield rights are dominant

Article 37 and other Charter rights have only played a limited role in the environmental and climate case law of the CJEU so far. This especially holds true for the substantive "sword" rights such as Article 2 (right to life) and Article 7 (respect for private life and the home) that are generally used to advance environmental protection. Even Article 37 has played a relatively limited role.[12] There has, however, been a subtle move from a short passing reference to more extensive engagement whereby Article 37 is used as an interpretative tool or to highlight the importance of environmental protection as a justification for an interference.[13] Practice in relation to the latter has varied with some judgments citing Article 37,[14] while others merely mentioning environmental interest without reference to this

provision.[15] Advocates General (AGs) have generally engaged more extensively with Article 37.[16]

What's more, the number of cases in which Charter provisions have been used to counter measures protecting the environment is higher.[17] This especially holds true for anti-environmental "shield" rights such as Article 17 (right to property) and Article 16 (freedom to conduct a business). Also, Articles 20 (equality), 21 (non-discrimination) and 41 (good administration) have, by and large, been used in an "anti-environmental" way. The CJEU has also recently precluded a rights turn by declaring the "People's Climate Case" *Carvalho* inadmissible due to lack of standing (more later in this contribution).[18] It also closed off the possibility of state liability in *JP* in relation to breaches of air quality directives by denying that these directives intend to confer rights upon individuals.[19]

A slight turn more recently in Ilva?

The Grand Chamber of the CJEU rendered a judgment in *Ilva* in June 2024 concerning the pollution caused by the European largest iron and steelworks located in Southern Italy and the damage to human health.[20] Italy was earlier given a rap over the knuckles in infringement proceedings in 2011,[21] and the European Court of Human Rights (ECtHR) determined a violation of Article 8 ECHR in *Cordella* because of the polluting effects on the environment and human health.[22] The Strasbourg and Luxembourg systems thus complement each other nicely, as also noted by Callewaert and Bellezit.[23] The CJEU also cross-checked its analysis with the ECtHR and explicitly cited the Strasbourg precedent in *Ilva*. Above all, especially noteworthy for the purpose of this contribution is the combined role of

Article 37 and Article 35 (right to health care) in the interpretation of relevant secondary EU law. The CJEU interprets Directive 2010/75[24] in the light of both provisions after having determined the following:

> *"Having regard to the close link between the protection of the environment and that of human health, Directive 2010/75 seeks to promote not only the application of Article 37 of the Charter, as stated in recital 45 of that directive, but also the application of Article 35 of the Charter, it not being possible to achieve a high level of protection of human health without a high level of environmental protection, in accordance with the principle of sustainable development."*[25]

It remains to be seen whether *Ilva* marks a turn to a more extensive role for pro-environmental sword rights in the CJEU's case law.

Explaining the absence of a turn: silent rights and locus standi

One obvious explanation for the limited role of rights in the environmental/climate case law of the CJEU is the abundance of so-called silent rights in EU secondary law.[26] Reliance on the Charter is often unnecessary because of clear, precise and unconditional statutory obligations and specific limit values, such as in the (precursors of the) Directive on ambient air quality and cleaner air for Europe (AAQD)[27] or the Water Framework Directive.[28]

Another explanation are the strict *locus standi* requirements. The best illustration is the earlier mentioned *Carvalho* case. The applicants argued that the EU was insufficiently reducing greenhouse gas emissions in violation of a wide variety of Charter rights (Articles 2, 3, 15, 16, 17, 20, 21 and 24). The CJEU relied on its well-established *Plaumann* case law in relation to the individual concern requirement.[29] The (alleged) victims had failed to show that "the contested act affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed". The CJEU added that the fact that the contested acts infringe fundamental rights is in itself sufficient to establish such individual concern.[30] Therefore, it did not accept the argument that the effects of climate change are unique to and different for each individual. The CJEU also rejected the ground of appeal, arguing in favour of easier access for (members of) associations to bring climate cases before the CJEU.[31] The CJEU's strict *locus standi* requirements have been the subject of criticism and concerns from the ECtHR, ECtHR judges, AG Jacobs, the General Court, the Aarhus Compliance Committee and several commentators, such as Craig.[32]

Noteworthy is that the ECtHR referred to the CJEU's strict *locus standi* case law (including *Carvalho*) in *Verein KlimaSeniorinnen Schweiz and Others* in which it broadened access for associations in climate cases.[33] Strasbourg Judge Eicke, for example, noted in his partly concurring and partly dissenting Opinion in *KlimaSeniorinnen* that "individuals and associations only have very limited standing before the [CJEU] under Article 263 TFEU".[34] It remains to be seen whether the ECtHR will find the

locus standi to be in conformity with Article 6 ECHR, after EU accession to the ECHR.[35]

The way forward

In my article with Sanderink, we argued that a more prominent rights turn is warranted before the CJEU as well, also from a legal perspective.[36] We distinguished two potential avenues. First, the CJEU can – just like the ECtHR[37] – derive positive obligations from relevant Charter provisions, including Articles 2 (right to life) and 7 (right to respect for private life and the home) of the Charter. Second, the CJEU can rely more extensively on Article 37 as a tool for interpreting primary and secondary EU law in an environmentally friendly way.[38] The possibilities to do so have grown in recent years. All EU secondary laws mentioned in the introduction contain references to the Charter, except for ETS 2. Most noteworthy is the explicit reference to Article 37 in the European Climate Law.[39]

By way of conclusion, recognition of a separate R2HE should not be seen as a panacea. Much depends on the actual formulation as well as the institutional and procedural context of the respective system. The recent Grand Chamber judgment in *Ilva*, nevertheless, could herald a new era in which human rights play a more considerable and explicit role in relation to the protection of the environment and climate. This development is equally relevant to cases where intellectual property protection clashes with or ignores environmental interests.

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38. This also holds true for national courts in their handling of cases in which EU law plays a role. I argued with my colleague De Waele that the Dutch Supreme Court should attach more importance to the Charter, including Article 37, as well as relevant ECtHR case law (following Article 52(3) of the Charter) in its interpretation of Regulation 598/2014 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports within a Balanced Approach. See Henri de Waele and Jasper Krommendijk, 'Bescherming van de mensenrechten gaat voor op procedure-verplichtingen' (2024) 99:16 *Nederlands Juristenblad*. The eventual Dutch Supreme Court judgment about the reduction of the number of flight movements per year at airport Schiphol does, however, not engage with the Charter. See Dutch Supreme Court, *IATA c.s./Dutch State c.s.* (ECLI:NL:HR: 2024:1061), Judgment of 12 July 2024.

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Luísa Netto

The Struggle Is Now

Why We Should Be Cautious About Granting Present Rights to Future Generations

The appeal to future generations as a means to legitimise climate litigation is growing.[1] The idea of advocating for the rights of future generations[2] is closely linked to the recognition of the human right to a healthy environment (HR2HE); this right is seen as a *conditio sine qua* for the existence of future generations. However, this appeal – and the conceptual connection it entails – raises various questions. Is it feasible to distinguish between present and future generations in the context of the climate crisis? Can all future people be meaningfully treated as a single, homogenous category? What rights, if any, do future generations have? And who can speak on their behalf? This short contribution offers a preliminary analysis of the issue, reflecting the key arguments presented during the workshop on HR2HE and IP and now gathered in this edited volume.

While protecting the planet for future generations is crucial, the legal invocation of future generations remains unclear and inconsistent. This chapter will briefly discuss this inconsistency by (i) arguing that "future generations" do not constitute a coherent group of (present) rightsholders; (ii) contending that the consequences of advancing a legally vague approach to future generations and future generations' rights need further analysis; (iii) questioning whether granting rights to future generations is an adequate means to tackle the climate crisis.

Future generations?

The appeal to future generations seems to be increasingly presented as an established and accepted concept. It may then appear counterintuitive and unpopular[3] to look critically at this

"almost-sacred-entity". However, we must define this category in order to use it consistently in the legal domain.[4]

Future generations are often invoked without further specification. In other instances, there is plenty of discussion[5] over what constitutes future generations: present children,[6] the following generation(s), or those yet unborn?[7]

This inconsistency and – at times inaccuracy – can also be exemplified by several quotations on the famous *Urgenda* case,[8] portraying it as a decision in which future generations' rights were central. Contrary to what is often suggested in the literature, the Dutch Supreme Court did not rely on future generations' rights to decide *Urgenda*; it upheld the arguments put forward by the Court of Appeal, stating that greenhouse gas emissions are a current-generation issue.[9]

A more detailed analysis of the usage of future generations and future generations' rights, possible (in)accurate references to legal documents and case law falls beyond the scope of this chapter. To further illustrate the allegedly inconsistent use of future generations, a reference can be made to a recent article by Aoife Nolan where, investigating the relation between children's rights and future generations before courts, Nolan observes that future generations do not constitute a defined category within constitutional law.[10] Moreover, she notes that "[t]he specific scope of future generations and the extent to which they benefit from protection under IHRL [international human rights law] has always been unclear".

If future generations are to be conceived as rights-holder, it would require identifying distinct generational cohorts – those born in 10 years, 100 years, and so forth – whose rights may differ or even conflict. Yet such generational boundaries are impossible to draw.

Given these definitional challenges, "future generations" is often being considered as referring to individuals yet to be born. This approach indicates a group and makes it possible to advance some broad predictions about future generations – they will exist, the planet will be warmer, and coastal areas might disappear. Within such a group, specifying its members remains uncertain;[11] their societal position, values, political preferences, and living conditions are unpredictable. In the face of these unpredictable circumstances, making rights-based considerations is complex. Just as no present generation shares uniform rights, needs, or interests, neither will future generations show this homogeneity; defining them as a cohesive group is unrealistic and might be misleading.

A question may illustrate the problem: What cohesive legal interest could plausibly exist between an unborn child in Sweden and one in Guinea? While grouping present and future generations may make sense in extreme cases, such as planetary survival, other contexts require a more nuanced approach. Concerns for future generations in political and legal discourse must avoid using the notion of future generations as a rhetorical shield that deflects attention from current social and economic inequalities or the universal protection of fundamental rights. Intergenerational equity must go hand in hand with intragenerational justice.[12] Addressing generational heterogeneity is essential for equitable climate action.

Which rights are given to future generations?

As pointed out above, the key issue in invoking future generations lies in their definitional ambiguity and their status as rights-holders. Specifically in constitutional adjudication,

approaching the category "rightsholders" is crucial for balancing rights, assessing the constitutionality of state action, and enforcing State obligations. This is equally important when balancing environmental human rights with, among others, intellectual property protection (see the other chapters of this book). To handle rights rationally and proportionally, clarity is needed – but future generations remain too vague a category to qualify as (present) rightsholders. And even if we consider the not-yet-born, the core question remains: Which rights belong to which rightsholders? This is neither trivial nor easy to answer.

In current discourse, it is often unclear whether future generations' rights are legally recognised or merely aspirational claims. Many references are vague, failing to distinguish between interests, moral rights, and legal rights.[13] In addition, the assertion that future generations have at least minimum rights does not resolve this ambiguity. Defining such rights faces similar hurdles as the concept of future generations itself.

One contributing factor to this confusion is the misinterpretation of non-binding texts and case law, sometimes portrayed as granting future generations legal rights when they may not. The Maastricht Principles on the Human Rights of Future Generations, for example, while non-binding, are gaining attention and could influence interpretations of international law and domestic constitutional systems. According to these principles, future generations are not entitled merely to minimum rights; rather, they are said to possess the same rights as present generations,[14] with equality and non-discrimination often invoked to support this claim.

Constitutional provisions are similarly subject to overinterpretation. While many claim that constitutions protect future generations' rights, research conducted by Araújo and Koessler

shows that there is variation among constitutional texts, with most constitutions imposing state duties rather than granting future generations rights.[15] In other words, there is no broad constitutional recognition of future generations as rightsholders.

This raises another issue, the so-called nonexistence argument. It is problematic to grant future generations the same rights as living individuals, as rights require justiciability. As Aiofe Nolan points out, balancing the constitutional rights and interests of future generations and present generations, especially when they conflict, is difficult if the scope of future generations' rights is unclear.[16] Beyond justiciability, recognising future generations' rights would impact foundational principles of constitutional law, including the separation of powers and democracy.

Within the framework of constitutional adjudication, rights are legal norms with specific content, holders, and addressees, and they require justiciability to ensure protection and promotion. Recognising future generations as rightsholders could lead to hierarchies between rights, potentially undermining certain rights, such as social rights. Moreover, given the uncertainty about the future, predicting potential conflicts between rights is nearly impossible, leading to complex and endless legal debates that could dilute the current legal meaning and effectiveness of rights.

From another perspective, it is crucial to distinguish between rights as concrete subjective entitlements (held by individuals) and rights as abstract legal norms embedded within a legal system. On the one hand, specific rights (held by individuals) can conflict with other rights, constitutional values, and public interests. These conflicts are typically resolved by admin-

istrative bodies or, ultimately, by courts, which interpret abstract legal provisions while adjudicating cases. These conflicts may involve violations or risks to rights, leading to reparations, injunctions, or prohibitions.

On the other hand, rights can also be analysed as abstract legal norms, which may also come in conflict with other legal goods or norms at a similarly abstract level. In this context, rights may either trump other legal goods or face justified and proportional restrictions, such as in budgetary priorities or public policy design. These abstract conflicts can lead to legislative limitations on rights, often subject to constitutional review in Western democracies.

Constitutional theory and practice cannot accommodate the simultaneous and equal existence of rights for both present and future generations as specific subjective rights held by individuals. Legal rights held by individuals[17] require an existing rightsholder, and while legal fictions, like the nasciturus, can extend protection in exceptional cases, they cannot apply to the vague category of future generations. As abstract norms, rights are there to be held by all subjects existing within the legal system, whether in the present or future.

While the notion of future generations' rights is rhetorically and symbolic appealing, taking it seriously reveals several critical challenges. First, we cannot predict nor enforce rights for non-existent, unknown individuals. Second, recognising these rights as present rights held by future individuals would render governance and societal functioning unworkable, as every action or inaction could violate someone's rights. Adding the idea of reparations further complicates this already untenable scenario. Although law and legal theories evolve – evident in the progressive recognition of social rights or the protection of the

unborn – it currently seems legally unviable to grant future generations the same status as subjective rightsholders as actual individuals. Future legal developments may introduce new categories like "prospective" rights. This is yet to be seen.

The empty allure of future generations

The previous discussion outlined the challenges in defining future generations and argued that even with a concept of future generations as those yet to be born, the category may not solve the underlying problems. Additionally, the concept of future generations can create the illusion of homogeneity, ignoring the inequalities within each generation, especially under the current legal and economic systems.

Two other key aspects should be pointed out: (i) recognising future generations' rights does not address the structural causes of climate change, and (ii) it could reinforce the idea that climate change is a future problem rather than a pressing present issue.

Granting rights to nature and future generations may seem like a converging strategy, but they are not necessarily aligned. A central rationale for recognising the rights of nature is that the environmental crisis, driven by climate change and biodiversity loss, stems from the anthropocentric logic of our economic and legal systems.[18] These systems, based on rights, property, and exploitation, enable practices that harm the planet. While factors like population growth contribute to ecological degradation, the deeper issue lies in the need to move away from extractive and exploitative paradigms. Recognising future generations' rights does not challenge the anthropocentric logic that rights of nature aim to address. The current legal and economic

systems have failed to promote sustainability,[19] including in the context of intellectual property protection, as discussed in other chapters in this edited volume. Therefore, granting the same rights to future generations is unlikely to change that.

It is true that advocates for future generations' rights often emphasise intergenerational equity,[20] including proposals to limit the rights of present generations to safeguard the rights of future generations. However, this emphasis does not directly tackle the causes of climate change or improve our relationship with nature.

First, it is unclear how the focus on future generations' rights would lead to a fundamental shift in our economic system or whether present rights restrictions would effectively address climate change. Second, each future generation eventually becomes the present generation relative to the next generation. How would this ongoing cycle of restrictions be calculated? My question can be better understood in the light of assertions like this one: "[w]hile the rights of children who are present on Earth require immediate urgent attention, the children constantly arriving are also entitled to the realisation of their human rights to the maximum extent."[21] For each present generation there would be a future generation entitled to the maximum realisation of their human rights. This does not seem feasible. In fact, it may be time to reassess the premise of "maximum extent" rights, especially in light of the urgent need for radical transformations in our current economic system.

I believe Matthias Petel's critique of rights of nature largely applies to future generations' rights, though the latter pose a unique set of problems.[22] The discourse supporting future generations' rights often lacks clarity, as it draws on various legal, philosophical, political, and even religious/spiritual

foundations that are not always explicitly stated. These diverse bases can serve different ideologies and goals. Without substantive considerations, future generations' rights risk reinforcing the structural causes of the problem rather than addressing them.

Finally, invoking future generations may create the illusion that climate change is a distant problem – something that still lies ahead and can be dealt with in due time. In reality, it is an urgent crisis of the present, directly affecting those alive today.[23] Moreover, framing the issue as a conflict between present and future generations distracts from the deeper and more pressing inequalities that exist within generations – between rich and poor, the Global North and South, and across social classes.[24] These divisions shape not only who suffers most from climate impacts today but also who will bear the brunt of those consequences in the future. Future generations will certainly inherit many of these injustices,[25] but the real struggle is already happening within our own time.

Concluding remarks

This chapter aimed to address major inconsistencies in using the concept of future generations' rights within climate discourse. First, it highlighted the vagueness of future generations as a category and argued that recognising future generations' rights creates unsolvable legal issues, particularly in determining who the rightsholders are and how to balance conflicting rights. Second, it critiqued the romanticised view of future generations' rights, which preserves current power structures and overlooks unequal responsibilities and impacts of

climate change. This, in turn, risks perpetuating exploitative relations with nature and inequalities within generations.

The goal of my argumentation is not to undermine future generations' protection but to push for legal consistency, particularly in constitutional law. While future generations' concerns can positively shape law, granting (present-day) rights to future generations is not feasible within the current legal framework. Instead, we should focus on sustainable development and equity without romanticising future generations' rights in the climate discourse.

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Eva Meyermans Spelmans

Fast Fashion, Slow Transition

Social and Environmental Rights at the Heart of a Sustainable Transition in the Textile Industry

In the new ultra-fast fashion era, garment production cycles are accelerated to new heights, while the quality of the garments deteriorates. Key characteristics of the industry are its reliance on cheap manufacturing, overconsumption and short-lived garment use.[1] The textile industry accounts for 10% of global carbon emissions and 20% of global wastewater, making it one of the most polluting industries in the world.[2] At the same time, phenomena linked to climate change, such as flooding[3] and extreme heat[4], threaten the workers in apparel production centers situated in some of the most climate-vulnerable countries.[5] To bring an end to these high environmental and social costs, a shift towards a sustainable textile industry is long overdue.

In 2009 the Office of the UN High Commissioner for Human Rights recognised that the enjoyment of a broad array of human rights is threatened by climate change.[6] Fast forward to 2025, the effects of climate change can be widely seen in the textiles industry as increased heat stress and flooding affect worker health, production pace and infrastructure. These events show that human rights, the environment and climate change are strongly interlinked, which clearly touches upon the human right to a clean, healthy and sustainable environment (HR2HE). This right constitutes a precondition to the enjoyment of human rights, as these cannot be enjoyed without a healthy and sound climate. Gradually, the HR2HE has been emerging under international law with the adoption of UN Resolution 76/300[7] as an important recognition.[8] The importance of the HR2HE was confirmed in the case law of the European Court of Human Rights.[9]

The transition towards a sustainable textile industry requires fundamental changes that can be initiated by a strong

legal framework. An example of such a catalyst of change can be found at the level of the European Union, where the EU Strategy for Sustainable and Circular Textiles (EU Strategy)[10] envisions to bring "fast fashion out of fashion". One of the instruments crucial to this transition is the Corporate Sustainability Due Diligence Directive (CSDDD).[11]

This chapter will set out who is responsible for the protection of human rights from climate change within the textile industry. In a second step, this chapter aims to analyse the EU Strategy, focusing on the intersection between environmental and social rights in the textile industry. Lastly, this chapter aims to set out how the EU envisions their obligation with regard to climate change, both in relation to mitigation and adaptation in the textile industry. The focal point of the analysis will be the concept of circular economy. Ultimately, the goal is to show the importance of centralising the intersection between social and environmental rights within the legal framework to make sure both society and the environment can benefit from the green transition.

This discussion is important, particularly in relation to the current exploration in this book of the intersection between the HR2HE and intellectual property (IP) protection. IP protection in the textile industry plays a significant role in shaping the sustainability transition. For instance, trademark and copyright protection on garments and other products can hinder their sustainable upcycling and raise concerns about balancing IP rights with circular economy principles and the HR2HE. This issue, along with potential legal solutions, will be further explored in the following chapters by, among others, Martin Senftleben, Irene Calboli, Péter Mezei and Heidi Härkönen.

Protecting human rights within the textile industry

As recognised by the preamble of the 2015 Paris Agreement, states should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights.[12] The linkages between human rights and climate change are widely recognised at the national and international level.[13] Within the textile industry, states involved in production and consumption have to take responsibility for protecting their communities from climate change. At the same time, as recognised by the UN Guiding Principles on Business and Human Rights, private actors, including brands, retailers and suppliers, also need to take responsibility to protect workers and the environment.[14]

Through voluntary policies of corporate social responsibility, companies aim to develop sustainable policies and make decisions that take the environment and society into account. These policies have often proven to be ineffective in improving labour standards or providing a living wage within the textile industry's global supply chain.[15] Acknowledging the ineffectiveness of voluntary actions, the conduct of private corporations is increasingly governed at international and national levels by national environmental laws and policies that aim to protect environmental rights, even extraterritorially (see: Loi de Vigilance[16], Lieferkettengesetz[17] and CSDDD). A more systemic approach can be found in the development of a circular economy which aims to transform the linear business model by circulating products and materials at their highest value. This concept aims to tackle climate change and other environmental

global challenges like pollution through processes like maintenance, reuse, refurbishment, recycling and upcycling.[18]

The EU strategy for sustainable and circular textiles

Introduced in 2022, the EU Strategy recognises that the linear business model is at the roots of many of the negative social and environmental impacts in the textile industry. Building on the aims set forward by the EU Green Deal[19], the Circular Economy Action Plan[20] and the EU Industrial Strategy[21], the EU envisions a transition to sustainable and circular production, consumption and business models. The Strategy sets forward the Commission's vision for the future of the textile industry. This includes that "all textile products placed on the EU market are durable, repairable and recyclable, to a great extent made of recycled fibers, free of hazardous substances, produced in respect of social rights and the environment". To meet this goal, the EU Strategy builds a framework based on revising existing legislation as well as new legislation that touches on the textile industry. Through 16 pieces of legislation, the EU Strategy aims to change the entire lifecycle of textile products and the way they are produced and consumed. Central pieces of legislation are the CSDDD, the Green Claims Directive[22], the Waste Framework Directive[23], and the Ecodesign for Sustainable Products Regulation[24].

The circular economy and social rights in the textile industry

Many of the pieces of legislation touch upon the environmental aspect of sustainability by focusing on the transition towards a circular economy.[25] The idea is that the circular economy will

reduce the dependency of clothing producers on fossil fuels and, at the same time, reduce their impact on climate change and microplastic pollution. A key legislative instrument is the Ecodesign for Sustainable Products Regulation, which introduces the Digital Product Passport and a prohibition on destroying unsold textile products.[26]

The circular economy has much potential to bring an end to pressing environmental issues such as the overuse of national resources and waste-related problems. So far, the greatest action among brands, manufacturers, and producers can be situated in reducing the environmental footprint of the industry by adopting new technologies.[27] However, the environmental footprint of the industry is still expected to grow as resource consumption continues to increase in the coming years.[28] When reviewing the legislative instruments crucial to the green transition envisioned by the EU Strategy, it becomes clear that the focus of the EU legislator is mainly on the protection of the environment and less on the impact on social rights.[29] The most promising instruments that take the intersection between environmental and social rights into account are the Corporate Sustainability Reporting Directive[30] and the CSDDD. The CSDDD aims to foster sustainable and responsible behaviour for a just transition towards a sustainable economy. The impact of EU corporate accountability legislation remains to be seen, as the Omnibus simplification package significantly weakens the sustainability obligations.[31]

Thus, social and human rights implications are not automatically addressed with circular solutions, as the concept of circular economy does not always mean sustainability.[32] Even within recycling facilities, there have already been reports about child and forced labour.[33] The impact of circular business

models on labour in the value chain is not sufficiently addressed by the legal framework. Job growth will significantly be disrupted by the move towards a circular business model.[34] At the same time, there remains a strong risk of perpetuating existing working conditions concerns, such as low wages, excessive overtime, and harassment.[35] Informal workers will be of crucial importance in areas such as waste-picking but are especially vulnerable to negative social impacts as they are also more likely excluded from legal protection.

Lastly, the EU strategy acknowledges that the exploitative business model based on overconsumption and overproduction lies at the root of negative socio-ecological impacts in the Strategy. However, the unsustainable business model and purchasing practices are not addressed by the legislation envisioned by the EU Strategy.[36] Only when textile overconsumption and overproduction are addressed by the legal framework, a genuine change towards a sustainable value chain is possible.[37]

Conclusion

The EU Strategy lays out an important pathway for transitioning the textile industry. However, it does not adequately address the intersection between environmental and social rights. Instead of reducing sustainability obligations, the EU should take on a leadership role and protect human rights, the environment, and the climate. More action, in the form of new policies or legislation, is needed to mitigate the negative social and environmental effects of the textile industry. Central to a sustainable transition should be the goal of keeping consumption and production within planetary boundaries.[38]

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Martin Senftleben

Fashion Upcycling and the Human Right to a Healthy Environment

Trademark Protection Thwarting Sustainable Reuse?

With new collections each season, the fashion industry produces a highly problematic fashion garbage heap every year.[1] Circular economy projects seeking to produce "new" garments by reworking second-hand and unsold fashion items have particular societal value against this background. EU law explicitly recognises the importance of environmental protection projects by stating in Article 37 of the Charter of Fundamental Rights that the improvement of the quality of the environment must be ensured in accordance with the principle of sustainable development. The Circular Economy Action Plan[2] – adopted in 2020 by the European Commission as a pillar of the European Green Deal[3] – offers additional support. An important element of the Action Plan is the objective to establish a legal framework that makes product policies more sustainable, in particular by enhancing the sustainability and repairability of goods in the European market.

Evidently, legal solutions that support fashion reuse have particular relevance in the light of these goals. Initiatives, such as fashion upcycling, add new value to worn pieces of clothing and contribute to the reduction of fashion waste. "Upcycling" can be defined as "the process of transforming by-products, waste materials, useless, or unwanted products into new materials or products perceived to be of greater quality, such as artistic value or environmental value".[4]

Trademark protection of brand insignia displayed on fashion items, however, can pose difficulties. The more garment components enjoy trademark protection, the more legal obstacles arise. Upcycling may trigger allegations of (post-sale)[5] consumer confusion and unfair freeriding[6] when fashion elements bearing third-party trademarks remain visible on "new" upcycled products made of fashion waste.[7] To support the sustainable

reuse of fashion items in the shadow of trademark protection, it thus is important to assure upcyclers that they can rework trademarked fashion items without risking infringement. Offering a reliable shield against trademark claims, EU law can provide legal certainty for fashion upcyclers and support the sustainable reuse of fashion products.[8]

Weakness of existing defences

In principle, EU trademark law could achieve these goals by making robust defences available – defences which fashion upcyclers can invoke to neutralise infringement claims. As upcycling concerns the productive reuse of fashion items that have initially been produced and marketed by the trademark owner, the exhaustion of trademark rights after the first sale of products bearing brand insignia comes to mind.[9] The crux, however, lies in the focus on the resale of goods in the specific form in which they have been marketed by the trademark owner.[10] Product changes as a result of upcycling can render the exhaustion doctrine inapplicable.[11] Article 15(2) of the EU Trade Mark Regulation[12] stipulates that exhaustion shall not occur when the trademark owner has legitimate reasons to oppose further commercialisation, especially where the condition of the goods is changed or impaired after they have been put on the market. As upcycling entails changes, trademark owners will often have the opportunity to rebut exhaustion arguments in upcycling cases by pointing out that the condition of the goods has been changed or that elements of the original goods have become part of new and different, upcycled goods.[13]

Not only the exhaustion doctrine but also other limitations of trademark rights may fail to offer sufficient flexibility. Article

14(1) of the EU Trade Mark Regulation explicitly permits so-called "referential use": use "for the purpose of identifying or referring to goods or services as those of the proprietor of that trade mark". For instance, a parody using a trademark to criticise policies of the trademark proprietor, or the mention of a trademark in a critical newspaper article, may fall within the scope of the referential use defence.[14] Arguably, the display of trademarked fashion elements on circular economy products can also be regarded as a legitimate form of referential use. Fashion re-users refer to reworked fashion products as those of the trademark proprietor to make an important statement on the urgent need to change production and consumption patterns: sustainable reuse instead of wasteful new productions several times a year.[15]

Considering current developments in EU trademark law and practice, however, it is doubtful whether the referential use defence will effectively shield users who invoke the HR2HE from the verdict of infringement. The Court of Justice of the EU (CJEU) may prefer a restrictive interpretation. The decision in *Audi/GQ* points in this direction. The case concerned the sale of spare parts for Audi models from the 1980s and 1990s. GQ offered grilles that contained an element designed for the attachment of the protected Audi emblem.[16] Discussing whether the marketing of these Audi grilles could be regarded as a legitimate form of referential use, the CJEU held that no permissible referential use could be found when the alleged infringer incorporated a conflicting sign into spare parts intended for repair.[17] A valid case of referential use could only be found when the alleged infringer, without affixing the third-party trademark to the spare parts themselves, merely used the trademark to indi-

cate that they were compatible with the trademark owner's cars.[18]

Quite clearly, this restrictive interpretation can thwart the invocation of the referential use defence when the sign triggering the infringement action becomes an element of the product offered by the user invoking the defence. This approach can have a deep impact on reuse in the circular economy. It minimises the chances of having success with referential use arguments when a third-party trademark remains visible on upcycled fashion products.[19]

A comparison with developments in the area of descriptive use further darkens the horizon. Before the *Audi* decision, the CJEU already held that the descriptive use defence was inapplicable when a third-party trademark became a central element of the very contents of a product. In *Adidas/Marca* – a case about allegedly infringing use of decorative elements similar to Adidas' famous three stripes logo – the Court concluded that the use of a two-stripe motif on sports clothing was "not intended to give an indication concerning one of the characteristics of those goods."[20] If a trademarked design element remains visible on an upcycled product, the upcycler will thus have difficulty to argue that this indicates a product characteristic – namely the fact that the product is the result of reworking used garments. Similarly, the Court denied descriptive use in *Opel/Autec*, on the ground that the faithful reproduction of the Opel logo on a scale model car could not be regarded as an indication of product characteristics.[21] Instead, the logo became part of the product itself. This CJEU case law does not give much hope that defences in trademark law, such as the defences for referential and descriptive use, will be applied broadly.[22]

Honest practices test as an additional obstacle

EU trademark legislation itself poses additional hurdles. Article 14(2) of the Trade Mark Regulation makes the invocation of limitations of exclusive trademark rights that can serve as defences for upcyclers dependent on compliance with honest practices in industrial or commercial matters. This additional, open-ended prerequisite can cause substantial difficulties. The CJEU tends to determine compliance with honesty in industrial and commercial matters on the basis of the same criteria that inform the analysis of *prima facie* infringement in trademark confusion and dilution cases.[23] This circular approach has led to concerns that the inquiry into honest practices may ignore competing societal values underpinning the limitations of trademark rights.[24] Instead of shaping the honest practices test in a way that offers room for competing policy objectives, the CJEU simply replicates standard criteria of the trademark infringement analysis. In *Gillette*, for instance, the Court held that use would fail to comply with honest practices in industrial and commercial matters if it gave the impression that there was a commercial connection between the third party and the trademark owner (= causing confusion), or affected the value of the trademark by taking unfair advantage of its distinctive character or repute (= unfair freeriding).[25]

As indicated, these criteria for rejecting defences that upcyclers might invoke, replicate infringement criteria in the field of trademark protection against confusion and dilution. The risk of circularity is obvious: By copying almost literally the criteria for establishing *prima facie* infringement, the CJEU subjects defences to additional scrutiny in the light of the same criteria

that enabled the trademark owner to bring the infringement claim in the first place. As a result, defence arguments, such as referential use, become moot in practice. Following the current CJEU approach, the same findings that have led to a finding of *prima facie* infringement in upcycling cases support the denial of compliance with honest practices when the upcycler invokes defences. The symmetry of criteria for assessing *prima facie* infringement and determining honesty in industrial and commercial matters can easily lead to a situation where a finding of a likelihood of confusion or unfair freeriding already foreshadows a finding of dishonest practices and a rejection of defence arguments.

In sum, the conclusion seems inescapable that current EU trademark legislation fails to offer legal certainty for upcycling projects. Instead, trademark infringement claims are risk factors that can easily discourage upcyclers seeking to reduce fashion waste.

Ways out of the dilemma

So what should be done? Considering the environmental crisis – fueled by the wasteful use of resources in the fashion industry[26] – it is of particular importance to develop legal solutions that offer upcyclers a high degree of legal certainty even when they rework fashion items that bear third-party trademarks. As both the exhaustion doctrine and statutory defences, as demonstrated, fail to offer a sufficient degree of legal certainty in EU trademark law, it is important to explore alternative avenues to support sustainable reuse. To give fashion upcycling a chance, a legal presumption of non-infringing, permissible use should be introduced.[27] More concretely, it should be assumed that

consumers are well aware that trademarked fashion pieces may be reworked and included in circular economy products. Third-party trademarks that remain visible as a result of upcycling may be reminiscent of the original fashion items that served as raw materials. Considering the overarching goal of environmental protection, however, the assessment must be based on the perception of an average consumer who knows about the sustainable reuse of fashion items and looks actively for indications of commercial origin which upcyclers add to ensure transparency.

Hence, it should be clarified that, in EU trademark law, by affixing their own logos to upcycled products, fashion re-users can dispel concerns about (post-sale) confusion, and avoid a finding of blurring, tarnishment or unfair freeriding. Seeing the upcycler's logo, the well-informed consumer will understand that third-party trademarks have become decorative elements of a "new" product consisting of reworked fashion items that served as raw materials.[28] This finding should tip the scales in favour of the upcycler and, as a rule, exclude trademark infringement claims. The trademark proprietor should only be able to rebut the presumption of permissible use by producing evidence that the circular economy setting is a mere pretext for a use specifically intended to mislead consumers or unfairly profit from the magnetism of the third-party brand.

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Irene Calboli

Upcycling, the Ongoing Battle

A (Hopeful) United States Perspective

The term "upcycling" was first used in 1994 by Reiner Pilz, a mechanical engineer, in the architecture magazine *Salvo*.[1] Specifically, Pilz contrasted the practice of upcycling with recycling, referring to the latter as "down-cycling" and noting that recycled products often lose their value when recycled. On the contrary, Pilz pointed out that upcycling generally improves existing products and product parts in ways that add value and make them more appealing to consumers. Since then, the term "upcycling" has been used to define activities that involve repurposing discarded materials or old items and transforming them into new or rejuvenated products.[2] Staple examples in this respect are Louis Vuitton bags revamped with fringe or rhinestones or Nike sneakers personalised with fabric, paint, or different decorations. Upcycling also refers to taking the remaining good parts of old products – such as buttons, buckles, and fabric – to create new items.[3] In all instances, upcycling promotes sustainability by reducing the need for new materials and increasing the life cycle of existing products or parts of them.

In recent years, upcycling has seen a surge in popularity thanks to its positive impact on sustainability and the circular economy due to consumers' increasing attention to the environment. As a result, individuals, artisans, and small companies have enthusiastically embraced the practice as a central part of their activities and a way to reduce waste.[4] Large companies (like Ikea,[5] Patagonia,[6] and The North Face,[7] to name a few) have also begun to upcycle their products to reduce their environmental impact. However, with fame often comes unwanted attention, and the growth of upcycling practices has led to various legal challenges against independent upcyclers based on

the argument that their products violate intellectual property (IP) rights.

In particular, since upcycling generally leads to the creation of modified or altogether new products, it has been argued that using IP-protected materials can lead, amongst others, to trademark infringement and dilution. Supporters of this argument have argued that the traditional defence of trademark first sale[8] (or trademark exhaustion as it is known on the other side of the Atlantic) does not apply because upcycled products are materially different[9] than the goods on which the marks were used initially. In turn, this could lead to consumer confusion and damage to the reputation of the original trademark owners.[10] It certainly does not help that upcycled products frequently include original parts of luxury goods and prominently display their trademarks – such as earrings or pendants made with buttons from old luxury clothes or cut-up pieces of designer bags displaying the logos of the original trademark owner. Not surprisingly, this has led to widespread displeasure (and fear of competition) on the part of the trademark owners, who have vocally supported that these products may create confusion as to their commercial source and lead the public into believing they originate with or are authorised by the original owners.[11] A related complaint is that, even when they do not confuse the public, upcycled products are still likely to be associated with the famous marks they display, thereby constituting trademark dilution.[12]

Against this background, it is no surprise that upcycling has been the subject of several lawsuits in recent years. Yet, since all claims have been settled out of court so far, the practice's legal boundaries remain uncertain both for upcyclers and trademark owners.

The still murky litigation on upcycling

In particular, one of the first relevant cases on upcycling filed in the U.S. was the 2021 lawsuit between Louis Vuitton (LV) and Sandra Ling Designs, Inc. (SLD), in which LV alleged trademark infringement and dilution for the unauthorised creation and sales of apparel, handbags, and accessories made from authentic pre-owned LV goods.[13] The dispute focused on the upcycled bags SLD made by adding fringe and stones to old LV bags and accessories – such as earrings, bracelets, and keychains – made with fabric from old LV products. In its complaint, LV argued that these products not only prominently and unlawfully bore LV marks but also fundamentally altered and no longer met LV's quality standards, which could both lead consumers into confusion and negatively affect LV's reputation. SLD responded to the claims by arguing that customers were unlikely to be confused because the upcycled products included language disclaiming that the products were not affiliated with LV on each upcycled product. Ultimately, the parties recently reached a confidential settlement agreement, but $603,000 and a permanent injunction were issued against SLD, with the company also agreeing to drop all counterclaims against LV.[14]

The same year, Chanel filed a similar suit against Shiver + Duke, a small company known for its upcycled jewelry made from pieces from luxury brands, including repurposed authentic Chanel buttons from old Chanel clothing.[15] Similarly to the LV dispute against SLD, Chanel claimed that the upcycled products could create a likelihood of customer confusion with authentic Chanel jewelry. Chanel additionally claimed that Shiver + Duke's use of the buttons was materially different from the use of the

original Chanel products, and in turn, the company could not rely on the first sale defence. Here again, the parties reached a confidential settlement in 2022.[16] Moreover, the Shiver + Duke website no longer displays any upcycled jewelry, and the landing page displays a large "Non-Affiliation" disclaimer regarding their "Repurposed/Upcycled Collection", which states that "In no way is Shiver + Duke affiliated with Chanel, Louis Vuitton, Dior or Gucci. S+D creates unique designs using Authentic buttons and bags to preserve their beauty while reducing waste and its impact on the planet. The names of the above companies are registered trademarks of their respective owners".[17]

Upcycled products were also the subject of a complaint filed in 2023 by Levi Strauss (Levi's) against Coperni UK Limited.[18] In this case, Levi's argued that Coperni's use of small white fabric logo tabs on the back pockets of its denim pants and button-up shirts was confusingly similar to the well-known labels or tabs found on Levi's products.[19] Levi's additionally argued that the stitching used on the pockets of Coperni's denim pants infringed on Levi's protections for the "Arcuate" stitching design. Levi's owns multiple registrations for both the Tab trademark and the Arcuate Stitching design and supported that Coperni's use of these designs was likely to confuse consumers and the relationship between Coperni and Levi's. Levi's further argued that Coperni sold unauthorised "reworked" versions of Levi's authentic apparel – this part of the complaint being the most relevant to the practice of upcycling. Like LV and Chanel in the previous cases, Levi's asserted claims for trademark infringement, unfair competition, and trademark dilution. Again like the previous cases, this case settled less than two months later, with Levi's filing a voluntary dismissal with prejudice.[20]

As a result of all these settlements, no court opinion has been issued to date in the U.S. to guide businesses and designers involved with upcycling, even though opponents of the practice have tried to point to the favourable award Chanel received in a 2024 case against What Goes Around Comes Around (WGACA) as a positive development for trademark owners.[21] However, this case did not refer to upcycling, but rather to the resale of used Chanel products, some of which were found to be counterfeited. Notably, Chanel was awarded $4 million after a jury trial that found WGACA liable for trademark infringement, false advertising, unfair competition, and deceptive trade acts or practices because some of WGACA's products were found carrying serial numbers matching stolen Chanel numbers. Since then, WGACA added a disclaimer that they are "not an authorized reseller nor affiliated with any of the brands we sell".[22] Of course, the outcome of this case has reinforced the narrative that upcycling may overlap with counterfeiting, leading to additional confusion and possible chilling effects in the upcycling market by independent entities. Yet, does this mean that the practice of upcycling is necessarily doomed in the U.S. at this point? As elaborated below, I hope this is still not the case.

Can upcycling be rescued?

Of course, given the recent U.S. litigation, it would be hard to support the idea that the traditional IP framework enthusiastically encourages upcycling when the practice is not controlled by trademark (and other IP) owners, particularly when upcycled products use elements displaying famous marks as part of the upcycled design. Still, U.S. courts have not ruled on the merit of the issue yet, and based on past decisions in other areas, such as

trademark fair use or parody,[23] it cannot be excluded that they may decide to uphold the validity of upcycling. In fact, we could even speculate that the rush to reach confidential settlements in all the cases at issue was partially driven by trademark owners' concerns for a negative judicial outcome siding with the upcyclers. Considering the growing importance of sustainability, U.S. courts certainly realise the importance of upcycling as a means to facilitate a robust circular economy as a fundamental societal interest (or perhaps even as a human right, as several chapters in this book have demonstrated[24]) no less relevant than enforcing trademark rights.

In this respect, what could be some valuable suggestions that U.S. courts could take into account based on the current trademark law to support upcycling when they are finally given the opportunity to rule on the validity of the practice?

First, courts should consider rebutting the current prevailing notion that upcycling does not fit under the defence of trademark first sale because upcycled products are materially different than the goods originally identified by the marks at issue, now used as parts of the upcycled products. Specifically, even though the final upcycled products may use upcycled components differently than the original products – for example, old buttons from a dress are now used as earrings, or a piece of fabric originally used for a dress is now used for a bag – courts could support that these components, in and of themselves, are not materially different, meaning that the button is still the same button and the fabric is still the same fabric that was used in the original goods. So long as upcyclers obtained those components lawfully, they should be entitled to use them in their products. Courts should remember that the principle of first sale aims to balance the property rights of the products'

physical owners with the control granted to IP owners. The principle is also necessary for businesses to prevent IP rights from becoming obstacles to the free movement of goods, including product parts, in an economy where products are generally complex and made with multiple parts. In this respect, the use of IP-protected parts in upcycled products is no different than in other complex products, such as laptops and automobiles, whose manufacturers routinely use parts lawfully acquired in the marketplace.

U.S. courts should also consider the possibility of requiring disclaimers on upcycled products, clearly stating that the products use parts from original goods and there is no commercial affiliation between the business engaged in the activity and the IP owners.[25] As in several cases mentioned above, the use of disclaimers can help exclude trademark infringement and dilution and function as notice for consumers about the product's origin and upcycled quality, thus explicitly dispelling the risk of confusion and commercial affiliation with the original trademark owners. Disclaimers can also function as contractual agreements between the sellers and purchasers of the upcycled goods and shield trademark owners from any possible liability from problems related to the upcycled products[26] – like a faulty zipper in an upcycled bag made with old fabric from famous designers or a loose earring made with the buttons from famous designer clothes. As I argued elsewhere,[27] U.S. courts are already moving in this direction and have allowed disclaimers, for example, for aftermarket sales of spare parts.[28] Why not require the same for upcycled products?

Last, but not least, U.S. courts could consider applying the doctrine of trademark fair use as a ground to justify upcycling unauthorised use of trademarked products. Based on the First

Amendment, trademark fair use seeks to balance the interests of trademark owners with those of third parties to use a mark in an expression-related context. Specifically, while it may be difficult to argue that upcycled products represent parodies, they may very well fall under the notion of nominative fair use, according to which unrelated parties can use a mark to identify or refer to the trademarked product so long as the reference does not suggest endorsement or affiliation.[29] Nominative fair use can provide an effective defence against a claim of infringement, even when some confusion may be present. This position was also supported by the U.S. Supreme Court in *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*[30] Moreover, by taking pieces of another product and using them to create something new and desirable, upcyclers make a clear statement in support of circularity and sustainability. They transform used, worn, or vintage products into something that has a new life as part of the circular economy. As U.S. courts supported in the past, the unauthorised use of a mark beyond a simple commercial transaction is protected speech under the First Amendment.[31] In this respect, U.S. courts should support that upcycling represents a form of speech and protect it as such. The U.S. courts could go even further by relying not only on the free speech argument but also on the human right to a healthy environment. As Otto Spijkers demonstrated in his contribution to this book,[32] this right is universally recognised as essential for fully enjoying human rights – whether as a new autonomous right or as a basis for a "green" interpretation of existing human rights, such as upcyclers' freedom of expression or trademark holders' right to property.

Recent litigation involving Nike could be used to further support these arguments. In 2021, popular rapper Lil Nas X

collaborated with MSCHF to create 666 limited edition upcycled Nike Air Max 97s decorated with pentagrams, a Bible verse about Satan, and real blood. Although Nike was not a part of the collaboration, consumers believed Nike was somehow involved since their shoes were being satanically decorated and sold *en masse*. Because of consumer pressure, Nike brought a suit against MSCHF for trademark infringement, false designation of origin, trademark dilution, and unfair competition.[33] Here again, the case settled shortly after, largely due to the likelihood the court would rule in MSCHF's favour on First Amendment grounds.[34] More recently, in 2024, Nike filed a complaint against shoe customisation giant Dominic Chambrone, known as the "Shoe Surgeon", claiming he was creating and selling fake Nike sneakers, teaching customers how to create their own fake Nike sneakers, and falsely leading consumers to believe he is affiliated with Nike.[35] The Shoe Surgeon denied these allegations and counterclaimed defamation and/or trade libel and unjust enrichment and requested a declaratory judgment of invalidity.[36] While this case may also settle, it is another example of how customisation and upcycling are not necessarily unlawful at this time.

In conclusion, while upcycling is currently on unstable ground in the U.S., courts and legal practitioners can find reasonable legal spaces for it to exist against the pressure by trademark owners to ban the practice or allow it only when they fully control it. Ultimately, there is no doubt that the practice serves the public interest (or, as already mentioned, even as an exercise of the human right to a healthy environment) by promoting sustainability and circularity, and these interests are no less important than trademark rights in today's society.

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Greenifying Copyright

Economic Rights and User Flexibilities in the Context of Upcycling

Upcycling has become one of the trendiest buzzwords for people with a sustainability-oriented mindset. While the term might refer to various forms of recollection, improvement and reuse of data or (raw) materials, this chapter adopts a narrower focus. It is limited solely to reviewing how upcycling might be approached from a copyright perspective.[1]

For the purposes of this analysis, we might define upcycling as the transformative – recontextualised or repurposed – recycling and redistribution of tangible copies of works or goods (or components thereof) that represent, embody, visualise, or otherwise express content protected by intellectual property (IP) law.

Essential features of upcycling

From a copyright perspective, there are (at least) four essential features of upcycling.

First, the source work or good shall remain objectively recognisable or identifiable to the average observer or consumer. However, the transformed object need not constitute an original work of expression eligible for copyright protection (as the Court of Justice of the European Union has said in the context of parody in its *Deckmyn* judgment[2]).

Second, although upcycling is most commonly associated with the fashion sector, it may also extend to other parts of the creative economy, including visual art, design, and architecture.

Third, the use may be commercial (see the sale of customised luxury watches[3]), non-industrialised/artisan (e.g., unique upcycled garments[4]), or purely artistic (e.g., the "Watts Towers"[5] or the Portuguese street artist, Bordalo II's works[6]). Upcycling can therefore lead to the production of more or less

unique handcrafted goods in a typically do-it-yourself manner. In particular, artisan and artistic forms of upcycling represent a bottom-up approach to reusing otherwise discarded materials in an environmentally conscious manner.

Finally, the added value of upcycling is not necessarily commercial. The added value of upcycled products often lies in their artistic or purely "sentimental" qualities. Upcycling, in many cases, represents a distinctive form of transformative expression – an exercise of freedom of expression.

Not all of these conceptual elements can be paralleled with specific copyright concepts, but each can nonetheless be evaluated in light of current legal doctrine.

Proposition 1

My first proposition is that the actual manner of use – rather than the purpose of the upcycler, whether commercial, artisanal, or artistic – affects which exclusive right applies in a given case and how the operation of that right might be limited or excluded.

The range of possible applicable rights is notably broad: Upcycling somewhat overlaps with the scope of reproduction, distribution, adaptation, and even public display. The quantitative and qualitative features of upcycling are of crucial importance. It makes a significant difference whether the reuse leads to a new, original work of expression – thus triggering the adaptation right (which is more plausible for artistic reuses) – or whether it constitutes mere copying of the whole or parts of the source material. Frequently, upcycled works are also disseminated publicly, either through sale (distribution) or through exhibition (display).

The right that is ultimately engaged will, in turn, influence which limitation or exception is potentially applicable. For instance, exceptions grounded in freedom of expression – such as quotation, parody, or pastiche – typically limit reproductions (as harmonised by the European Union); and they apply to the rights of adaptation, distribution or display only as long as Member States choose to provide for such coverage. In the case of distribution rights, any such domestic exception may be justified under Article 5(4) of the InfoSoc Directive.[7] However, the rights of adaptation and display, along with their corresponding limitations, have not been harmonised at the EU level, thereby leaving it to the Member States to delineate their boundaries (albeit subject to the three-step test, though). As of this writing, the author is unaware of any Member State laws that introduced any upcycling- or sustainability-oriented exceptions to their copyright regime.

Another illustrative example is the doctrine of exhaustion, which is expressly limited to cover redistributions of copies of works whose ownership has been lawfully transferred by the right holder or an authorised party. Consequently, resales of upcycled goods – such as garments – might be excluded if their creation is declared *ab initio* as reproduction or adaptation.

Proposition 2

The second proposition is that any determination regarding the interplay between exclusive rights and their limitations has direct implications for the balancing of fundamental rights.

More precisely, Article 17(2) of the Charter of Fundamental Rights protects IP rights in line with property rights.[8] At the same time, Article 37 of the Charter declares that "[a] high level

of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".[9] Furthermore, Article 52(1) necessitates the balancing of fundamental rights so that the operation of one right does not harm the operation of any other right in a disproportionate manner. Finally, Article 3(3) of the Treaty on European Union requires that the internal market contribute to the sustainable development of Europe.[10]

Taken together, we need to identify a combination of economic rights and corresponding exceptions or limitations that meets the proportionality requirement under the Charter. Which combination best reconciles a high level of protection for intellectual property with a high level of environmental protection?

The Finnish tableware jewelry case

From a copyright perspective, the *Finnish tableware jewelry and copyright* (2021) case deserves the closest look in Europe.[11] In this case, fragments of broken porcelain tableware were repurposed into necklaces and earrings. The original plates and cups had been decorated, among other things, with floral patterns and berries of different colors. In its statement, the Finnish Copyright Council (FCC) concluded that the decoration met the threshold of originality and was thus protected under copyright law.

The FCC had to consider whether the rights of reproduction, adaptation or distribution in relation to the copyright-protected tableware had been infringed by the defendant's upcycling practices or, alternatively, whether those rights had been limited or

exhausted. However, the Council's statement did not offer a definitive resolution. On the one hand, it distinguished the case from the CJEU's famous *Art & Allposters* judgment,[12] as the porcelain pieces were not "moved onto" (though they were "incorporated in") other tangible products. Furthermore, the FCC did not consider the classification of the use as "permitted borrowing" due to the lack of creating new and independent works, and since the requirements of the quotation defence were not met due to the lack of any (artistic) dialogue between the source and secondary objects (as requested by the CJEU's other notable judgment in *Pelham and Others*[13]). Finally, the FCC also excluded the defendant's activities from the scope of the doctrine of exhaustion since the defendant created "new material objects". Overall, upcycling seems to be excluded from the scope of almost all possible economic rights – except reproduction – and from the reach of relevant exceptions and limitations.

The FCC's statement was not unanimous. The dissenting opinion pointed out that the jewelry consisted of the exact same material objects initially sold in the Community by the right holder and, therefore, the distribution right concerning such objects that covers their reuse had been exhausted.[14]

The statement of the FCC was widely criticised and became a catalyst for the first systematic review of the copyright aspects of upcycling in Europe by Heidi Härkönen and myself.[15]

Distribution + exhaustion = balanced interpretation

A close look at the FCC statement shows clearly how important it might be to approach transformative reuses in a flexible manner. While the invocation of reproduction (and adaptation)

rights aligns with the current doctrinal status quo in copyright law, it also risks imposing undue burdens on secondary creators. These burdens may conflict with broader, socially vital objectives – chief among them, environmental sustainability. By contrast, the applications of the doctrine of exhaustion in upcycling cases presents an opportunity for a more nuanced and equitable balancing of rights, interests, and resources.

A sustainability-oriented (re)interpretation of exhaustion would align with key EU legislative initiatives that are vital for the circular economy, including, but not limited to the Waste Directive,[16] the Textile Strategy,[17] the Green Claims Directive proposal,[18] or the Right to Repair Directive.[19] As previously argued with Heidi Härkönen, interpreting the exhaustion doctrine in a manner which prohibits actions that improve the lifespan of a product simply does not serve the demands, aims and goals of the aforementioned EU legislative pieces.[20] In a circular economy, a rights-holder-centric view of exhaustion is simply outdated and must be replaced.

Furthermore, granting rights-holders an exclusive right to decide on the distribution of the work, including discarded pieces of it, for the whole lifespan of such works does not comply with the concept and policy considerations of exhaustion at all. Ownership interests, product availability and affordability, and the reward theory support the logic of lawful downstream commerce.[21] A sustainability-oriented interpretation of the doctrine adds only further depth to this socially relevant concept. It might also foster new types of businesses and circular innovations, which is one of the ultimate goals of the EU to build a thriving and innovative single market.

Elsewhere, I have argued that since exhaustion represents a special limitation to the right of distribution, it "shall benefit

from the doctrinal flexibilities developed by the CJEU related to other limitations and exceptions, especially the 'user rights' approach. This approach relies on the fundamental rights of end-users, e.g. freedom of expression, and it offers the effective application of such limitations against rights holders' exclusive rights".[22]

Finally, exhaustion is defined in the EU with a regional scope and effect. As such, it could naturally support reusing trash on a scale far broader than what domestic limitations and exceptions can realistically achieve.

Conclusion: No to monopolising trash!

In sum, upcycling represents a new philosophy for environmentally conscious producers and consumers, promising new bottom-up approaches to mitigate the adverse environmental impacts of human activity. It fits perfectly within the scope of (re)distribution and is reinforced by the policy rationales underlying the doctrine of exhaustion. There is little doubt that this synergy between an economic right and its inherent flexibilities could play a significant role in the ongoing effort to "greenify" EU copyright law.

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Heidi Härkönen

Copyright Moral Rights Protection and Environmental Sustainability

The Case of Upcycling

When we talk about intellectual property (IP) and sustainability, we rarely pay attention to the moral rights of authors. However, it is important to assess these "authors-only" rights in a world where copyright is often used as a tool to maximise corporate profits. In terms of sustainable development, moral rights can both promote and hinder environmental, social and cultural sustainability in the creative industries. However, their relationship with sustainable development is not straightforward. This chapter looks at some of the key issues that link the protection of moral rights in copyright to sustainable development and the circular economy. It focuses in particular on perhaps the hottest topic in IP law at the moment: upcycling, i.e. the transformative recycling of tangible copies of works or goods protected by some form of intellectual property (IP) law.[1]

Moral rights and sustainability in general

The international legal basis for the protection of moral rights is the Berne Convention for the Protection of Literary and Artistic Works (as amended on 28 September 1979). According to Article 6bis(1): "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to [their] honor or reputation."

The article contains the two most widely recognised moral rights: the right of attribution and the right of integrity. The former ensures that the author is credited for their creative work, and the latter ensures that the work remains in the form

and context intended by the author. Respecting the right of attribution leads to transparency about the source of the work, and the right of integrity helps, among other things, to preserve the work and to respect the author's (artistic or literary) intentions. These concepts are almost foreign to some creative fields, such as the fashion industry.[2] The European high fashion sector, for example, largely ignores authors' attribution rights, with the exception of famous "star designers" who often take credit for the creative work of their less famous colleagues.[3]

But how does this relate to sustainability? The link is more indirect, but there is one. First of all, transparency about the source of a work is important, especially in creative fields that produce consumer goods, such as fashion.[4] As we all know, utilitarian works tend to be discarded and treated as commodities more often than, say, works of fine art. Again, fashion is a textbook example of such consumer behavior.[5] Secondly, in my previous research I have pointed out that transparency about the creative source of the work – i.e. respecting the author's right of attribution – can promote social appreciation of creative work and its results.[6] Thirdly, increased social recognition in turn means increased cultural sustainability in these fields. Recognising the creative value of creative utilitarian objects recognises their cultural significance. Finally, this arguably makes it harder for individuals to view them as disposable commodities, meaning that cultural sustainability can lead to increased environmental sustainability. Increased respect for the moral rights of authors could thus promote sustainable development.

It is also possible to argue that moral rights can be an obstacle to sustainable development. In theory, one could try to

use these rights to oppose the circular reuse of copies of protected works.

Moving on from the philosophical aspect of the role of moral rights in the circular economy, let us now look at more concrete scenarios. I pay particular attention to the possibility of using moral rights as a pretext to intervene in upcycling activities.

Point 1: Who cares about moral rights?

When we talk about copyright in highly commercial areas of creativity (such as fashion and other industrial arts), we often focus on the perspective of corporate rightsholders. Now that works of applied art are increasingly protected by copyright in the EU, economic rights holders in the fashion and design sectors, for example, have more opportunities to intervene in the (re-)use of their copyrighted products. Unfortunately, we have seen corporate rightsholders try to use copyright as an argument against the upcycling of their products. For example, the rightsholder Fiskars Group did not like the fact that an upcycling artist made jewellery from their broken cups and plates and wanted to sell them.[7] The Finnish design and lifestyle company Marimekko had the online second-hand marketplace Tori.fi take down a post in which a private individual attempted to sell a dress upcycled from a vintage Marimekko curtain.[8] In both cases, the rightsholders' claims are absurd not only doctrinally,[9] but especially because both rightsholders claim to care about sustainability.[10]

Indeed, it seems that it is mainly rightsholders who have something against upcycling. Authors, on the other hand, have shown no signs of having problems with the circular reuse of

copies of their works. This is important in the context of moral rights because, strictly speaking, the interests of corporate rightsholders are irrelevant to moral rights. Moral rights are not transferable, which means that only authors can enforce them. And authors do not seem to agree with corporate rightsholders when it comes to upcycling. In fact, they do not seem to mind upcycling at all: At the time of writing, there are no known cases where authors themselves would have objected to the upcycling of copies of their works.

But let's say they did – could the rights of attribution and integrity operate as valid claims against upcyclers? I will now consider these two rights separately.

Point 2: The right of attribution and upcycling

The right of attribution ensures that the author is credited as such. This generally also applies to situations where their work has been upcycled; transformed into something else. (Provided the work is still recognisable), the author should be credited in the context of the upcycled product. If upcyclers do not respect the author's right of attribution, this could be a barrier to upcycling activities.

However, respecting the right of attribution is a relatively straightforward matter; it typically entails providing appropriate credit to the author, such as by including their name on the product label, in promotional materials, or on the price tag.[11]

Point 3: The right of integrity and upcycling

The right to integrity is more complicated in the context of upcycling. Since the Berne Convention allows the author to

"object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to [their] honor or reputation", we might ask: Could upcycling be such a prejudicial action?

There are divergent traditions regarding the right of integrity between the countries of the Union and, in particular, between common law and civil law jurisdictions. However, it is generally accepted that more commercial works typically receive a narrower scope of integrity protection. Some countries, such as the Nordic jurisdictions, have specific provisions in their national copyright laws that allow owners of utilitarian items to make changes to them. Most "upcycling material" falls into this category of works: tableware, bed linen, curtains, etc. tend to be commercially mass-produced and not unique works of art. The starting point is therefore that their right to protection of integrity is somewhat narrower than, for example, that of a painting.

Another important thing to bear in mind is that "prejudice" is assessed through an objective lens, even though it involves a subjective factor. When assessing the potential harm to the author, we ask: "Would a reasonable person consider the treatment of the work to be detrimental to the honor or reputation of the author?"[12] Honor and reputation in this context means the author's honor and reputation as an author – not as a person. It thus differs from the assessment of harm in, for example, criminal law contexts (such as in defamation cases).

There is also a subjective element in the assessment of the right of integrity, as the values of the author are taken into account. This is particularly true in jurisdictions that protect the author's artistic individuality, such as the Nordic countries. The Swedish Supreme Court, for example, has held that a television

channel infringed the artistic individuality of film directors by showing commercials in the middle of their cinematographic works.[13] By interrupting the atmosphere of the films, the advertising breaks caused changes to the films in a manner which was prejudicial. What was important here was that the films in question were critical of consumer society, so interrupting them by advertisements which encouraged the audience to consume more appeared particularly obscene. The values of the directors were thus taken into account. Similarly, it could be argued that if, for example, an eco-conscious fashion designer creates a design that should be made from biodegradable or recycled materials, it cannot be made from, say, virgin polyester without their consent. To disregard the author's choice of materials in this way would be to alter the work in a way that could damage their honor and reputation and cause resentment among their clientele. So the question is: Could an author invoke the right of integrity to oppose the upcycling of their work if it would harm their honour or reputation?

It is important to remember that prejudice is assessed from the perspective of a reasonable person. Let's say an author does not want their work to be upcycled because they do not believe in climate change and are against all kinds of green and circular activities. Would this argument work? I think not. In most cases, no reasonable person would think any less of the author, because a copy of their work is being reused according to the principles of the circular economy. Because we are looking at prejudice from the perspective of a reasonable person, the author's values that can be given weight must somehow be generally accepted values in society. Values against public order cannot be considered in the same way. It would also be difficult to rely on the author's values if they were very old-fashioned,

conservative and/or no longer accepted by the majority of people in a contemporary society. For example, objecting to the use of curtains or shirts to make revealing clothing would probably not be the best legal argument. Also, remember that moral rights (like any intellectual property rights) should not be abused.

To take the opposite example, an author should be able to invoke their right of integrity if their work is used in a racist or misogynistic context, since anti-racism and non-discrimination are generally accepted values in society. For instance, if a copyright-protected curtain is upcycled into tote bags that are then sold at a fundraiser for an anti-immigration, alt-right political party, the author who designed the curtain should be able to invoke their right of integrity to object to such use. In this case, it would be reasonable for the author to demand that their artistic work not be associated with racist or discriminatory values.

Conclusion

Moral rights need to be taken into account in various circular economy activities, such as upcycling. While the protection they offer may promote sustainability, especially in commercial areas of creativity, they could theoretically conflict with certain types of upcycling activities. But only in theory. Any problems with the right of attribution can be easily dealt with, and the right of integrity only works against upcycling in very rare cases where a reasonable person would consider the upcycling to be detrimental to the author's honor or reputation. Authors therefore have minimal recourse to their moral rights to object to the upcycling of their works. This concern is unlikely to arise in the case of

individual authors, who – in contrast to corporate rightsholders – tend to be more accepting of upcycling practices.

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Léon Dijkman

Patents and the Right to a Healthy Environment

An Outline of a Response to the Critics

As recent political developments make the prospect of a global consensus on – let alone an adequate response to – climate change an ever more distant fantasy, innovation and technology are increasingly looking like the most promising option (not to say last straw) of avoiding an ecological catastrophe.[1] For instance, the International Monetary Fund (IMF) estimates that improvements in direct air capture, advanced battery, and hydrogen electrolysis technologies may achieve as much as 15% of the cumulative emissions reductions required between 2030 and 2050.[2]

To be sure, technology alone will not save us, and lifestyle change remains necessary if a limitation of global warming to 1.5°C is to be achieved.[3] At the same time, further advancement of green technologies is likewise indispensable. Direct air capture, for example, will be critical to removing sufficient carbon dioxide from the atmosphere, yet the aforementioned IMF analysis indicates that this technology "remain[s] at the earliest stages of development".[4] Furthermore, innovation and lifestyle changes often go hand in hand. Despite considerable controversy surrounding its CEO (and older allegations of hypocrisy and greenwashing[5]), Tesla undeniably contributed significantly to the net-zero transition precisely because its technology made a more sustainable way of driving appealing to a vast number of car owners.

In the context of this book, the question arises how patent law may contribute to or hinder the technologies and innovation needed to conserve a healthy environment. This brief contribution seeks to make two points in this respect. The first is that the role patent law can play on its own should not be overestimated. The second is that future studies in this direction should take an innovation systems approach. While neither

point is new, I believe connecting them and building on key publications that first expressed them serves as a useful agenda for future research in this field.

Applying patent law with a view to environmental concerns

Most contributions in this book seek to fix presumed environmentally harmful aspects of intellectual property law and its application in practice. Charlotte Vrendenbarg, for instance, argues that when issuing destruction orders for infringing goods, courts should consider less environmentally harmful alternatives such as recycling.[6] At first glance, there is little to object to in the argument. Especially in patent law, where enforcement often concerns infringing functionalities of relatively complex devices, it is firmly accepted that permanent disablement of these functionalities (if possible) is preferred over destruction of the devices in their entirety.[7] The Unified Patent Court (UPC) appears to have accepted this principle as well.

Yet the argument cuts both ways. Granted, the destruction of goods is environmentally wasteful, but the real damage to the environment comes from these goods having been manufactured in the first place, as Vrendenbarg also points out in her inaugural address.[8] It is worth recalling that Directive 2004/48/EC (the Enforcement Directive) arose from concerns over counterfeit goods, a paradigmatic example of environmentally and socially harmful products.[9] Article 3(2) of this Directive requires, among other things, that remedies for IP infringement be dissuasive, which implies at least some measure of general deterrence.[10] The Directive's deterrent effect, including the threat of a destruction order (Article 10(1)(c)), can thus be

viewed as a means to prevent the environmentally harmful production of mass market infringing goods. From this perspective, leniency in respect to destruction orders may well achieve precisely the opposite of what Vrendenbarg and others argue for.

These considerations hint at a larger problem posed by "green" application of IP laws: It is very difficult for courts to oversee the ramifications of their decisions beyond the individual case they are deciding. I address this problem elsewhere in the context of patent injunctions and argue that courts should not consider public interests when deciding on remedies in individual cases.[11] In my view, there is simply no way of knowing which approach best serves abstract policy objectives, including sustainability and a circular economy, when deciding a specific case. The example of destruction orders against infringing stock illustrates this rather well, as short-term environmental gains could just as well be counterproductive if judicial leniency invites larger-scale infringements.

Of course, administrative and/or legislative interventions in the patent system are not similarly constrained and could potentially boost innovative activity in more sustainable directions. Vrendenbarg proposes some ideas and the literature contains various other suggestions.[12] Such proposals are without a doubt worth investigating further, but here too we must keep in mind that the ultimate goal is a shift in innovation focus and consumer behavior. Neither follows directly from the specifics of intellectual property policy, as convincingly argued by Reto Hilty and Pedro Batista.[13] Their conclusion that "[t]he potential of patent law should not be overestimated when it comes to combating climate change through innovative solutions and thus technical progress" strikes me as a helpful call to

modesty when it comes to the role that IP scholarship can play in tackling climate change.[14]

Patents as impediments to the development of sustainable technologies?

The primary concern of Hilty and Batista when it comes to patents and climate change is that "holders of patents protecting older technologies have a rather sharp sword in their hands to hinder follow-on innovations". This concern is not new. Fifteen years ago, Peter Drahos evaluated the "connection between the sources of catastrophic global change and intellectual property", and concluded that "intellectual property is more about opportunistic protectionism than it is about innovation".[15] Many scholars take a skeptical view of the efficacy of the patent system, and when it comes to the environment the stakes become existential. The patent system, it would seem, must be negated or at least severely curtailed to avoid rent-seeking behaviors and the obstruction of incremental innovation.

I cannot hope to adequately respond to these critiques in this contribution. But I am inclined to agree with Caoimhe Ring that "[p]roposals to weaken patent protection [...] have the potential to negatively impact green innovation, without offering robust evidence as to the benefits".[16] Importantly, Ring observes that patents are likely key drivers in "technology commercialization and diffusion".[17] Patents may not be suitable means to incentivise the radical technological breakthroughs we need to mitigate the climate crisis, and it is plausible that in some instances they hinder incremental innovation by third

parties. At the same time, if patent protection can contribute to the diffusion of sustainable technologies, that potential should be embraced and studied further. After all, as noted in the introduction to this contribution, large-scale adoption is the only way to achieve sufficient impact and (hopefully) avert the direst consequences.

Ring advocates an "innovation system analysis" to achieve a proper understanding of what and how patents might contribute alongside other policy interventions. Modern scholarship increasingly acknowledges that patents are only part of a web of policies that drive innovation in research-intensive industries such as pharmaceuticals.[18] Consideration of patent law's role within this policy mix, and specifically its role in the diffusion of green technologies, brings to mind a classical paper by Edmund Kitch.[19] As is well known, Kitch proposed a so-called prospect theory of patents, according to which their predominant purpose is to protect investments subsequent to the invention and necessary to turn the patented invention into a commercially viable product.

The insights of Kitch's work appear germane to the problems here addressed. The European Patent Office has reported steadily increasing numbers of patent applications for low-carbon energy technologies between 2000-2019.[20] These statistics suggest that there are plenty of good ideas, but which idea will be the next Tesla, capable of causing a fundamental shift towards a more sustainable lifestyle on a global scale? I certainly do not want to suggest that patents will readily determine the answer. Yet patents allow small, R&D-focused companies to compete with large incumbents on the basis of innovation breakthroughs, as Jonathan Barnett has persuasively argued.[21] Thus, Drahos may well be right to assume the "blue

skies" research needed to avert an ecological disaster is unlikely to be performed by entrenched, rent-seeking corporations; however, that can be read as a plea for, rather than against, patent protection if one takes a more optimistic views of the role that can be played by upstart competitors. Prospect theory provides a valuable clue to understand these dynamics, because it explains how patents offer innovators protection during the critical period in which they must prove themselves, i.e. until they can introduce an actual product. That actual product is what ultimately matters and we should not risk its attainment by prematurely limiting patent protection on the basis of an incomplete understanding of the relevant innovation system.

The reader may rightfully object that this is no more than an outline of an argument, and they would be right that much more work remains to be done here. But if this contribution can serve as a modest call to caution before curtailing patents and their holders' rights, it will have achieved its purpose.

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Charlotte Vrendenbarg

Greenforcement of Intellectual Property Rights

What Role for the Fundamental Right to a Healthy Environment in IP Practice?

The current practice of enforcement of intellectual property rights (IPR) impacts the environment in many ways. The disposal and destruction of IPR infringing goods are an everyday occurrence throughout the EU, causing waste, pollution of the air and soil (depending on the method of destruction[1]), and also waste of scarce raw materials. There is increasing recognition of the pressing need for more human and environmentally friendly alternative remedies, such as donating goods to charity, removing infringing signs or parts, or disposing of the goods outside the EEA/EU.[2] The question is whether, and to what extent, the legal framework leaves room for ecologically sustainable alternatives to disposing of and destroying IPR-infringing goods.

TRIPS & sustainable alternative remedies

The framework for civil IPR enforcement within the EU is provided by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the IPR Enforcement Directive (IPRED). Article 46 TRIPS requires member states to grant the judiciary the authority to order the disposal or destruction of goods in virtually the entire field of intellectual property. This provision, which is often misconstrued, has put the focus on the destruction of infringing goods as a commonplace remedy.[3] From the perspective of rightsholders, this is the most effective and deterrent remedy. However, the provision leaves leeway for national authorities to order alternative, more sustainable remedies in several aspects.

First of all, it empowers national authorities to impose certain measures, such as the disposal and destruction; it does not require national courts to take these measures in concrete

cases. Other, more appropriate, effective and sustainable measures can be chosen in specific cases. This also follows from the requirement that measures are proportionate to the seriousness of the infringement and third-party interests. The principle of proportionality guides the national authorities' choice between the remedies specified in the first sentence of Article 46 and any alternative remedies, allowing them to consider less severe measures in less serious infringement cases.[4] The principle of proportionality further provides room for broader societal interests to be taken into account in the choice of remedy, such as the interest in environmental protection.[5]

Secondly, Article 46 provides that the available remedies include the disposal or destruction, unless this would be contrary to constitutional requirements. As Gervais noted, in some countries, for example Brazil, the destruction of useful goods is unconstitutional.[6] The provision explicitly recognises and respects such potential constitutional obstacles to ordering the disposal and destruction of IPR-infringing goods.

Thirdly, the final sentence of Article 46 is often misinterpreted as an obligation to order the destruction of trademark-infringing goods. It provides that "[i]n regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce". From the WTO case *China – Intellectual Property Rights*[7], it follows that this sentence must be interpreted in a more nuanced way.[8] In the first place, it only applies to counterfeit goods and not otherwise infringing goods. Counterfeit goods are considered a specific category of goods: Debranding them would not be sufficient to avoid the risk of infringement, because in those cases the infringing signs could easily be

affixed again. This means that if the state of the debranded counterfeit goods is altered sufficiently to deter infringement, for instance by dismantling or recycling them, their release in the channels of commerce in fact would be permitted. Furthermore, with respect to goods that bear confusingly similar signs, debranding instead of their destruction would also be permitted. Finally, disposal outside the channels of commerce of debranded counterfeit goods seems permitted as well, e.g. by donation to charity.

IPR Enforcement Directive & sustainable alternative remedies

The proportionality test is also required by Article 10 IPRED, which transposes Article 46 TRIPS and provides for corrective measures that include the recall and definitive removal from the channels of commerce, or destruction, of infringing goods.[9] As was confirmed by the Court of Justice of the European Union (CJEU) in the *Perfumesco* case[10], under this provision, it is up to the national authorities to decide on the appropriate measure to be adopted in each individual case.

Also in this context, the proportionality test provides room for taking societal interests into account. Para. 32 of the preamble to the IPRED states that it respects the fundamental rights and observes the principles that are recognised in particular by the EU Charter of Fundamental Rights. This means that in practice, the right to intellectual property (protected under Article 17(2) of the Charter) must be reconciled with other fundamental rights and principles, including the right to environmental protection as enshrined in Article 37 of the Charter.[11] Partly due to the influence of the European Green Deal[12] and the UN Sustainable Development Goals[13], the right to protection of the

environment is set to carry more and more weight, also in IPR enforcement.

Notably, the right to environmental protection is explicitly mentioned in the preamble of the Directive on the Protection of Trade Secrets (TSD)[14]:

> *"(21) In line with the principle of proportionality, measures, procedures and remedies intended to protect trade secrets should be tailored to meet the objective of a smooth-functioning internal market for research and innovation, in particular by deterring the unlawful acquisition, use and disclosure of a trade secret. Such tailoring of measures, procedures and remedies should not jeopardise or undermine fundamental rights and freedoms or the public interest, such as public safety, consumer protection, public health and environmental protection, and should be without prejudice to the mobility of workers."*

Specifically, regarding the destruction of goods, the TSD provides that destruction should be avoided if other viable options are available, such as depriving goods of their infringing quality or disposing of the goods outside the market, for example, by means of donations to charitable organisations.

Greenforcement of IPR: Examples from the Netherlands

In the Netherlands, courts are becoming more and more reluctant to order the destruction of infringing goods. There are a number of recent judgments in which orders for destruction were rejected on the grounds of proportionality. In several cases, applying the proportionality test and weighing "the

general interest that goods should not be destroyed unnecessarily" resulted in more sustainable solutions, such as simply removing the infringing signs or copyright/design right infringing parts of cars[15] and children's bicycles.[16] There are also cases in which courts rejected the destruction and instead ordered the relabeling of the goods[17] or the donation of the goods to charity.[18] But also in other member states, courts seem to have turned the corner. Given the urgent need to protect the environment and mitigate climate change, this is an encouraging development.

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Balancing Intellectual Property Protection with the Human Right to a Healthy Environment

Internal and External Reconciliation Approaches

This contribution examines the practical ways in which the human right to a healthy environment (HR2HE) can influence the development and interpretation of intellectual property (IP) laws. It focuses on two potential approaches to reconciling this human right with IP: (1) the so-called "internal" reconciliation approach, which essentially uses the HR2HE as an interpretive tool to recalibrate IP law's own internal rules and mechanisms in a more sustainability-friendly direction, and (2) the "external" reconciliation approach, which views the HR2HE as an independent defence against IP infringement actions that can be invoked in courts to challenge allegations of IP infringement.

Internal Reconciliation of IP with the HR2HE: Example of copyright and upcycling

The first reconciliation strategy that involves the "internal" balancing of IP laws with the relevant human rights must be well familiar to IP law specialists. The Court of Justice of the European Union (CJEU) frequently employs this approach when balancing IP protection with more "traditional" human rights (as compared to the relatively "new" right to a healthy environment), such as the right to freedom of expression[1] or the rights to privacy and personal data protection.[2]

In practice, this approach enables the CJEU and, following its example, national courts in Europe to interpret IP law's own concepts and balancing mechanisms in a manner that aligns with the principles of the relevant human right at issue. The most classic example of such mechanisms, originally designed to strike a balance between the exclusivity of IP law and the

freedom of use, is the set of exceptions to IP rights, or, as they are also sometimes termed, "user rights".[3]

By analogy with this already well-established approach to balancing IP protection with more "classic" human and fundamental rights, interpreting IP law in light of the "new" HR2HE could help courts reach more balanced solutions when IP protection presents obstacles to sustainability objectives. In the context of copyright law, for example, the exhaustion of a distribution right, as well as the exceptions for quotation and pastiche, could offer such flexible avenues for integrating the HR2HE logic into the design of this field of IP protection. More specifically, the conflicts between copyright protection and upcycling could be examined through this lens.[4]

Copyright exhaustion and upcycling

Regarding, first, the exhaustion principle,[5] in its current interpretation by the CJEU, this principle may hinder sustainable practices such as upcycling, where old products featuring copyright-protected prints, ornaments, or design patterns are repurposed into new goods while retaining visible elements of the original design – potentially triggering copyright infringement claims. Notably, in *Allposters*, the CJEU held that modifying physical copies of copyright-protected works constituted a new reproduction, meaning upcycling could thus be governed by this exclusive right, rather than the exclusive right of distribution, to which only the principle of copyright exhaustion applies.[6]

However, if interpreted in light of the HR2HE, the CJEU's arguably rather restrictive position expressed in *Allposters* could be reconsidered.[7] Given the demands and principles of the HR2HE (which include, among other things, the principle that

"[f]inancial imperatives and even certain fundamental rights, such as ownership, should not take precedence over environmental protection considerations"[8]), modifications to original copyright-protected works – such as upcycling – might be classified not as infringements under the exclusive right of reproduction, but rather as instances of an exhausted exclusive right of distribution.[9]

Quotation exception and upcycling

Beyond the principle of exhaustion, another flexible area within EU copyright law that could be interpreted more broadly in light of the HR2HE is the exceptions to copyright holders' exclusive rights, particularly quotation and pastiche. Using upcycling again as an example of an environmentally-friendly practice that could – and in some cases already does – face challenges due to copyright law, the current interpretation of the quotation exception in Article 5(3)(d) of the InfoSoc Directive[10] by (at least some) judicial authorities in the EU may not favour this sustainable consumption practice.

Indeed, in the Finnish case concerning copyright law restrictions on upcycled jewellery made from broken tableware, the Finnish Copyright Council held that the requirement for a dialogue between the original work and the new work quoting it (as advanced by the CJEU in the *Pelham* case[11]) was not met in the case of upcycled jewellery and broken tableware, as no dialogue could be established between the broken tableware and the jewellery created from it.[12]

When viewed in the light of the HR2HE, however, this interpretation of a dialogue requirement under copyright law's quotation exception fails to strike a fair balance between exclu-

sivity and freedom of use (including the environmentally sustainable use of old, broken porcelain). Particularly in the context of artistic expression (within which creative upcycling arguably falls), dialogue may not always require verbal communication but can instead be conveyed through allusions or symbolic messaging. As such, the use of broken tableware in jewellery may already convey a strong message – perhaps serious to some or humorous or playful to others – but nonetheless a message. Importantly, the European Court of Human Rights' (ECtHR) understanding of dialogue and speech more generally extends well beyond verbal communication[13] to also cover visual artistic creation[14] and other types of images.[15] Thus, relying on the human rights of upcyclers in this context, including the HR2HE, as well as their freedom of artistic expression,[16] may help change any existing or potential future conservative interpretations by the judiciary in Europe of the quotation exception in the upcycling context.

Pastiche exception and upcycling

Finally, another internal balancing mechanism in copyright law holds significant promise for accommodating environmentally-friendly reuses of objects bearing copyright-protected works: the pastiche exception. This exception is outlined in Article 5(3)(k) of the InfoSoc Directive, which permits "use for the purpose of caricature, parody, or pastiche". While parody may not offer a strong defence against copyright infringement for upcycling businesses – due to the requirement of humor in derivative works – the concept of pastiche, by contrast, shows greater promise.

Pastiche broadly aligns with upcycling, which involves combining different styles and materials to create something new from a patchwork of elements.[17] If interpreted broadly in the light of the HR2HE,[18] the copyright law's pastiche exception has all the potential to cover, among other practices, upcycling (although the success of such interpretation hinges on the outcome of the currently pending before the CJEU *Pelham II* case which is aimed to clarify the concept and meaning of the copyright law's pastiche exception[19]).

External application of the human right to a healthy environment to IP

As the examples discussed above demonstrate, the existing copyright law mechanisms hold significant potential for a flexible, HR2HE-friendly interpretation of this field of IP law (and similar flexible approaches could be further extended to other areas of IP, including but not limited to trademark law, patent protection, and remedies for IP infringement).

However, should the relevant authorities (including the judiciary) fail to accommodate considerations regarding the right to a healthy environment within the internal design of IP laws, those affected by such failures should, arguably, still have standing to allege a violation of their HR2HE in its external application to IP – i.e., as a human rights law-based defence in and of itself.[20]

This allegation would then essentially involve balancing environmental human rights (i.e., in Europe, either "greened" traditional human rights, such as, first and foremost, the right to privacy in Article 8 of the European Convention on Human

Rights (ECHR) or Article 7 of the EU Charter, and/or a self-standing right to a healthy environment in Article 37 of the EU Charter) with the right to property of IP holders, which is likewise recognised as a human right in Europe, both by the explicit legislative wording of the EU Charter of Fundamental Rights in Article 17(2) and in the practice of the ECtHR concerning the general right to property under Article 1 of the First Protocol to the ECHR.[21]

However, the first question that needs to be asked before considering the particularities of such an external balancing approach of IP with the HR2HE is whether such an external application of human rights to IP is possible at all. Notably, the CJEU, in its *Pelham/Funke Medien/Spiegel Online*-triad, explicitly rejected the possibility of applying any external, human-rights-based defence to the existing copyright (or related rights) law framework.[22]

Is an external, human rights-based defence to IP infringement possible at all?

It could be argued that an external, human rights-based defence to IP infringement is still possible, and that the CJEU's position might not necessarily be an obstacle to the external application of human rights – specifically, the HR2HE – to IP, understood as a separate defence. This is because, first, as early as the year 2000, the UN had already established "the primacy of human rights obligations over economic policies and agreements".[23]

Indeed, it is difficult to conceive why ordinary economic laws, such as IP,[24] should be immune to external human rights constraints. Likewise, it is hard to imagine, for instance, the

ECtHR rejecting an otherwise valid claim alleging a violation of one of the Convention rights simply because the allegation stems from IP regulation.

Furthermore, the ECtHR has already previously conducted an external human rights-based review of IP law provisions, most notably in its *Ashby Donald* and *"The Pirate Bay"* rulings.[25] Admittedly, though, neither in those cases nor in any other IP-related cases it has been called to examine so far[26] has the Strasbourg Court explicitly ruled on the validity of a human rights-based defence (in the sense of a separate "exception") to alleged IP rights infringement. Since the ECtHR is not a "fourth-instance" court,[27] its role in balancing IP protection with other Convention rights is confined to determining whether national IP law or a judicial decision in a particular case has failed to adequately respect the human right at stake, thereby resulting in a violation. However, the question of how to remedy that violation at the national level – whether through "internalising" the relevant human right's logic within IP laws via legislative reform or a changed approach to judicial interpretation of such laws, or allowing an "external" human rights law-based defence to an IP infringement action – remains the responsibility of national authorities. In this sense, it does not preclude an "internal" reconciliation of IP laws with relevant human rights, to which the CJEU appears to adhere firmly and unconditionally.[28]

That being said, an (albeit rare) situation may still arise in which even the most flexible interpretation of existing IP laws fails to strike a proper balance with a conflicting human right.[29] In such a case, and in the absence of legislative intervention capable of remedying this imbalance, an external human rights law-based defence – understood as a separate, independent

limitation on the scope of IP protection – should still be possible, at least from the perspective of human rights law. Again, it is difficult to contemplate how norms of "simple" economic regulation, such as IP laws, could block this supremacy, given their inferior legal status under international human rights law.[30]

Moreover, an external human rights law-based defence approach to IP is not unfamiliar to a number of national courts in Europe.[31] Therefore, invoking the HR2HE outside the framework of IP laws should indeed be possible, albeit only when national authorities have demonstrably failed to strike a proper balance between IP and the HR2HE internally – whether through judicial interpretation or the relevant legislative reform.

It thus seems pertinent to discuss in further detail how such an external HR2HE defence[32] relating to, for instance, trademark or copyright law infringement allegations advanced against upcyclers could be exercised in practice.

Problems (and solutions) associated with the external application of the HR2HE to IP

Admittedly, actors alleging that IP laws violate the HR2HE may face a number of challenges.

First, it may be difficult for upcycling (as well as other types of sustainability-oriented businesses, such as those focusing on repair, refurbishment, customisation, or other forms of reuse of old goods) to prove a causal link between the IP-related restrictions on their businesses and the harm to the environment.

In such litigation, courts might also note that the primary interest these businesses seek to protect is not necessarily environmental protection, but rather their own property interests or their freedom to operate their business without restriction.[33]

Nevertheless, arguably, if properly viewed in the light of the HR2HE, the courts could (and should) still take into consideration in such litigation, first, the fact that the economic interests of upcyclers, repairers, refurbishers and the like also align with the significant societal goal of environmental protection. As a result, the freedom to conduct a business[34] or the right to property[35] of such actors could be interpreted in light of the HR2HE – much like the ECtHR regularly interprets one human right in light of another; for example, freedom of expression in light of freedom of assembly[36] (and *vice versa*[37]), or the right to education in light of freedom of religion.[38]

Further, the courts examining such claims might also wish to consider the impact of imposing restrictions on sustainable businesses on broader groups of citizens, not only on the immediate actors in the litigation.[39]

Additionally, when assessing the extent of damage to the property rights of IP holders caused by sustainable business practices, the courts may wish to take into account the fact that the IP holder has already realised the full economic value of the object for which they seek IP protection through the initial sale.[40] This, in a way, would then "externalise" the exhaustion argument within the framework of human rights law, should it fail within the internal IP law assessment.[41]

Finally, the courts might question whether original IP holders had even anticipated secondary markets – such as upcycling or repair – for their products. If they had not, it could be argued that their human right to (intellectual) property claim is

unfounded, as there is no right to acquire property under the ECHR,[42] for instance. Consequently, claims by IP holders of an unjustified violation of their human right to property would, in essence, be deprived of their human rights status, leaving IP holders' claims in a much weaker position when balanced against the superior HR2HE of upcyclers or other sustainable reworkers of old products or works in this scenario.

Conclusion

As demonstrated, multiple pathways exist for reconciling IP protection with the HR2HE, both through internal and external balancing of IP law with this increasingly significant human right. Whether through internal reinterpretations of IP laws or a more radical external application of the HR2HE-based defence to IP infringement actions, these approaches offer the potential to develop a more sustainable IP framework that adequately addresses environmental concerns.

On a broader note, the analysis presented here, along with the other contributions to this book, highlights the need for ongoing reflection on the intersection of IP law with human rights more generally and the HR2HE more specifically. Regarding the latter, its evolving role in shaping the future of IP laws warrants further attention, particularly as the global demand for sustainable and equitable solutions intensifies.

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