

Intellectual Property and the Human Right to a Healthy Environment



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ON MATTERS CONSTITUTIONAL

Elena Izumenko

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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.⁶

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 Häkkinen** 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 **Leon 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!

References

1. Rebecca Lindsey and Luann Dahlman, 'Climate Change: Global Temperature' NOAA (18 January 2024), <https://www.climate.gov/news-features/understanding-climate/climate-global-temperature>.
2. See Taina Pihlajarinne and Rosa Maria Ballardini, 'Paving the Way for the Environment: Channelling "Strong" Sustainability Into the European IP System' (2020) 42:4 *European Intellectual Property Review*; Martin Senftleben, 'Fashion Upcycling and Trademark Infringement – A Circular Economy/Freedom of the Arts Approach' (2023) *SSRN*, <https://ssrn.com/abstract=4470873>; Péter Mezei and Heidi Häkkinen, 'Monopolising Trash: A Critical Analysis of Upcycling under Finnish and EU Copyright Law' (2023) 18:5 *Journal of Intellectual Property Law & Practice*; Irene Calboli, 'Pushing a Square Pin into a Round Hole? Intellectual Property Challenges to a Sustainable and Circular Economy, and What to Do About It' (2024) 55:2 *International Review of Intellectual Property and Competition Law*; Elena Izumenko, 'Intellectual Property in the Age of the Environmental Crisis: How Trademarks and Copyright Challenge the Human Right to a Healthy Environment' (2024) 55:6 *International Review of Intellectual Property and Competition Law*.
3. Charlotte J. S. Vrendenbarg, 'Towards a Judicial Sustainability Test in Cases Concerning the Enforcement of Intellectual Property Rights' (2023) 72:12 *GRUR International*.
4. See Article 6 (1) of the Treaty on the European Union, C-326/15, OJ 26 October 2012.
5. For a comprehensive overview of this case law on IP and human rights, see Elena Izumenko and Christophe Geiger, *Human Rights and Intellectual Property before the European Courts: A Case Commentary on the Court of Justice of the European Union and the European Court of Human Rights* (Elgar Commentaries in European Law, Edward Elgar Publishing, forthcoming 2025). See also Christophe Geiger, 'Reconceptualizing the Constitutional Dimension of Intellectual Property – An Update' in Paul Torremans (ed.), *Intellectual Property and Human Rights* (Kluwer Law International, 2020), p. 117; Martin Senftleben, 'The Unproductive "Overconstitutionalization" of EU Copyright and Trademark Law – Fundamental Rights Rhetoric and Reality in CJEU Jurisprudence' (2024) 55 *International Review of Intellectual Property and Competition Law*.
6. Ke Tang and Otto Spijkers, 'The Human Right to a Clean, Healthy and Sustainable Environment' (2022) 6:1 *Chinese Journal of Environmental Law*.
7. For further discussion about the environmental human rights framework under the European Convention on Human Rights, see Natalia Kobylarz, 'Why Recognizing the Right to a Healthy Environment Would Strengthen the Environmental Human Rights Framework Under the European Convention on Human Rights' (2025) *Verfassungsblog*.