Intellectual Property and the Human Right to a Healthy Environment

An Introduction

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As the detrimental effects of climate change continue to escalate, 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 patent protection) on environmental sustainability (see, e.g., here, here, here, here, and here). Central to these discussions are concerns regarding the potential barriers posed by strong IP protection 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.

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. 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 (see, e.g., here, here, and here).

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 IP. It is with this goal in mind that this blog symposium was conceived and now comes to meet its readers.

Symposium structure

The symposium will feature 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 will lay the essential groundwork for any subsequent discussions 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 will also explore 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.

Part II will shift the focus to the IP aspect of the discussion, featuring renowned experts in IP law who will examine various conflicts at the intersection of IP, sustainability, and the HR2HE. Topics will 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 will also address whether patent law

serves as a hindrance or rather a stimulus for green innovation, explore the role of sustainability in remedies for IP infringements, and, finally, consider 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 symposium will begin with a contribution by Otto Spijkers, who will examine whether the right to a clean, healthy, and sustainable environment is already part of customary international law. The discussion will cover resolutions from the Human Rights Council and the UN General Assembly, which some view as recognizing 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 will be followed by a contribution from European Court of Human Rights (ECtHR) senior lawyer Natalia Kobylarz, who will explain the environmental human rights framework under the European Convention on Human Rights (ECHR). She will also further explore whether recognizing the right to a healthy environment as an autonomous right under the Convention – currently a prominent issue on the Council of Europe's agenda – would enhance the ECtHR's protection of environmental interests.

Jasper Krommendijk will further analyse the protection of the HR2HE within the EU legal order, where, in contrast to the Council of Europe's ECHR, the fundamental right to environmental protection is (already) explicitly incorporated in Article 37 of the EU Charter of Fundamental Rights. It will be argued that despite the EU's growing role in climate and environmental protection, the Court of Justice of the European Union (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 will next explore the meaning and relevance of the reference to the interests of future generations in the definitions of the HR2HE. She will argue 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 will be 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 symposium will conclude with a contribution from Eva Meyermans Spelmans, who will examine the role of environmental human rights in building circular economies, thereby providing a smooth transition to the next, IP law-oriented part of the symposium. The contribution will focus particularly on the environmental challenges of the textile industry, highlighting its significant contribution to global pollution and climate change, and emphasizing 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 will call for stronger action to reduce the industry's environmental footprint and advocate 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 symposium, which will focus on narrowing the general discussion of the HR2HE to its specific relevance in IP law, will begin with a contribution from Martin Senftleben, who will examine the legal challenges faced by fashion upcyclers under EU trademark law. It will be 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 will then call 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 will continue with Irene Calboli, who will examine similar trademark issues for upcyclers in the U.S. context. It will be 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 will then shift to the tension, similar to that in trademark law, between this sustainability-oriented practice and copyright law protection. Péter Mezei will argue 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 will next discuss a largely unexplored but highly relevant question regarding the implications of copyright law's moral rights in upcycling. She will argue 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 will further be 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 will also be 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 symposium will shift focus to patent law's relationship with the HR2HE, featuring a contribution by Léon Dijkman. He will argue 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 will also be 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 will address the highly topical issue of sustainability and the HR2HE considerations in the enforcement of intellectual property rights. It will demonstrate 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 will be 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 symposium will conclude with a contribution by Elena Izyumenko. Using the example of the tension between copyright law and upcycling, she will demonstrate, 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, it will be explored 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 authors in this symposium 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!

ABOUT THE AUTHOR

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