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Intellectual Property in the Age of the Environmental Crisis: How Trademarks and Copyright Challenge the Human Right to a Healthy Environment

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Abstract In the face of the escalating environmental crisis driven by overconsumption, there is a growing recognition of the urgent need for environmental consciousness and a sustainable, circular economy. Practices like repair, refurbishment, and fashion upcycling have emerged as tangible efforts to mitigate the negative effects of this crisis. Perhaps unexpectedly, however, trademark and copyright laws clash with these endeavours, placing obstacles to sustainability goals. This paper contributes to the emerging literature devoted to studying this problem by undertaking the first in-depth analysis of the issue from a human rights law perspective. It specifically investigates the nature, scope, impact on, and consequences for intellectual property protection of the evolving human right to a healthy environment. Following a short introduction (1), the paper delves into the legal nature of obstacles posed by trademark and copyright protection to environmental sustainability (2), scrutinizes the human right to a healthy environment with a European emphasis (3), and proposes strategies for reconciling trademark and copyright protection with this fundamental right (4). The key findings are summarised at the end (5).

Keywords Intellectual property · Environmental protection · Sustainability · Human rights · Repair · Upcycling · Exhaustion · Exceptions · EU Charter · ECHR · Copyright · Trademarks

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1 Introduction

Current linear market patterns, characterized by rampant overconsumption, cast a looming shadow over the environment, contributing significantly to its degradation.[1] In response, the urgent need for environmental consciousness is increasingly recognized, with various practices, such as repair, refurbishment, and fashion upcycling, having emerged as beacons of hope in mitigating the adverse effects of overconsumption.[2] These practices represent tangible efforts to reduce the environmental footprint, especially in the context of unfolding climate change.[3]

However, an unexpected barrier obstructs these sustainable practices – intellectual property (IP) protection. Despite the pressing call for a shift in linear modes of consumption, IP laws fail to align with sustainability goals. Across jurisdictions, IP holders, wielding near-absolute control over their productions,[4] are well-equipped to allege trademark or copyright infringement in relation to goods incorporating their intellectual creations. In certain cases, they have even already initiated legal actions against repair, refurbishment, and upcycling businesses in this regard.[5] The internal mechanisms within IP laws, theoretically capable of safeguarding sustainable practices through concepts like IP exhaustion and exceptions, are often interpreted by the courts to favour stringent protection of IP holders, creating, at most, conflicting outcomes.[6] This, in turn, generates legal uncertainty that further chills environmentally friendly practices and sustainable business models.[7]

Despite a growing body of scholarship exploring the negative impact of IP protection on repair, refurbishment, upcycling, and sustainability in general,[8] no study has yet undertaken an in-depth analysis of this problem from a human rights law perspective. This paper seeks to fill this gap by studying the impact of the rapidly evolving human right to a healthy environment on IP laws. Once relegated to the shadows of other human rights, the right to environmental protection[9] is

[1] Grosse Ruse-Khan (2022), p. 683; Kur and Calboli (2023), p. 337; Calboli (2023); Calboli (2024), pp. 237–238.

[2] Pihlajarinne and Ballardini (2020), p. 239; Kur (2021), p. 228; Grosse Ruse-Khan (2022), p. 684; Senftleben (2023a), p. 1; Mezei and Härkönen (2023), p. 361; Vrendenbarg (2023a); Kur and Calboli (2023), p. 337; Calboli (2023); Calboli (2024), pp. 237–238.

[3] Kur (2021), p. 228; Senftleben (2023a), p. 1.

[4] Pihlajarinne and Ballardini (2020), pp. 240–241; Calboli (2024), p. 238.

[5] For an overview of some of such cases, *see* Kur (2021); Mezei and Härkönen (2023); Calboli (2023); Calboli (2024).

[6] Kur (2021); Senftleben (2023a); Mezei and Härkönen (2023); Calboli (2023); Calboli (2024).

[7] Kur (2021), p. 228; Pihlajarinne (2021), p. 97; Senftleben (2023a), p. 1; Furuta and Heath (2023), pp. 1053–1054; Senftleben (2023b).

[8] *See*, notably, Derclaye (2009); Pihlajarinne and Ballardini (2020); Keats (2020); Schenerman (2020); Kur (2021); Härkönen (2021); Pihlajarinne (2021); Abdel-Latif and Roffe (2021); Grosse Ruse-Khan (2022); Senftleben (2023a); Mezei and Härkönen (2023); Kur and Calboli (2023); Hilty and Batista (2023); Calboli (2023); Vrendenbarg (2023a); Furuta and Heath (2023); Lepesant (2023); Calboli (2024); Geiregat (2024).

[9] In this paper, the terms "the right to environmental protection" and "the right to a healthy environment" are used interchangeably. However, in legal texts, it is more common to refer to "the right to a healthy environment".

promptly gaining in strength through either the "greening" of traditional human rights or via the recognition of a standalone right to a healthy environment. Despite the theoretical potential of alternative mechanisms like relying on "public interest" or unfair competition law to rebalance IP laws in favour of "green" practices, the human rights framework remains essential. This framework like no other prioritizes the well-being and dignity of individuals and communities, making it crucial for interpreting IP law to support environmental protection. Human rights resonate strongly with the general public and are progressively gaining popularity among both the IP lawmakers and judges, including at the EU level.[10] The Court of Justice of the European Union (CJEU), for example, increasingly considers human rights when interpreting intellectual property laws.[11] Similarly, another principal supranational court in Europe, the European Court of Human Rights (ECtHR), is gradually engaging in examining IP issues from a human rights perspective.[12]

[10] For the examples of references to human and fundamental rights in the recent EU IP legislation, *see, e.g.*, recitals 70, 84 and 85, as well as Art. 17(10) of the EU Directive 2019/790 on Copyright and Related Rights in the Digital Single Market; Recital 27 to the EU Trademark Directive 2015/2436 and recital 21 to the EU Trademark Regulation 2017/1001; Preamble to the Agreement on a Unified Patent Court (2013/C 175/01) (entered into force on 1 June 2023). On the international stage, intellectual property treaties are now being enacted with the primary aim of safeguarding human rights. A notable example in this respect is the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (2013). This treaty is inherently rooted in human rights as its very goal is to create a set of mandatory limitations and exceptions to copyright for the benefit of this group of people with the purpose of ensuring that they are free from discrimination and fully enjoy their human right to seek, receive and impart information, as well as the right to education and the right to research.

[11] *See*, *e.g.*, CJEU, Judgments in *Netherlands v. Parliament and Council*, C-377/98, 9 October 2001, ECLI:EU:C:2001:523; *Promusicae*, C-275/06, 29 January 2008, ECLI:EU:C:2008:54; *L'Oréal and Others v. eBay*, C-324/09, 12 July 2011, ECLI:EU:C:2011:474; *Brüstle v. Greenpeace eV*, C-34/10, 18 October 2011; *Scarlet Extended*, C-70/10, 24 November 2011, ECLI:EU:C:2011:771; *Painer*, C-145/10, 1 December 2011, ECLI:EU:C:2011:798; *SABAM v. Netlog*, C-360/10, 16 February 2012, ECLI:EU:C:2012:85; *Bonnier Audio and Others*, C-461/10, 19 April 2012; *UPC Telekabel*, C-314/12, 27 March 2014, ECLI:EU:C:2012:219; *Deckmyn*, C-201/13, 3 September 2014, ECLI:EU:C:2014:2132; *International Stem Cell Corporation*, C-364/13, 18 December 2014, ECLI:EU:C:2014:2451; *Huawei Technologies*, C-170/13, 16 July 2015, ECLI:EU:C:2015:477; *Coty Germany*, C-580/13, 16 July 2015, ECLI:EU:C:2015:485; *NEW WAVE CZ*, C-427/15, 18 January 2017, ECLI:EU:C:2017:18; *Mc Fadden*, C-484/14, 15 September 2016, ECLI:EU:C:2016:689; *Renckhoff*, C-161/17, 7 August 2018, ECLI:EU:C:2018:634; *Pelham*, C-476/17, 29 July 2019, ECLI:EU:C:2019:624; *Funke Medien*, C-469/17, 29 July 2019, ECLI:EU:C:2019:623; *Spiegel Online*, C-516/17, 29 July 2019, ECLI:EU:C:2019:625; *Constantin Film Produktion v. EUIPO (Fack Ju Göhte)*, C-240/18 P, 27 February 2020, ECLI:EU:C:2020:118; *Mircom International Content Management*, C-597/19, 17 June 2021, ECLI:EU:C:2021:492; *YouTube and Cyando*, C-682/18 and C-683/18, 22 June 2021, ECLI:EU:C:2021:503; *Poland v. Parliament and Council*, C-401/19, 26 April 2022, ECLI:EU:C:2022:297; *G. ST. T. (Proportionnalité de la peine en cas de contrefaçon*, C-655/21, 19 October 2023, ECLI:EU:C:2023:791; *Seven.One Entertainment Group*, C-260/22, 23 November 2023, ECLI:EU:C:2023:900. *See also* General Court, Judgments in *Couture Tech Ltd v. OHIM*, T-232/10, 20 September 2011, ECLI:EU:T:2011:498; *Cortés del Valle López v. OHIM (¡Que buenu ye! HIJOPUTA)*, T-417/10, 9 March 2012, ECLI:EU:T:2012:120; *Efag Trade Mark Company v. OHIM (FICKEN LIQUORS)*, T-54/13, 14 November 2013, ECLI:EU:T:2013:593.

[12] *See*, among many others, ECommHR, *Smith Kline & French Lab. Ltd. v. the Netherlands* (dec.), No. 12633/87, 4 October 1990, ECLI:CE:ECHR:1990:1004DEC001263387; ECommHR, *Österreichische Schutzgemeinschaft für Nichtraucher and Robert Rockenbauer v. Austria* (dec.), No. 17200/90, 2 December 1991, ECLI:CE:ECHR:1991:1202DEC001720090; ECommHR, *Nijs, Jansen and the Onderlinge Waarborgmaatschappij Algemeen Ziekenfonds Delft-Schiedam-Westland U.A. v. the Netherlands*

The analysis unfolds as follows. Section 2 details the legal nature of challenges posed by IP to environmental sustainability, focusing on repair, refurbishment, and upcycling. Section 3 scrutinises the right to a healthy environment as a legal entitlement, examining its evolution and varying modes of protection, with a particular emphasis on Europe. Section 4 proposes strategies for reconciling IP protection with this human right, both internally within trademark and copyright laws and externally through the human rights litigation avenues available to repairers, refurbishers, and upcyclers. The paper concludes by summarising key findings and proposing pathways for a harmonious coexistence between intellectual property and the human right to a healthy environment.

Footnote 12 continued
(dec.), No. 15497/89, 9 September 1992, ECLI:CE:ECHR:1992:0909DEC001549789; ECommHR, *A.D. v. the Netherlands* (dec.), No. 21962/93, 11 January 1994, ECLI:CE:ECHR:1994:0111DEC002196293 ECommHR, *Societé Nationale de Programmes FRANCE 2 v. France* (dec.), No. 30262/96, 15 January 1997, ECLI:CE:ECHR:1997:0115DEC003026296; ECommHR, *Aral, Tekin and Aral v. Turkey* (dec.), No. 24563/94, 14 January 1998, ECLI:CE:ECHR:1998:0114DEC002456394; ECommHR, *Lenzing AG v. the United Kingdom* (dec.), No. 38817/97, 9 September 1998, ECLI:-CE:ECHR:1998:0909DEC003881797; ECtHR, *Mihăilescu v. Romania* (dec.), No. 47748/99, 26 August 2003, ECLI:CE:ECHR:2003:0826DEC004774899; ECtHR, *Dima v. Romania* (dec.), No. 58472/00, 26 May 2005, ECLI:CE:ECHR:2005:0526DEC005847200; ECtHR, *Melnychuk v. Ukraine* (dec.), No. 28743/03, 5 July 2005, ECLI:CE:ECHR:2005:0705DEC002874303; ECtHR, *Anheuser-Busch Inc. v. Portugal* [GC], No. 73049/01, 11 January 2007, ECLI:CE:ECHR:2007:0111JUD007304901; ECtHR, *OAO Plodovaya Kompaniya v. Russia*, No. 1641/02, 7 June 2007, ECLI:-CE:ECHR:2007:0607JUD000164102; ECtHR, *Paeffgen Gmbh v. Germany* (dec.), nos. 25379/04, 21688/05, 21722/05 and 21770/05, 18 September 2007, ECLI:CE:ECHR:2007:0918DEC002537904; ECtHR, *Bălan v. Moldova*, No. 19247/03, 29 January 2008, ECLI:CE:ECHR:2008:0129JUD001924703; ECtHR, *SC Editura Orizonturi SRL v. Romania*, No. 15872/03, 13 May 2008, ECLI:-CE:ECHR:2008:0513JUD001587203; ECtHR, *Abramiuc v. Romania*, No. 37411/02, 24 February 2009, ECLI:CE:ECHR:2009:0224JUD003741102; ECtHR, *Ashby Donald and Others v. France*, No. 36769/08, 10 January 2013, ECLI:CE:ECHR:2013:0110JUD003676908 and ECtHR, *Neij and Sunde Kolmisoppi v. Sweden* (dec.), No. 40397/12, 19 February 2013, ECLI:CE:ECHR:2013:0219DEC004039712; ECtHR, *Akdeniz v. Turkey* (dec.), No. 20877/10, 11 March 2014, ECLI:CE:ECHR:2014:0311DEC002087710; ECtHR, *Zosymov v. Ukraine*, No. 4322/06, 7 July 2016, ECLI:CE:ECHR:2016:0707JUD000432206; ECtHR, *SIA AKKA/LAA v. Latvia*, No. 562/05, 12 July 2016, ECLI:CE:ECHR:2016:0712JUD000056205; ECtHR, *Kamoy Radyo Televizyon Yayıncılık ve Organizasyon A.Ş. v. Turkey*, No. 19965/06, 16 April 2019, ECLI:CE:ECHR:2019:0416JUD001996506; ECtHR, *Csibi v. Romania* (dec.), No. 16632/12, 4 June 2019, ECLI:CE:ECHR:2019:0604DEC001663212; ECtHR, *Pendov v. Bulgaria*, No. 44229/11, 26 March 2020, ECLI:CE:ECHR:2020:0326JUD004422911; ECtHR, *Sergets v. Latvia*, No. 41744/12, 6 October 2020, ECLI:CE:ECHR:2020:1006DEC004174412; ECtHR, *AsDAC v. Republic of Moldova*, No. 47384/07, 8 December 2020, ECLI:CE:ECHR:2020:1208JUD004738407; ECtHR, *Tokel v. Turkey*, No. 23662/08, 9 February 2021, ECLI:CE:ECHR:2021:0209JUD002366208; ECtHR, *Zinin v. Russia*, No. 54339/09, 9 March 2021, ECLI:CE:ECHR:2021:0309JUD005433909; ECtHR, *Łysak v. Poland*, No. 1631/16, 7 October 2021, ECLI:CE:ECHR:2021:1007JUD000163116; ECtHR, *Safarov v. Azerbaijan*, No. 885/12, 1 September 2022, ECLI:CE:ECHR:2022:0901JUD000088512; ECtHR, *Korotyuk v. Ukraine*, No. 74663/17, 19 January 2023, ECLI:CE:ECHR:2023:0119JUD007466317; ECtHR, *Nazaré Martins v. Portugal* (dec.), No. 83098/17, 30 May 2023, ECLI:CE:ECHR:2023:0530DEC008309817; ECtHR, *Aydin and Others against Türkiye* (dec.), No. 23721/11, 16 May 2023, ECLI:-CE:ECHR:2023:0516DEC002372111. For a comprehensive overview of the IP-related case law of the ECtHR, *see* Geiger and Izyumenko (2018).

2 Intellectual Property's Challenges to Environmental Sustainability: The Case of Repair, Refurbishment, and Upcycling

As mentioned already, a number of practices and business models based on repair, refurbishment, and upcycling considerably benefit the environment. Repair involves fixing, refurbishment improves and restores products, while upcycling creatively transforms old items into new goods. These practices contribute to environmental sustainability by reducing waste, conserving resources, and fostering a circular economy, thereby minimizing the demand for new production and lowering the overall environmental impact.

Despite their societal benefits, however, these practices are likely to qualify as a *prima facie* IP infringement under the current trademark and copyright laws in the EU.[13]

2.1 Circular Business Models as *Prima Facie* Trademark and Copyright Infringement

Under trademark law, problems arise due to the uncertainty surrounding the conditions under which repaired, refurbished, or upcycled products, still bearing their original trademarks, can be commercialised.[14] One could think of the replacement of automotive or IT equipment components, refilling of empty containers, repair of electronics, jewellery, watches, and more. In most such cases, the items to be refurbished or repaired would still carry their original makers' trademarks. Analogously, in the sphere of upcycling, especially with fashion items, old pieces of clothing, bags, or jewellery reworked into new ones might still retain their original trademarks. The primary infringement criterion in trademark law, use "in the course of trade",[15] automatically captures such activities, provided that they occur in the commercial sphere and not as a purely private matter.[16] Effectively, this brings all business models based on the sale of repaired, enhanced, or upcycled

[13] Pihlajarinne and Ballardini (2020), pp. 246–247; Kur (2021); Senftleben (2023a); Calboli (2024). The implementation of environmentally friendly practices, such as repair, also faces challenges related to patent and trade secret laws. The discussion of these challenges is, however, beyond the scope of this paper. Interested readers are encouraged to refer to Götting and Hetmank (2019); Grinvald and Tur-Sinai (2019); Pihlajarinne (2021), pp. 87–92; Pihlajarinne and Ballardini (2020), pp. 243–244. On the role of patent law with regard to sustainable inventions, *see* Derclaye (2009) and Hilty and Batista (2023). The need to account for environmental considerations arises in relation to not only the scope of IP protection but also its enforcement – for further discussion, *see* Vrendenbarg (2023b).

[14] Kur (2021), p. 228; Senftleben (2023a), p. 1.

[15] Article 10(2) of Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks [2015] OJ L 336/1 (EU Trademark Directive) and Art. 9(2) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L 154/1 (EU Trademark Regulation 2017/1001). For further detailed analysis of this primary infringement criterion, *see* Kur and Senftleben (2017), para. 5.1.2.2.

[16] CJEU, Judgments in *Arsenal Football Club*, C-206/01, 12 November 2002, para. 40, EU:C:2002:651; *Google France and Google*, C-236/08 to C-238/08, 23 March 2010, para. 50, EU:C:2010:159; and *Audi (Support d'emblème sur une calandre)*, C-334/22, 25 January 2024, para. 34, ECLI:EU:C:2024:76. *See also* Kur (2021), p. 231; Senftleben (2023a), p. 2; Furuta and Heath (2023), p. 1054.

goods within the ambit of the use "in the course of trade". Another trademark law's primary infringement criterion of the use "in relation to goods or services"[17] is likewise unable to immunize the business models at issue, as this criterion had been consistently interpreted by the CJEU as requiring as little as establishment of a "link" or "association" with goods or services, rather than necessitating the use of another's trademark as an identifier of the user's own commercial source.[18] Consequently, trademark proprietors are well positioned to assert that repair, refurbishment, and upcycling amount to *prima facie* trademark infringement – by giving rise to either consumer confusion (including post-sale confusion[19]) or by blurring, tarnishment, or unfair freeriding on a trademark with a reputation.[20]

In addition to the chilling effects of trademark law on circular business models, certain types of these businesses, particularly those centred around upcycling, may potentially generate further claims of copyright infringement. This could occur if upcycled items incorporate copyright-protected works from the original product. One could think here of upcycled clothing, jewellery, or even furniture, glassware, ceramic or other forms of applied arts featuring copyright-protected ornaments or design patterns. Similar to trademark law, the extension of copyright protection to upcycled products is made possible because the entrance criterion for establishing *prima facie* copyright infringement in the EU – copying of the "author's own intellectual creation"[21] – is often interpreted with a bias favouring strong protection for copyright holders. In *Infopaq*, for example, the CJEU held that even capturing as few as eleven words from the original work could constitute copyright infringement adding also that each individual part or element of a work enjoys copyright protection itself if, analysed in isolation, it satisfies the originality test.[22] Practically speaking, this means that any taking of a design element of a protected creation amounts to copyright infringement if the taken element fulfils the relatively low originality threshold.[23]

Despite the above-mentioned approaches to *prima facie* trademark and copyright infringement, it appears, on the first sight, that the doctrine of IP exhaustion should provide an immediate shelter to repair, refurbishment, and upcycling given the particularities of trademark and copyright use implied by these practices – namely,

[17] Article 10(2) of EU Trademark Directive and Art. 9(2) of EU Trademark Regulation. For further detailed analysis of the use "in relation to goods or services" infringement criterion, *see* Kur and Senftleben (2017), para. 5.1.2.3.

[18] Senftleben (2023a), pp. 2–4, with further case-law references; Senftleben (2023b).

[19] Senftleben (2023a), p. 4; Senftleben (2023b); Schenerman (2020), pp. 778–779.

[20] Senftleben (2023a), pp. 4–5; Senftleben (2023b); Pihlajarinne and Ballardini (2020), p. 247; Pihlajarinne (2021), p. 94.

[21] CJEU, Judgment in *Infopaq International*, C-5/08, 16 July 2009, para. 37, EU:C:2009:465.

[22] *Id.*, paras. 38, 51. *See* Senftleben (2020a), pp. 751–769.

[23] The reuse of tangible objects of applied art may implicate not only copyright but also industrial design rights. However, similar to the correlation between environmental preservation and patents or trade secrets (*see supra* note 13), the intersection of sustainability and industrial design protection falls outside the purview of this study. Interested reader is referred to, *e.g.*, Pihlajarinne and Ballardini (2020), pp. 244–245; Hoekstra and Cornet (2023). *See also*, exploring how recent CJEU case law highlights the misalignment of EU design law with efforts to promote sustainable product usage, Klein (2023).

the fixing, improving, or repurposing the old items that had previously been already placed on the market with the rightholders' consent, and not the creation of new, unauthorized items.[24]

2.2 Exhaustion – the Most Promising Avenue for Accommodating Repair, Refurbishment and Upcycling

IP exhaustion, also known as the "first sale doctrine", is a legal principle that precludes the rightholder's control over further distribution or use of their product or work once those have been sold with the rightholder's consent.[25]

2.2.1 Trademark Exhaustion: Non-coverage of Altered Goods

With respect to trademarks, the first-sale doctrine is incorporated, on the EU level, in Art. 15(1) of the EU Trademark Directive and Art. 15(1) of the EU Trademark Regulation. These provisions state that a trademark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Union under that trademark by the proprietor or with the proprietor's consent. Crucially, however, the second paragraph of these provisions contains an exception to this general rule, in accordance with which the exhaustion would not apply "where there exist legitimate reasons for the proprietor to oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market."[26]

Given that repair, refurbishment, and upcycling inherently involve varying degrees of alteration to the original condition of goods initially released to the market under the trademark of the rightholder, this exception to the principle of exhaustion poses serious challenges for those running the businesses of repair or enhancement of used items.[27]

In fact, this has already been evident in specific court rulings on the subject. Thus, for example, it was held by the District Court of Munich that the replacement of a firmware installed on used Wi-Fi routers constituted a change in the condition of the goods that precluded their coverage by exhaustion within the meaning of Art. 15(2) of the EU Trademark Directive, irrespective of whether the routers' functionality had been compromised as a result.[28] In another case from Germany, it was determined that the resale of chlorine-bleached, re-dyed, and partially shortened second-hand Levi's jeans by a third party did not fall under exhaustion despite the defendant having prominently displayed in their store, in close proximity

[24] Senftleben (2023a), p. 5; Senftleben (2023b); Pihlajarinne and Ballardini (2020), p. 243.

[25] Ghosh and Calboli (2018); Mezei (2022).

[26] Article 15(2) of EU Trademark Directive and Art. 15(2) of EU Trademark Regulation.

[27] Senftleben (2023a), p. 6; Senftleben (2023b). *See also* Kur (2021), pp. 232–233; Pihlajarinne and Ballardini (2020), pp. 246–247; Kur and Calboli (2023), p. 337; Calboli (2023); in the context of the US trademark laws, Keats (2020), pp. 715–716.

[28] District Court of Munich I, decision of 9 April 2020, 17 HK O 1703/20, https://www.gesetze-bayern.de/Content/Document/Y-300-Z-GRURRS-B-2020-N-9289?hl=true (accessed 19 December 2023), reported in Kur (2021), p. 228.

to the offered jeans, a notice indicating that the items were used, second-hand jeans not dyed by Levi Strauss.[29] With the demand for and rise of repair- and upcycling-based businesses, it is likely that more such cases will arise in Europe. This is especially true in light of analogous recent developments in the US, where there has been a rise in trademark law litigation related to, in particular, upcycling practices.[30]

2.2.2 *Copyright Exhaustion: Non-coverage of Modifications of Authorized Copies*

The situation is somewhat similar in copyright law. In the European Union, Art. 4(2) of the InfoSoc Directive[31] specifically addresses exhaustion, stating that the distribution right of the copyright holder is exhausted within the EU after the first sale or other transfer of ownership of a copy of a work with the rightholder's consent. While, in contrast to trademark law, there is no explicit legislative provision establishing the non-coverage by exhaustion of modified subject matter under copyright law, essentially the same principle is construed through judicial interpretation.

The most relevant in this respect is the CJEU's judgment in the case of *Allposters*,[32] which concerned the transfer, by means of a chemical process, of images of copyright-protected works from paper posters, marketed with the copyright holder's consent, to a painter's canvas that were then sold on that new medium. Faced with the question on whether such a transfer impacted on exhaustion of the distribution right, the CJEU responded in the positive. The Court reached this conclusion by a curious judicial construct, in accordance with which the transfer in question was to be covered not by the exclusive right of distribution (to which only the principle of copyright exhaustion applies) but by the right of reproduction. According to the CJEU, "a replacement of the medium […] results in the creation of a new object incorporating the image of the protected work, whereas the poster itself ceases to exist."[33] Pursuant to the CJEU, such an alteration of the copy of the protected work was sufficient to constitute a new reproduction of that work, which required the author's authorisation.[34] The CJEU did not accept Allposters' argument that the transfer onto canvas could not be categorised as reproduction on the ground that there was no multiplication of copies of the protected work since the image was

[29] German Federal Supreme Court, 14 December 1995, case I ZR 210/93, Gefärbte Jeans, Gewerblicher Rechtsschutz und Urheberrecht – International 1996, reported in Senftleben (2023a), p. 6, footnote 38.

[30] *See, e.g., Hamilton Int'l Ltd. v. Vortic LLC*, 486 F. Supp. 3d 657 (S.D.N.Y. 2020), aff'd, 13 F.4th 264 (2d Cir. 2021); *Chanel, Inc. v. Shiver and Duke, LLC*, No. 1:21-cv-01277-MKV (S.D.N.Y. Nov. 29, 2022); *Louis Vuitton Malletier S.A.S. v. Sandra Ling Designs, Inc.* No. 4:21-CV-00352 (S.D. Tex. Dec. 1, 2022); *Rolex Watch USA, Inc. v. Beckertime, LLC* (5th Cir. Jan. 26, 2024). For a discussion of some of these cases, *see* Calboli (2023).

[31] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10 (InfoSoc Directive).

[32] CJEU, Judgment in *Art & Allposters International*, C-419/13, 22 January 2015, ECLI:EU:C:2015:27.

[33] *Id.*, para. 43.

[34] *Id.*

transferred and no longer appeared on the poster.[35] In the CJEU's opinion, "[t]he fact that the ink is saved during the transfer cannot affect the finding that the image's medium has been altered." Crucially, what was important is "whether the altered object itself, taken as a whole, is, physically, the object that was placed onto the market with the consent of the rightholder."[36]

Naturally, this conclusion has significant implications for circular business models, such as upcycling, that are inherently based on alteration of used items, which happen to contain copyright-protected elements.[37] A confirmation of this statement came from Finland, where the Copyright Board was called upon to consider a case concerning the use of pieces of broken tableware for creating designed jewellery.[38] The Finnish company that produced the tableware opposed such use, claiming infringement of its copyright in the ornaments placed on original tableware that remained visible on the reworked jewellery pieces. Relying on *Allposters*, the company argued that the use of its ornaments in the jewellery constituted a new unauthorised copy of a work and hence infringed upon its exclusive right of reproduction. The majority of the Finnish Copyright Council members agreed. Explicitly citing *Allposters*, they stated that, although, unlike in *Allposters*, the physical medium in which the work was incorporated remained the same,[39] the creation of jewellery out of broken tableware pieces gave rise to a new object, which was no longer the work that had been authorised for distribution with the consent of the copyright holder.[40] Exhaustion of the distribution right was, accordingly, not applicable to the production of this new object (i.e., upcycled jewellery pieces).[41]

In summary, it has been shown that, although trademark and copyright exhaustion appear to be the most promising legal avenues for legitimising circular business models centred on repair, refurbishment, or upcycling of old, worn-out or broken items, this doctrine does not cover most cases involving the use of others' trademarks and copyrights, at least under the current interpretation of relevant legislative provisions.

2.3 IP Exceptions – the Repairers' and Upcyclers' Last Hope

In view of the exhaustion's non-coverage of the use leading to new products, one might turn to another evident option of incorporating sustainability considerations into the legal design of IP laws – trademark and copyright exceptions.

[35] *Id*., paras. 44–45.

[36] *Id*., para. 45.

[37] Criticising the effects of the CJEU's judgment in *Allposters* on the sustainability practices in the EU, *see* Pihlajarinne and Ballardini (2020), p. 246.

[38] Finnish Copyright Council, Opinion 2021:9, 16 November 2021. For a detailed discussion of this case, *see* Mezei and Härkönen (2023).

[39] Finnish Copyright Council, Opinion 2021:9, 16 November 2021, para. 42.

[40] *Id.*, para. 43.

[41] *Id.*

2.3.1 *Descriptive, Non-distinctive and Referential Use Exceptions Under Trademark Law*

Under trademark law's catalogue of exceptions, descriptive and non-distinctive, as well as referential use appear the most likely candidates for shielding repair and upcycling businesses.

An exception concerning the use of descriptive and non-distinctive signs is enshrined in Art. 14(1)(b) of the EU Trademark Directive and Art. 14(1)(b) of the EU Trademark Regulation. It legitimizes unauthorized use, in the course of trade, of "signs or indications which are not distinctive or which concern the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of the service, or other characteristics of goods or services". However, the effectiveness of the, first, descriptive use defence in the cases of repair, refurbishment, and upcycling is uncertain,[42] as the CJEU jurisprudence suggests that "the purely decorative" use of an original trademark in third-party products cannot be regarded as intended to give an indication concerning one of the characteristics of the third party's goods.[43] Concerning, second, the non-distinctive use defence, whose addition to the catalogue of available trademark exceptions was a result of the 2015 trademark reform,[44] the question on whether a trademark-protected sign can be considered non-distinctive in specific contexts, such as repair, refurbishment, or upcycling is yet to be clarified by the CJEU.[45]

As to the referential use exception, its applicability to repair and upcycling appears more likely at first glance.[46] Article 14(1)(c) of the EU Trademark Directive and Art. 14(1)(c) of the EU Trademark Regulation provide that the proprietor of a trademark cannot prohibit a third party from using, in the course of trade, "the trade mark for the purpose of identifying or referring to goods or services as those of the proprietor of that trade mark, in particular, where the use of the trade mark is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts". However, the applicability of this exception to repair and upcycling-related businesses might be constrained by the strict interpretation of this exception by the CJEU, as recently confirmed in its *Audi* judgment.[47] The case revolved around the question of whether it was possible to market non-original spare parts for cars, specifically a radiator grille that included a component for attaching the Audi logo, which was essentially identical to the original logo. In assessing whether that marketing practice fell under the referential use defence, the

[42] Senftleben (2023a), pp. 8–9; Senftleben (2023b); Tischner and Stasiuk (2023), pp. 38–40; Kur (2021), p. 235.

[43] CJEU, Judgment in *Adidas and adidas Benelux*, C-102/07, 10 April 2008, para. 48, ECLI:EU:C:2008:217. *See also* CJEU, Judgment in *Adam Opel*, C-48/05, 25 January 2007, para. 44, ECLI:EU:C:2007:55. For further discussion, *see* Senftleben (2023a), p. 8; Senftleben (2023b); Pihlajarinne and Ballardini (2020), p. 247.

[44] Kur and Senftleben (2017), para. 6.1.2.2.3.

[45] Senftleben (2023a), p. 9; Senftleben (2023b); Kur and Senftleben (2017), para. 6.1.2.2.3.

[46] Senftleben (2023a), p. 9; Senftleben (2023b); Calboli (2024), p. 246.

[47] CJEU, Judgment in *Audi (Support d'emblème sur une calandre)*, C-334/22, 25 January 2024, ECLI:EU:C:2024:76.

CJEU distinguished between, on the one hand, the situation in which a spare part produced by the third party does not incorporate a sign identical to the protected trademark – merely using the trademark to indicate the spare part's compatibility with the goods of the trademark owner – and, on the other hand, the situation in which, by contrast, the protected trademark is affixed to the spare part.[48] Pursuant to the CJEU, only the former situation was covered by the referential use exception.[49] Accordingly, "[t]he affixing of a sign identical with, or similar to, the trade mark on the goods marketed by the third party exceed[ed] […] the referential use".[50] Such an interpretation might complicate matters not only for the businesses involved in the production and sale of spare parts such as those at stake in the *Audi* case, but also for upcycling businesses, as some of the latter are inevitably concerned with products bearing third-party trademarks on old items used in upcycling.

In addition, further obstacles to the applicability of the referential use exception may stem from the explicit legislative wording that subjects the referential, as well as the descriptive and indistinctive use exceptions to the requirement of compliance with honest practices in industrial or commercial matters.[51] The biggest problem arises here, as Senftleben explains, from the fact that "[t]he 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."[52] This "symmetry of criteria for assessing *prima facie* infringement and determining honesty in industrial and commercial matters" then "easily lead[s] to a situation where a finding of a likelihood of confusion or unfair freeriding already foreshadows a finding of dishonest practices."[53]

2.3.2 Quotation and Pastiche Exceptions Under Copyright Law

In the context of circular business models involving copyright-protected subject matter, the quotation exception, enshrined in Art. 5(3)(d) of the InfoSoc Directive, seems to be the primary candidate for shielding such businesses. However, here, likewise, the current CJEU understanding of quotation might preclude its applicability. In *Pelham*, the CJEU ruled that, in order to be able to rely on the quotation exception, the user of a protected work has to "have the intention of entering into 'dialogue'" with the quoted work.[54] It might hence need to be demonstrated that the quoted work illustrates, clarifies or supports the borrower's

[48] *Id.*, para. 57.

[49] *Id.*

[50] *Id.*

[51] Article 14(2) of EU Trademark Directive and Art. 14(2) of EU Trademark Regulation. *See* Senftleben (2023a), p. 15; Senftleben (2023b).

[52] Senftleben (2023a), p. 15, with further references to CJEU, Judgments in *Portakabin*, C-558/08, 8 July 2010, para. 69, ECLI:EU:C:2010:416; and *Gillette Company and Gillette Group Finland*, C-228/03, 17 March 2005, para. 49, ECLI:EU:C:2005:177. *See also* Senftleben (2023b) and Senftleben (2013), pp. 168–169.

[53] Senftleben (2023a), p. 16. *See also* Senftleben (2023b).

[54] CJEU, Judgment in *Pelham*, C-476/17, 29 July 2019, para. 71, EU:C:2019:624.

own expression. In the Finnish tableware case, the Copyright Council's majority applied this "dialogue" requirement to the effect of excluding applicability of quotation exception to the broken tableware reworked into jewellery pieces. In the majority's opinion, no quotation-exception-relevant interaction between the original dishes and the new jewellery could be directly observed in that case.[55]

If other European jurisdictions adopt the Finnish approach, excluding upcycling practices from the scope of a quotation exception, there appears to be yet another exception within the InfoSoc Directive that could potentially apply to upcycling. This exception is outlined in Art. 5(3)(k) of the InfoSoc Directive, which pertains to the "use for the purpose of caricature, parody, or pastiche". While parody may not offer a robust defence against copyright infringement for upcycling businesses due to the requirement of humour in derivative works,[56] the concept of pastiche, by contrast, is promising in this regard. The dictionary definition of the term is that of "a literary, artistic, musical, or architectural work that imitates the style of previous work"[57] or, alternatively, "a musical, literary, or artistic composition made up of selections from different works".[58] The concept of "pastiche" broadly aligns with upcycling, as the latter almost by definition involves combining different styles and materials, essentially creating something new from a patchwork of elements. However, the CJEU is yet to clarify the concept of "pastiche", pending the *Pelham II* judgment,[59] which aims to determine whether this concept could serve as a "catch-all" provision for artistic use of copyright-protected subject-matter and whether this exception is subject to limiting criteria, such as the requirement of humour, stylistic imitation or tribute.[60] If interpreted broadly, the CJEU's clarification would potentially allow the pastiche exception to cover, among other practices, upcycling.[61] However, the narrow interpretation is also possible,[62] and, until the CJEU provides further clarification, relying on the pastiche defence

[55] Finnish Copyright Council, Opinion 2021:9, 16 November 2021, para. 51.

[56] CJEU, Judgment in *Deckmyn*, C-201/13, 3 September 2014, para. 20, ECLI:EU:C:2014:2132. For further discussion, *see* Jacques (2015).

[57] Merriam-Webster English Dictionary, available at https://www.merriam-webster.com/dictionary/pastiche.

[58] *Id. See also* the discussion in Senftleben (2020b), pp. 157–159.

[59] CJEU, *Pelham* (pending), C-590/23.

[60] *See* the first prejudicial question in *Pelham II* by the German Federal Court of Justice (Bundesgerichtshof, BGH): Request for a preliminary ruling, *Pelham*, C-590/23, 25 September 2023, https://curia.europa.eu/juris/showPdf.jsf?text=&docid=280562&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3145681. With regard to the pastiche debate in EU copyright law, *see* Senftleben (2020b), pp. 157–159; Hudson (2017); Jacques (2023).

[61] On the potential coverage by pastiche exception of forms of user-generated content that mix different source materials and combine selected parts of pre-existing works, *see* Senftleben (2020b), pp. 157–159.

[62] Arguing for an interchangeable nature, for the copyright law's purposes, of the concepts of "parody", "caricature", and "pastiche", *see* Jacques (2023), relying, in turn, on the CJEU, Opinion of Advocate General Cruz Villalón in *Deckmyn*, C-201/13, 22 May 2014, para. 46, ECLI:EU:C:2014:458. *See also*, positing the concepts of "parody", "caricature", and "pastiche" as distinct subsets of a broader quotation exception, Italian Supreme Court, *CO.GE.DI. International – Compagnia Generale Distribuzione s.p.a. v. Zorro Productions Inc.*, No. 38165/2022, 30 December 2022, and, building on this judgment, Rosati (2023).

remains highly unpredictable for upcycling businesses, offering insufficient legal certainty for their operations to thrive.

It thus appears that the current interpretation of both trademark and copyright laws in the EU offers limited immunity for businesses focused on repair, refurbishment, and upcycling. The level of certainty required for these businesses to thrive and establish themselves is lacking. This raises the question of whether this situation potentially violates the sustainability principle, grounded in the human right to a healthy environment.[63]

3 Looking Closer at the Right to a Healthy Environment as a Legal Entitlement

To assess the above hypothesis, a deeper examination of the legal nature of the right to a healthy environment is necessary. Specifically, it must be determined whether this right is, indeed, a recognized human right, and, if so, what are its meaning, scope, and modes of protection.

3.1 Environmental Protection as a Human Right? A General Overview of Global Evolution and the Scope of Protection

3.1.1 A Brief History of the Right to a Healthy Environment

The main international human rights instruments, such as the Universal Declaration of Human Rights,[64] the International Covenant on Civil and Political Rights,[65] and the International Covenant on Economic, Social and Cultural Rights[66] do not explicitly include a right to a healthy environment in their catalogue of rights.[67] It is noteworthy, however, that these instruments were all drafted before the full awareness of environmental issues started to emerge in the 1970s.[68] The first indirect mention of the right to environmental protection was made in the 1973 Declaration of the United Nations Conference on the Human Environment, which emphasised the importance of the environment for the enjoyment of basic human

[63] *See*, notably, Art. 3(3) of the Treaty on the European Union (TEU), in accordance with which the EU should work for the "sustainable development of Europe", aiming at, among others, "a high level of protection and improvement of the quality of the environment". Further on the relationship between sustainable development and environmental protection, *see* Pihlajarinne and Ballardini (2020), pp. 240–241; Tang and Spijkers (2022), p. 104. For a detailed discussion of how IP has been dealt with in key sustainable development fora and how sustainable development has been addressed in international IP settings, *see* Abdel-Latif and Roffe (2021).

[64] UN General Assembly, 10 December 1948, 217 A (III).

[65] UN General Assembly, 16 December 1966, 999 UNTS 171.

[66] UN General Assembly, 16 December 1966, 993 UNTS 3.

[67] Council of Europe, Manual on Human Rights and the Environment (3rd edition), February 2022, https://rm.coe.int/manual-environment-3rd-edition/1680a56197, para. 17 (accessed 19 December 2023).

[68] *Id*., paras. 10–15. *See also* Quirico (2021), p. 44.

rights.[69] Subsequently, this right proliferated into numerous national Constitutions worldwide[70] and became part of regional human rights instruments drafted after the 1970s.[71] Most recently, the aggravation and heightened awareness of the climate change crisis have significantly contributed to an increasing acknowledgment of the importance of enhanced environmental protection, including through human rights litigation.[72]

All of these tendencies culminated in the groundbreaking recognition by the UN, in its October 2021 Resolution, of a self-standing "right to a clean, healthy, and sustainable environment as a human right that is important for the enjoyment of human rights".[73] This recognition, having marked the first time that the right to a healthy environment was acknowledged as a distinct human right in international human rights law, was already labelled a "game changer"[74] and "a turning point in the evolution of human rights".[75]

Around the same time on the European soil, in September 2021, the Parliamentary Assembly of the Council of Europe (PACE) proposed to the Committee of Ministers a draft additional protocol anchoring "the right to a safe, clean, healthy and sustainable environment" to the European Convention on Human Rights (ECHR),[76] which currently does not recognize a standalone right to a healthy environment. In another groundbreaking move in April 2024, the Grand Chamber of the ECtHR ruled that Switzerland's failure to implement sufficient measures to combat climate change amounted to a violation of human rights.[77]

[69] Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev. 1 (1973), principle 1. For further discussion, *see* Cima (2022), p. 43.

[70] As observed by Cima (2022), p. 43, "Portugal was the first country to adopt, in 1976, a 'right to a healthy and ecologically balanced human environment', followed by Spain in 1978 and by more than 100 States as of today, where in one way or another the right to a healthy environment has gained constitutional recognition and protection."

[71] Notable examples include the 1981 African Charter on Human and Peoples' Rights (Art. 24); the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (Art. 11(1)); the 2004 Arab Charter on Human Rights (Art. 38); the 2012 Human Rights Declaration of the Association of Southeast Asian Nations (ASEAN) (para. 28(f)); and the 2000 EU Charter of Fundamental Rights (Art. 37).

[72] Quirico (2021), p. 74; Cima (2022), p. 38; Alston (2023), p. 172. *See also* in this sense Council of Europe, Protecting the environment using human rights law, https://www.coe.int/en/web/portal/human-rights-environment (accessed 12 April 2024) (highlighting in relation to, specifically, Europe, the "*growing trend*" of recent years to use "Europe's unparalleled system for protecting human rights to help tackle environmental problems" (emphasis added)).

[73] UN Human Rights Council, The Human Right to A Clean, Healthy, and Sustainable Environment, Resolution 48/13, adopted 8 October 2021, UN Doc A/HRC/RES/48/13, para. 1.

[74] Tang and Spijkers (2022), p. 89.

[75] Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, "The Right to a Clean, Healthy and Sustainable Environment: Non-Toxic Environment", distributed 12 January 2022, UNDoc. A/HRC/49/53, para. 1.

[76] Council of Europe Parliamentary Assembly, Recommendation No. 2211, "Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe", 29 September 2021, https://pace.coe.int/en/files/29501/html, Appendix (accessed 19 December 2023). For further discussion, *see* Kobylarz (2023).

[77] ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], No. 53600/20, 9 April 2024, ECLI:CE:ECHR:2024:0409JUD005360020.

3.1.2 Scope of Protection: "Not an Empty Vessel Waiting to be Filled"

Concerning the meaning and scope of the human right to a healthy environment, despite the recency of its recognition in the UN, "the right is not an empty vessel waiting to be filled", as stated famously by John Knox, the first UN Independent Expert on Human Rights and the Environment and, subsequently, the first UN Special Rapporteur on the Environment.[78] As observed by Knox and other experts, the right to a healthy environment, as well as, more generally, the relationship between environmental protection and human rights, have already been the subject of extensive examination by national courts, regional human rights tribunals, and various international bodies.[79]

One of the first most notable judicial clarifications of this right came from the African Commission of Human and Peoples' Rights in the 2001 *Ogoniland* case.[80] In that instance, the Commission asserted that the right to a general satisfactory environment, as recognized in the African Charter on Human and Peoples' Rights, "requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources".[81]

Following the *Ogoniland* case, the right to a healthy environment was further elaborated in various instances, including the 2007 Malé Declaration on the Human Dimension of Global Climate Change.[82] Having for the first time placed climate change in the human rights context, the Declaration stated, notably, that "climate change has clear and immediate implications for the full enjoyment of human rights including inter alia the right to life, the right to take part in cultural life, the right to use and enjoy property, the right to an adequate standard of living, the right to food, and the right to the highest attainable standard of physical and mental health".[83]

Further elaboration of the States' obligations under the right to a healthy environment came through the Framework Principles on Human Rights and the Environment developed by the UN Special Rapporteur.[84] Those Principles include, apart from the States' obligation to "ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights",[85] providing access to effective remedies for violations of human rights and domestic laws relating to

[78] Knox (2023), p. 164.

[79] Knox (2023), pp. 164–165; Cima (2022), p. 44.

[80] ACHPR, Communication 155/96: *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria* (2001) (Ogoniland).

[81] *Id.*, para. 52.

[82] Malé Declaration on the Human Dimension of Global Climate Change, adopted 14 November 2007, https://www.ciel.org/Publications/Male_Declaration_Nov07.pdf (accessed 19 December 2023). For further discussion, *see* Cameron and Limon (2012).

[83] Malé Declaration, *id.*, Preamble.

[84] Framework Principles on Human Rights and the Environment, in "Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment", UN Doc A/HRC/37/59, 24 January 2018, Annex.

[85] *Id.*, Principle 1.

the environment,[86] establishing and maintaining substantive environmental standards and ensuring their effective enforcement,[87] and many other measures.

In addition to regional human rights tribunals and international bodies, interpretations of the scope of the right to a healthy environment, as enshrined in national constitutions, by domestic courts undoubtedly add further clarity to the understanding of the contents of this human right.[88] For example, in a recent judgment from March 2021, the German Constitutional Court highlighted that the protection of life and physical integrity under Art. 2(2) of the country's Basic Law encompasses protection against environmental pollution and the negative effects of climate change.[89] The Court further referred to the specific environmental protection clause in Art. 20a of the Basic Law that sets out the state's responsibility to "protect the natural foundations of life and animals."[90] According to the Court, that provision, among others, "obliges the state to take climate action".[91] The Court clarified further that, although "Article 20a of the Basic Law does not take absolute precedence over other interests", in cases of conflict, "it must be balanced against other constitutional interests and principles."[92] Within such a balancing process, according to the Court, "the obligation to take climate action is accorded *increasing weight* as climate change intensifies."[93]

Either through its judicial interpretations in domestic courts or directly within the texts of national constitutions, the right to environmental protection is often acknowledged as both individual and collective.[94] Additionally, it is recognized as a right that can be asserted on behalf of future generations.[95] The right to a healthy

[86] *Id.*, Principle 10.

[87] *Id.*, Principles 11 and 12.

[88] Cima (2022), pp. 44–45.

[89] German Constitutional Court (BVerfG), *Neubauer et al. v. Germany*, Order of the First Senate of 24 March 2021, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, para. 1, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618.

[90] Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 19 December 2022 (Federal Law Gazette I p. 2478).

[91] German Constitutional Court (BVerfG), *Neubauer et al. v. Germany*, Order of the First Senate of 24 March 2021, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, para. 2, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618.

[92] *Id.*, para. 2(a).

[93] *Id.* (emphasis added).

[94] Cima (2022), pp. 44–45; Vašák (November 1977), p. 29. *See also* CJEU, Opinion of Advocate General Colomer in *Commission v. Council*, C-176/03, 26 May 2005, para. 67, ECLI:EU:C:2005:311 (referring to "a right to enjoy an acceptable environment" as a right "not so much on the part of the individual as such, but as a member of a group, in which the individual shares common social interests").

[95] Cima (2022), pp. 44–45; Quirico (2021), p. 65; Magraw and Siemes (2023), pp. 89–92. *See also* German Constitutional Court (BVerfG), *Neubauer et al. v. Germany*, Order of the First Senate of 24 March 2021, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, para. 1, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618 (making it clear that an obligation to protect the environment "can furthermore give rise to an objective duty to protect future generations").

environment is also often referred to as a "third-generation" human right distinguished, again, by its collective nature and emphasis on solidarity.[96]

The ongoing efforts to clarify the scope of human rights entitlements related to environmental protection are further evident in proposed texts. Most notably, the proposed additional protocol to the European Convention on Human Rights defines "the right to a safe, clean, healthy and sustainable environment" as that "of present and future generations to live in a non-degraded, viable and decent environment that is conducive to their health, development and well-being".[97]

Despite all of the aforementioned efforts to delineate the scope and meaning of the human right to a healthy environment, it is still, of course, a human right in the making.[98] Nevertheless, the right is rapidly evolving and, as noted by the German Constitutional Court in the above-discussed judgment, increasingly gaining in its legal weight.[99] These developments are primarily facilitated through two main modes of protection: 1) the so-called "greening" of traditional human rights from the first and second generations; and 2) the establishment of a self-standing right to a healthy environment, which is also the direction in which the first type of protection is progressively evolving.[100]

The following delves into a more detailed analysis of each of these two modes of human rights law protection of the environment, with a specific focus on Europe.

3.2 Focus on Europe: Two Distinct Modes of Protection in the European Context

3.2.1 Environmental Protection via "Greening" of Traditional Human Rights – the Council of Europe Approach

Ensuring that those affected by negative environmental impacts of anthropogenic nature receive human rights protection is often achieved by means of "greening" of traditional and well-established human rights.[101] The most prominent example of

[96] Vašák (November 1977), p. 29. *See also* Council of Europe Parliamentary Assembly, Recommendation No. 2211, "Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe", 29 September 2021, https://pace.coe.int/en/files/29501/html, para. 5 (accessed 19 December 2023), referring to the protection of the environment as a "new-generation human right".

[97] Council of Europe Parliamentary Assembly, Recommendation No. 2211, *id.*, Appendix, Art. 1 of the proposed Additional Protocol (accessed 19 December 2023).

[98] Tang and Spijkers (2022), pp. 87, 103.

[99] *See also* in this sense Alston (2023), p. 172.

[100] This evolution is evidenced, among other instances, by the aforementioned proposal to complement the ECHR with an additional protocol securing a standalone right to a healthy environment. If adopted, this protocol will shift the ECHR system of indirect protection of environment through the first-generation rights already recognized in the Convention to the second mode of protection. For an analysis of the ongoing efforts to incorporate the right to environmental protection in the ECHR, see Heri et al. (2023).

[101] Quirico (2021), p. 44; Tang and Spijkers (2022), p. 88; Cima (2022), pp. 45–46. *See also* ECtHR, Concurring Opinion of Judge Serghides in the case of *Pavlov and Others v. Russia*, No. 31612/09, 11 October 2022, para. 23, ECLI:CE:ECHR:2022:1011JUD003161209.

such an approach to environmental protection on the European level is the case-law of the Council of Europe's European Court of Human Rights.[102]

As noted already, the ECHR, having been adopted at the time when "the universal need for environmental protection was not yet apparent",[103] does not contain a self-standing right to a healthy environment.[104] Consequently, protection is ensured via "an evolutive interpretation by the Court"[105] of a number of existing Convention rights "so as to encompass environmental protection".[106] These rights include the right to private life, rights to life, property, and certain other Convention rights that might be affected by environmental harms.[107] Within the scope of these rights the Court has developed, as highlighted by the former President of the ECtHR, "quite a rich case-law on environmental issues".[108] Harmful industrial activities and pollution (including hazardous waste),[109] waste handling,[110] excessive

[102] An important caveat is due here. Referring to the first mode of protection as the "Council of Europe approach" and the second as the "EU approach" is highly conditional and, to a great degree, simplistic. Domestic judges employ both approaches when resolving cases related to the right to a healthy environment. It is also noteworthy that the Council of Europe approach may be evolving towards recognizing the right to a healthy environment as a standalone right, as evidenced by the proposed additional protocol incorporating such a right into the ECHR.

[103] ECtHR, Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner in the case of *Hatton and Others v. the United Kingdom* [GC], No. 36022/97, 8 July 2003, para. 1, ECLI:CE:ECHR:2003:0708JUD003602297.

[104] Press Unit of the European Court of Human Rights, Factsheet – Environment and the ECHR, April 2024, https://www.echr.coe.int/documents/d/echr/fs_environment_eng (accessed 12 April 2024).

[105] ECtHR, Concurring Opinion of Judge Serghides in the case of *Pavlov and Others v. Russia*, No. 31612/09, 11 October 2022, ECLI:CE:ECHR:2022:1011JUD003161209, para. 8.

[106] *Id*.

[107] For a comprehensive overview of the ECtHR case-law on environmental protection, *see* Registry of the European Court of Human Rights, Guide to the case-law of the European Court of Human Rights: Environment, Council of Europe/European Court of Human Rights, 2022, https://www.echr.coe.int/documents/d/echr/Guide_Environment_ENG (accessed 19 December 2023); Press Unit of the European Court of Human Rights, Factsheet – Environment and the ECHR, April 2024, https://www.echr.coe.int/documents/d/echr/fs_environment_eng (accessed 12 April 2024); Council of Europe (2022) Manual on Human Rights and the Environment (3rd edition), https://rm.coe.int/manual-environment-3rd-edition/1680a56197 (accessed 19 December 2023), and, specifically in the climate change context, Press Unit of the European Court of Human Rights, Factsheet – Climate change, April 2024, https://www.echr.coe.int/documents/d/echr/FS_Climate_change_ENG (accessed 12 April 2024).

[108] Spano (2021), p. 88. *See also* ECtHR, Dissenting Opinion of Judge Lobov in the case of *Pavlov and Others v. Russia*, No. 31612/09, 11 October 2022, para. 1, ECLI:CE:ECHR:2022:1011JUD003161209.

[109] ECtHR, *López Ostra v. Spain*, No. 16798/90, 9 December 1994, ECLI:CE:ECHR:1994:1209JUD001679890; ECtHR, *Öneryıldız v. Turkey* [GC], No. 48939/99, 30 November 2004, ECLI:CE:ECHR:2004:1130JUD004893999; ECtHR, *Fadeyeva v. Russia*, No. 55723/00, 9 June 2005, ECLI:CE:ECHR:2005:0609JUD005572300; ECtHR, *Giacomelli v. Italy*, No. 59909/00, 2 November 2006, ECLI:CE:ECHR:2006:1102JUD005990900; ECtHR, *Cordella and Others v. Italy*, nos. 54414/13 and 54264/15, 24 January 2019, ECLI:CE:ECHR:2019:0124JUD005441413.

[110] ECtHR, *Brânduşe v. Romania*, No. 6586/03, 7 April 2009, ECLI:CE:ECHR:2009:0407JUD000658603; ECtHR, *Di Sarno and Others v. Italy*, No. 30765/08, 10 January 2012, ECLI:CE:ECHR:2012:0110JUD003076508; ECtHR, *Kotov and Others v. Russia*, nos. 6142/18 and 13 others, 11 October 2022, ECLI:CE:ECHR:2022:1011JUD000614218.

noise,[111] and other environment-related issues[112] were all at different points in time brought to the ECtHR's scrutiny, and in many such cases conclusions were reached favouring environmental protection. In a recent and ground-breaking development, the Grand Chamber of the ECtHR had even ruled that the human right to private and family life (Art. 8 ECHR) includes individuals' entitlement to effective protection from the serious adverse effects of climate change by State authorities.[113] The ruling now carries significant influence across all forty-six European States that are party to the Convention. It is, however, noteworthy that, even prior to this game-changing pronouncement by the ECtHR, certain national courts in Europe had already started to address the issue of greenhouse gas emissions and climate change from a human rights perspective.[114] Specifically, the Dutch Supreme Court in its landmark 2019 *Urgenda* judgment affirmed the State's obligation to reduce the Netherlands' pollutant emissions by at least twenty-five percent from 1990 levels by 2020, grounding its rationale in the right to life and the right to private and family life under the ECHR, as well as the corresponding case-law of the Strasbourg Court.[115] A number of other national courts in Europe have subsequently arrived at analogous conclusions.[116]

Already in the 1990s, when the environmental case-law under the Convention only started to emerge, the ECtHR was recognising the protection of the

[111] ECtHR, *Powell and Rayner v. the United Kingdom*, No. 9310/81, 21 February 1990, ECLI:CE:ECHR:1990:0221JUD000931081; ECtHR, *Hatton and Others v. the United Kingdom* [GC], No. 36022/97, 8 July 2003, ECLI:CE:ECHR:2003:0708JUD003602297; ECtHR, *Kapa and Others v. Poland*, nos. 75031/13 and 3 others, 14 October 2021, ECLI:CE:ECHR:2021:1014JUD007503113.

[112] For a comprehensive overview of such cases, *see* Registry of the European Court of Human Rights, Guide to the case-law of the European Court of Human Rights: Environment, Council of Europe/European Court of Human Rights, 2022, https://www.echr.coe.int/documents/d/echr/Guide_Environment_ENG (accessed 19 December 2023); Press Unit of the European Court of Human Rights, Factsheet – Environment and the ECHR, April 2024, https://www.echr.coe.int/documents/d/echr/fs_environment_eng (accessed 12 April 2024).

[113] ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], No. 53600/20, 9 April 2024, ECLI:CE:ECHR:2024:0409JUD005360020. For a more in-depth discussion of the ECtHR climate change case-law, *see* Press Unit of the European Court of Human Rights, Factsheet – Climate change, April 2024, https://www.echr.coe.int/documents/d/echr/FS_Climate_change_ENG (accessed 12 April 2024).

[114] Pustorino (2023), p. 231.

[115] Dutch Supreme Court, *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, 20 December 2019. For a discussion, *see* Pustorino (2023), p. 231.

[116] Administrative Tribunal of Paris, nos. 1904967, 1904968, 1904972 and 1904976/4-1, 3 February 2021; Brussels Court of First Instance, *Klimaatzaak ASBL v. Belgium*, No. 2015/4585/A, 21 June 2021; the Hague District Court, *Vereniging Milieudefensie et al. v. Royal Dutch Shell Plc*, 26 May 2021; the Higher Administrative Court Berlin-Brandenburg, *DUH and BUND v. Germany*, 30 November 2023. For further discussion of some of these cases, *see* Pustorino (2023), pp. 231–232. Similar cases are on the rise in Europe. Thus, for example, in May 2023, several Italian citizens and NGOs filed a lawsuit with the Court of Rome against the fossil fuel company ENI for its contribution to global warming. The applicants allege a violation of fundamental rights to health, safety, and property. *See* Sabin Center for Climate Change Law, U.S. Litigation Chart made in collaboration with Arnold & Porter Kaye Scholer LLP, *Greenpeace Italy et. Al. v. ENI S.p.A., the Italian Ministry of Economy and Finance and Cassa Depositi e Prestiti S.p.A.*, filing date 2023, https://climatecasechart.com/non-us-case/greenpeace-italy-et-al-v-eni-spa-the-italian-ministry-of-economy-and-finance-and-cassa-depositi-e-prestiti-spa/ (accessed 19 December 2023).

environment as "an increasingly important consideration".[117] More recently, in his concurring opinion in the case of *Pavlov and Others v. Russia*, Judge Serghides even stressed that, although the right to environmental protection is not yet a *jus cogens* norm, "it will not be too long before it is developed and becomes such a norm, considering the negative, sometimes cataclysmically negative, direct and indirect implications of climate change – and, of course, the other serious environmental hazards which plague the world – on the effective enjoyment of all human rights."[118]

Of particular importance for the discussion in this paper, which focuses on balancing environmental protection with the economic rights of IP holders, is the ECtHR position that environmental protection can well justify interference with the right to respect for property.[119] The Court very strongly emphasises the legitimacy of environmental protection considerations in the context of conflicting property rights,[120] stating that "[f]inancial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations."[121]

Protection of environment through the greening of traditional human rights can offer an advantage of leveraging the wealth of established case-law related to the application and interpretation of such rights. This mode of protection does not, however, come without limitations. The major one is that the first- and second-generation human rights are not always well-suited for addressing collective (by contrast to personal) needs implied in environmental protection, as well as the protection of the environment per se.[122] There are also related difficulties of establishing a causal link between environmental damage and the individual harm to life, private and family life, or other traditional human rights.[123] This difficulty is

[117] ECtHR, *Fredin v. Sweden (No. 1)*, No. 12033/86, 18 February 1991, para. 48, ECLI:CE:ECHR:1991:0218JUD001203386. *See also* Spano (2021), p. 88, and ECtHR, Dissenting Opinion of Judge Lobov in the case of *Pavlov and Others v. Russia*, No. 31612/09, 11 October 2022, para. 1, ECLI:CE:ECHR:2022:1011JUD003161209.

[118] ECtHR, Concurring Opinion of Judge Serghides in the case of *Pavlov and Others v. Russia*, No. 31612/09, 11 October 2022, ECLI:CE:ECHR:2022:1011JUD003161209, para. 17.

[119] Registry of the European Court of Human Rights, Guide to the case-law of the European Court of Human Rights: Environment, Council of Europe/European Court of Human Rights, 2022, para. 163, with further case-law references, https://www.echr.coe.int/documents/d/echr/Guide_Environment_ENG (accessed 19 December 2023).

[120] *Id.*, para. 165.

[121] ECtHR, *Hamer v. Belgium*, No. 21861/03, 27 November 2007, para. 79, ECLI:CE:ECHR:2007:1127JUD002186103. For other case-law examples, reaffirming this position, *see* Registry of the European Court of Human Rights, Guide to the case-law of the European Court of Human Rights: Environment, Council of Europe/European Court of Human Rights, 2022, para. 165, https://www.echr.coe.int/documents/d/echr/Guide_Environment_ENG (accessed 19 December 2023).

[122] Quirico (2021), p. 72; Kobylarz (2023), p. 185; Alston (2023), p. 168; Spano (2021), p. 88. *See also* Council of Europe Parliamentary Assembly, Recommendation No. 2211, "Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe", 29 September 2021, https://pace.coe.int/en/files/29501/html, para. 6 (accessed 19 December 2023); and ECtHR, Concurring Opinion of Judge Serghides in the case of *Pavlov and Others v. Russia*, No. 31612/09, 11 October 2022, para. 22, ECLI:CE:ECHR:2022:1011JUD003161209.

[123] Quirico (2021), p. 70; Kobylarz (2023), pp. 166, 186; Spano (2021), pp. 90–91.

particularly acute in the case of climate change that is "characterized by a long and complex chain of steps between the initial human activities that produce greenhouse gas emissions and the final physical impacts that may result from those emissions".[124] In addition, greening traditional human rights is effective for localized pollution but is less applicable when dealing with de-localized sources like greenhouse gas emissions that transcend national borders.[125] Finally, traditional human rights provide redress for the harm that had already occurred, and do not offer protection (at least not directly) against future harms.[126]

In view of these shortcomings, the second mode of protecting the environment that is rapidly gaining strength – protection via a self-standing right to a healthy environment – is worth a closer examination.

3.2.2 Environmental Protection via a Self-Standing Human Right to a Healthy Environment – the EU Approach

The most notable European human rights instrument providing for a self-standing protection to the environment is the EU Charter of Fundamental Rights that was adopted in 2000[127] and became binding in 2009.[128] Article 37 of the Charter is explicitly titled "Environmental protection". It provides as follows: "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."[129]

While presenting the potential to overcome the aforementioned limitations associated with the greening of traditional human rights by autonomously safeguarding the environment,[130] the legal nature of Art. 37 of the Charter is debatable.[131] As immediately transpires from the wording of this provision, it is formulated rather as a legal principle, and not as a right in the traditional sense. It does not start with typical "rights" language, such as "Everyone has the right to". Moreover, it addresses the EU institutions ("the policies of the Union").[132] The Explanations to the EU Charter, notably to its Art. 52(5) that clarifies the distinction

[124] Cima (2022), pp. 40–41. *See also* Spano (2021), p. 91.

[125] Quirico (2021), p. 71; Cima (2022), p. 41.

[126] Cima (2022), pp. 41, 46.

[127] Charter of Fundamental Rights of the European Union (26 October 2012, 2012/C 326/02).

[128] The Charter acquired the same legal value as the EU Treaties with the entry into force of the Treaty of Lisbon in 2009 (*see* Art. 6(1) of the TEU).

[129] According to the Explanations to the Charter, Art. 37 thereof is based on Art. 3(3) of the Treaty on European Union and Arts. 11 and 191 of the Treaty on the Functioning of the European Union. It also draws on the provisions of some national constitutions. *See* Explanations Relating to the Charter of Fundamental Rights, OJ C 303, 14 December 2007, p. 17, Explanation on Art. 37 – Environmental protection.

[130] Kobylarz (2023), p. 175; Quirico (2021), p. 77; Cima (2022), p. 42.

[131] Quirico (2021), p. 56.

[132] *Id.*, p. 57.

between Charter "rights" and "principles", explicitly list Art. 37 as an example of the latter.[133]

Then what this "principle" nature of Art. 37 means in practice is unclear. An immediate explanation would be that a legal "principle", by contrast to a "right", is not directly applicable.[134] As the Explanations to Art. 52(5) of the EU Charter proceed to state, while "[p]rinciples may be implemented through legislative or executive acts", "[t]hey do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities."[135]

Arguably, however, the right to intellectual property protection in Art. 17(2) of the EU Charter is likewise formulated rather in the "principle" and not the "rights" language: "Intellectual property shall be protected".[136] Nevertheless, this did not prevent the CJEU from developing a body of case-law in which Art. 17(2) was directly applied to justify a rather strong human rights protection for economic intellectual property rights holders.[137] The view is also expressed that "bright lines" between the Charter rights and principles are "difficult to draw",[138] and that "the jurisprudential picture points towards the essential similarity between rights and principles rather than difference".[139] Much in confirmation of this statement, Advocate General Villalón argued, for example, that "the general category chosen for the title of the Charter itself, 'fundamental rights', must relate to all its contents", meaning that "none of the content of the Charter, in terms of its substantive provisions, should be excluded from the category of 'fundamental rights'."[140] In *European Air Transport*, Advocate General Villalón even stated that "Article 37 expressly recognises the *right* to environmental protection",[141] despite the fact that "[this] right is expressed as a principle".[142] Advocate General Colomer,

[133] Explanations Relating to the Charter of Fundamental Rights, OJ C 303, 14 December 2007, p. 17, Explanation on Art. 52 – Scope and interpretation.

[134] *See, e.g.,* Lock (2019), p. 1226.

[135] Explanations Relating to the Charter of Fundamental Rights, OJ C 303, 14 December 2007, p. 17, Explanation on Art. 52 – Scope and interpretation. *See also* Tang and Spijkers (2022), p. 96 (observing, with further references, that "[l]egal principles are regarded as more flexible, and thus less reliable in ensuring predictable and transparent adjudication").

[136] Further on the intellectual property clause of the EU Charter, *see* Geiger (2009); Griffiths and McDonagh (2013); Husovec (2019).

[137] *See, e.g.,* in the copyright context: CJEU, Judgments in *Luksan*, C-277/10, 9 February 2012, ECLI:EU:C:2012:65; *UPC Telekabel*, C-314/12, 27 March 2014, ECLI:EU:C:2014:192; *YouTube and Cyando*, C-682/18 and C-683/18, 22 June 2021, ECLI:EU:C:2021:503; *Poland v. Parliament and Council*, C-401/19, 26 April 2022, ECLI:EU:C:2022:297; and, in the trademark context: CJEU, Judgments in *L'Oréal SA and Others v. eBay*, C-324/09, 12 July 2011, ECLI:EU:C:2011:474; *Coty Germany*, C-580/13, 16 July 2015, ECLI:EU:C:2015:485. Arguing against the understanding of Art. 17(2) of the EU Charter as "a human right to ever-stronger protection", *see* Husovec (2023).

[138] Hilson (2008), p. 215.

[139] *Id. See also* Quirico (2021), p. 63, with further references.

[140] CJEU, Opinion of Advocate General Villalón in *Association de Mediation Sociale v. Union Locale des Syndicats CGT*, C-176/12, 18 July 2013, para. 44, ECLI:EU:C:2013:491. *See also* Quirico (2021), p. 62.

[141] CJEU, Opinion of Advocate General Villalón in *European Air Transport*, C-120/10, 17 February 2011, para. 78 (emphasis added), ECLI:EU:C:2011:94.

[142] *Id.*

likewise, referred to "a *right* to enjoy an acceptable environment"[143] that is supplemented by "the correlative duties on public authorities".[144] He further emphasized, with reference to the environmental case-law of the ECtHR, that, "irrespective of how the notion of the right to enjoy an appropriate natural environment is couched, it is easy to discern its link with the content of certain fundamental rights."[145] Advocate General Jääskinen also made reference to "the fundamental *right* to environmental protection laid down in Art. 37 of the Charter of Fundamental Rights".[146]

In relation to balancing environmental protection with other interests, the CJEU has consistently affirmed that safeguarding the environment qualifies as a public interest goal, justifying limitations on fundamental freedoms, including the freedom of trade.[147] Back in the 1980s, the Court was already stating that environmental protection is "one of the Community's essential objectives",[148] which may as such warrant certain constraints on the free movement of goods.[149] More recently, in the 2004 Opinion on the *Commission v. Italy* case, Advocate General Colomer observed that environmental protection occupies "a prominent position among Community policies", that the Member States have "a crucial responsibility in that area", and that, accordingly, "*Community citizens are entitled to demand fulfilment of that responsibility* under Art. 37 of the Charter of Fundamental Rights of the European Union".[150] Therefore, pursuant to Advocate General Colomer, "the main elements of any measure which strays from the general criteria aimed at protecting the environment must be duly specified".[151] In addition, in the 2013 Opinion on the *Essent Belgium* case, Advocate General Bot contended that, although it was not required that priority should always be given to environmental protection, "the environmental objective may be routinely balanced against the European Union's other fundamental objectives."[152]

[143] CJEU, Opinion of Advocate General Colomer in *Commission v. Council*, C-176/03, 26 May 2005, para. 67 (emphasis added), ECLI:EU:C:2005:311.

[144] *Id.*, para. 68.

[145] *Id.*, para. 70.

[146] CJEU, Opinion of Advocate General Jääskinen in *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, 23 October 2014, para. 6 (emphasis added), ECLI:EU:C:2014:2324.

[147] *See*, making this observation, CJEU, Opinion of Advocate General Bot in *Essent Belgium*, C-204/12 to C-208/12, 8 May 2013, para. 86, ECLI:EU:C:2013:294.

[148] CJEU, Judgment in *Procureur de la République v. ADBHU*, C-240/83, 7 February 1985, para. 13, ECLI:EU:C:1985:59.

[149] *Id.*, paras. 14–15. *See also* CJEU, Judgment in *Commission v. Denmark*, C-302/86, 20 September 1988, para. 9, ECLI:EU:C:1988:421 (stating that "the protection of the environment is a mandatory requirement which may limit the application of Art. 30 of the Treaty [on free movement of goods]"), as well as CJEU, Judgments in *Commission v. Belgium*, C-2/90, 9 July 1992, para. 34, EU:C:1992:4431; and *PreussenElektra*, C-379/98, 13 March 2001, para. 73, ECLI:EU:C:2001:160.

[150] CJEU, Opinion of Advocate General Colomer in *Commission v. Italy*, C-87/02, 8 January 2004, para. 36 (emphasis added), ECLI:EU:C:2004:13.

[151] *Id.*

[152] CJEU, Opinion of Advocate General Bot in *Essent Belgium*, C-204/12 to C-208/12, 8 May 2013, para. 97, ECLI:EU:C:2013:294.

Despite the firm stance taken by several Advocates General of the CJEU regarding the generally prominent status of Art. 37, and notwithstanding the CJEU being "an active environmental court",[153] "the Charter has only played a limited role in environmental cases before the CJEU to date".[154] Krommendijk and Sanderink argue that this can be attributed, first, to the fact that reliance on the Charter is often unnecessary from a substantive point of view, because citizens can rely on elaborated EU secondary law on environmental protection instead.[155] One example (which is also of particular significance for the discussion in this paper) is the Waste Directive,[156] which imposes substantial obligations on Member States to ensure that producers of products "contribute to waste prevention and to the reusability and recyclability of products."[157] The second reason for the scarce CJEU reliance on Art. 37 of the Charter is the limited engagement with this provision by the national courts and litigants who are more accustomed to rely on the ECHR instead.[158]

Nevertheless, it might be expected that, given the recent recognition of the right to a healthy environment at the UN level, the ongoing reinforcement of environmental protection on national, regional, and international levels, as well as the pending proposals to transit the Council of Europe system of indirect environmental protection to the self-standing right to a healthy environment akin to Art. 37 of the EU Charter, the latter is likely to soon play a more prominent role in the European legal landscape, including in the case-law of the CJEU. In addition, it should not be overlooked that the same individual rights which the Strasbourg Court employs to "green" the ECHR are also present in the EU Charter. Consequently, the CJEU can similarly emulate the ECtHR's approach in "greening" the Charter, drawing upon not only Art. 37 but also the "traditional' fundamental rights used for this purpose within the ECHR context.

4 Reconciling Intellectual Property Protection with the Human Right to a Healthy Environment

The heightened emphasis on human rights protection for the environment, coupled with the recognition of an independent right to a healthy environment, provides the basis for reassessing the existing balance in intellectual property regulation. As demonstrated in Section 2, the current regulatory framework often leans heavily towards robust protection for IP holders, even when conflicting environmental

[153] Krommendijk and Sanderink (2023), p. 617.

[154] *Id.*, p. 618.

[155] *Id.*, p. 621.

[156] Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste [2018] OJ L 150/109 (Waste Directive).

[157] Recital 14 to the Waste Directive. *See also* recital 20 ("Member States should take appropriate measures to encourage the development, production, marketing and use of products and components of products that are suitable for multiple use, that contain recycled materials, that are technically durable and easily reparable").

[158] Krommendijk and Sanderink (2023), pp. 618, 622.

values are in question. Particularly in scenarios where IP protection hinders sustainable practices such as repair, refurbishment, and upcycling, a reconfiguration of IP regulation becomes imperative to allow more flexibility for these environmentally friendly practices.[159]

Such a reconfiguration can be accomplished through two primary avenues: (1) by incorporating considerations of the right to a healthy environment into the *internal* design of IP laws, including their judicial interpretation; and (2) by *externally* applying human rights that afford protection to the environment to the field of IP law.

4.1 Integrating the Right to a Healthy Environment into the Internal Design of Trademark and Copyright Laws

The first way of bringing IP regulation in compliance with the requirements of the human right to a healthy environment is by interpreting internal rules of EU trademark and copyright law "in the light of" this fundamental right. The CJEU is well accustomed to this way of balancing IP protection with fundamental rights, as, in the past, the Court had already reconciled on numerous occasions, in particular, freedom of expression, with copyright protection by interpreting copyright law's own internal balancing mechanisms so as to accommodate the freedom of expression interests, including freedom of the press and freedom of artistic creativity.[160] To give just a few examples, in *Pelham*, for instance, the CJEU relied on freedom of expression and freedom of the arts to hold that a music sample taken from a phonogram and used in a new work in a modified form unrecognisable to the ear does not fall within an exclusive right of reproduction.[161] In *Funke Medien* and *Spiegel Online*, the Court held that the quotation and news reporting exceptions had to be interpreted liberally in order not to block, on copyright grounds, the information of general public interest (including information on politically sensitive matters) from reaching the public.[162]

The same approach could be employed when addressing the interface between IP and the right to a healthy environment. More specifically, the CJEU could, by analogy to the above-discussed freedom of expression cases, rely on Art. 37 of the

[159] Arguing in favour of embedding sustainability, environmental, and/or related human rights considerations more explicitly into IP regulation, *see* Pihlajarinne (2021), pp. 97–100; Härkönen (2021); Grosse Ruse-Khan (2022), p. 684; Senftleben (2023a), pp. 6–7; Senftleben (2023b); Calboli (2024).

[160] *See* CJEU, Judgments in *Painer*, C-145/10, 1 December 2011, para. 135, EU:C:2011:798; *Scarlet Extended*, C-70/10, 24 November 2011, para. 54, EU:C:2011:771; *SABAM v. Netlog*, C-360/10, 16 February 2012, para. 52, EU:C:2012:85; *UPC Telekabel*, C-314/12, 27 March 2014, para. 47, EU:C:2014:192; *Deckmyn*, C-201/13, 3 September 2014, para. 27, EU:C:2014:2132; *GS Media*, C-160/15, 8 September 2016, para. 45, EU:C:2016:644; *Mc Fadden*, C-484/14, 15 September 2016, para. 90, EU:C:2016:689; *Renckhoff*, C-161/17, 7 August 2018, para. 41, EU:C:2018:634; *Funke Medien*, C-469/17, 29 July 2019, para. 76, EU:C:2019:623; *Spiegel Online*, C-516/17, 29 July 2019, para. 59, EU:C:2019:625; *Pelham*, C-476/17, 29 July 2019, paras. 39 and 74, EU:C:2019:624.

[161] CJEU, Judgment in *Pelham*, C-476/17, 29 July 2019, paras. 34–37, EU:C:2019:624.

[162] CJEU, Judgments in *Funke Medien*, C-469/17, 29 July 2019, para. 76, EU:C:2019:623; and *Spiegel Online*, C-516/17, 29 July 2019, para. 59, EU:C:2019:625.

EU Charter in order to give a liberal interpretation to the requirement of, first and foremost, trademark and copyright exhaustion.

4.1.1 Environmentally Friendly Interpretation of IP Exhaustion

In the context of trademark exhaustion, integration of the environmental protection considerations into the scope of trademark protection implies that the exhaustion argument should not be easily dismissed by merely pointing out that the condition of goods had changed or was impaired after repair, refurbishment, or upcycling.[163] Importantly in this regard, EU trademark legislation does not mandate an *automatic* non-coverage by exhaustion of cases involving modifications to original goods. To establish such exhaustion non-coverage, it must be demonstrated additionally that the trademark proprietor has "legitimate reasons" to oppose further commercialization of goods after the first sale.[164] In essence, the alteration of condition or impairment of the goods is just one possible circumstance, not the necessary precondition, for these "legitimate reasons" to arise. As Senftleben contends in relation to, specifically, upcycling cases, integrating environmental considerations into the balancing act would lead to a rationale wherein "arguments based on the change/transformation of goods must be deemed illegitimate from the outset unless the trademark proprietor manages to substantiate an unusual necessity to oppose the commercialization of upcycled products containing her brand insignia."[165]

As the law stands now, however, there is, at most, a lack of clarity as to whether the courts would be inclined to consider environmental considerations as a valid counter-argument to legitimate reasons to oppose further commercialization.[166] If the right to a healthy environment is to be taken seriously, however, and the analysis in Section 3 demonstrated that it should, this needs to change. The repair, refurbishing, and upcycling businesses need to receive a clear message on their legitimacy in the face of trademark protection.[167] Ruling to the contrary should be exceptional and reduced to the rare cases of blatant violation of the property rights of trademark holders. In addition, it should be up to the latter to demonstrate unequivocally that the "legitimate reasons" advanced by them to oppose the repair, refurbishment, or upcycling of trademarked goods are so strong as to outweigh the benefits that these sustainable practices bring to the environment. Senftleben provides as an example the (evidenced) trademark use that deliberately aims at

[163] Senftleben (2023a), p. 6.

[164] Article 15(2) of EU Trademark Directive and Art. 15(2) of EU Trademark Regulation (stating that the trademark exhaustion does not apply "where there exist legitimate reasons for the proprietor to oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market.")

[165] Senftleben (2023a), p. 6. *See also* Senftleben (2023b); Calboli (2024), p. 245.

[166] Senftleben (2023a), pp. 6–7. Likewise arguing in favour of trademark exhaustion "tak[ing] sustainability arguments into account", *see* Geiregat (2024).

[167] *See, mutatis mutandis*, Pihlajarinne and Ballardini (2020), p. 249.

misleading consumers, damaging the mark, or denigrating the business of the trademark proprietor.[168]

Insofar as copyright exhaustion is concerned, one of the internal ways of reconciling copyright protection with the right to a healthy environment would be ruling that upcycling does not go beyond the right of distribution, making therefore the exhaustion doctrine applicable. This approach implies that upcycling would have to be regarded as a practice that does not amount to a relevant act of reproduction and, thus, does not fall within the scope of the corresponding exclusive right, as could be otherwise inferred from the CJEU judgment in *Allposters*.[169] As Mezei and Härkönen aptly note, "[t]ransformative redistributions clearly fit into the scope of the reinterpreted (or rather properly interpreted) exhaustion doctrine."[170] Upcycling, by definition, implies reuse of the very same objects that had already been placed on the market. In case those objects incorporate copyright-protected works, those are also the works that had already been commercialised by copyright holders. Consequently, the reuse of objects that incorporate such works should fall within the scope of the distribution right.[171] Such an approach is of particular importance in relation to mass-produced works of applied art.[172] By contrast, interpreting the copyright 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 a circular economy and environmental protection.[173]

Importantly, this environmentally friendly interpretation of copyright exhaustion had already been expressed in the aforementioned Finnish tableware case through a robust dissenting opinion. The latter highlighted, in particular, that, in creating the jewellery pieces out of the broken tableware, "no copy has been produced".[174] Materially, the subject matter of claimed copyright protection was the object that had been already put on the market with the consent of the copyright holder.[175] Consequently, in this case, according to the dissenting member of the Finnish Copyright Council, the distribution right in the tableware receiving copyright protection had been exhausted.[176] The dissenting opinion highlighted separately that the case was also about balancing the fundamental rights to intellectual property and environmental protection as enshrined, respectively, in Arts. 17(2) and 37 of the EU

[168] Senftleben (2023a), p. 6. Arguing, analogously, that "we should interpret [the] principle [of exhaustion] expansively and consider IP rights exhausted when this can promote sustainability and circularity unless consumers are truly deceived or harmed", *see* Calboli (2024), p. 245.

[169] Arguing, in the same vein, in favour of reconceptualising copyright exhaustion in order to support sustainability, *see* Mezei and Härkönen (2023).

[170] Mezei and Härkönen (2023), p. 366.

[171] *Id.*

[172] *Id.*

[173] *Id.*, p. 365.

[174] Finnish Copyright Council, Dissenting Opinion in Opinion 2021:9, 16 November 2021.

[175] *Id.*

[176] *Id.*

Charter. According to the dissenting opinion, in the case at hand, that balancing act required permitting a new use, specifically as jewellery, for the shards of dishes.[177]

Importantly, an environmentally friendly interpretation of copyright's exclusive rights and copyright law's exhaustion doctrine need not necessarily contradict the CJEU ruling in *Allposters*. While, in *Allposters*, copyright-protected works were transferred from one medium (paper poster) to another (a painter's canvas), in the case of upcycling, the transformed objects physically remain the same as the original ones placed on the market with the copyright-holder's consent.[178]

4.1.2 Alternative Applicability of Exceptions

In the (undesirable) scenario that trademark and copyright exhaustion is held inapplicable to the sustainable practices under consideration in this paper, recourse can be made, as a last resort of internal balancing,[179] to relevant trademark and copyright exceptions.

Trademark law can, in principle, address environmental protection concerns through exceptions like descriptive/non-distinctive and referential use. However, as discussed in Section 2, the main challenge arises here from the strict interpretation of these exceptions, as well as from the "circular" interpretation of the "honest practices" test to which all of these exceptions are subjected.[180] In accordance with this interpretation, the CJEU applies the same criteria for determining compliance with honest practices as those for *prima facie* trademark infringement.[181]

To address this issue, the Luxemburg Court should refrain, first, from extending the *Audi* approach, in accordance with which "[t]he affixing of a sign identical with, or similar to, the trade mark on the goods marketed by the third party exceeds […] the referential use",[182] to other cases. This approach should be limited to a particular form of spare part production, specifically spare parts bearing a sign

[177] *Id.*

[178] Mezei and Härkönen (2023), p. 363.

[179] Yet another approach to internally reconcile trademark rights with the human right to a healthy environment could involve a more stringent interpretation of the trademark law's *prima facie* infringement criterion, which relates to the use "in relation to goods or services". This interpretation would assert that mere decorative uses of others' trademarks, in contrast to uses that identify the commercial source of the alleged infringer's goods, should not fall within the scope of protection afforded by trademark law. Exploring in detail this method of reconciling trademark protection with the right to a healthy environment, including its successful application in previous German cases, *see* Senftleben (2023b). A more radical way of reconciling IP laws with environmental human rights obligations might lie in amending IP legislation and introducing, as a result, specific defences aimed at addressing sustainable reuses of IP-protected products. Arguing in favour of such a solution, as one of the possible alternatives, *see, e.g.*, Calboli (2024), p. 246, and Lepesant (2023).

[180] Senftleben (2023a), p. 15; Senftleben (2023b).

[181] *Id.*, with further references to CJEU, Judgments in *Portakabin*, C-558/08, 8 July 2010, para. 69, ECLI:EU:C:2010:416; and *Gillette Company and Gillette Group Finland*, C-228/03, 17 March 2005, para. 49, ECLI:EU:C:2005:177.

[182] CJEU, Judgment in *Audi (Support d'emblème sur une calandre)*, C-334/22, 25 January 2024, para. 57, ECLI:EU:C:2024:76.

confusingly similar to a registered trademark, and the CJEU should avoid adopting a similar approach in cases involving environmental considerations.

Second, a more flexible and "context-sensitive" assessment within the "honest practices" test for exceptions might be required.[183] More concretely, the desired flexibility can be achieved by taking into account the secondary user's behaviour, most importantly – "the effort made to avoid the impression of a commercial connection with the trademark proprietor".[184] This can be done, in turn, by provision of clear information on the changed nature of the repaired, refurbished, or upcycled products by means of, e.g., additional labelling or other disclaimers.[185] The practices in the relevant sector – in particular, whether consumers are accustomed to the repair/refurbishment/upcycling practices at stake – should also be taken into account.[186]

Inspiration in this regard can be drawn from CJEU cases concerning the refilling of empty containers, where it was established that the use of a trademark is permissible without the trademark owner's prior consent (even if the original trademark remains visible on the refilled product), provided that the supplementary labelling guarantees transparency regarding the commercial origin of the replenished product, taking into account sector practices and consumer awareness.[187] With regards to the latter, in particular, it can be argued that repair, refurbishment, and upcycling are rapidly gaining in popularity and become widespread, resulting in consumers being gradually accustomed to such practices.[188]

In relation to the referential use exception in particular, a more flexible reading of this exception is further supported by its broader scope introduced in the 2015 Trademark Directive. Unlike the previous wording, which required referential trademark use solely to indicate the intended purpose of a product or service, the current directive lists such use as one of the specific applications of the broader referential use exception.[189]

Concerning the ability of copyright law exceptions in the EU to accommodate the environmentally friendly practices at stake, the issue might appear more

[183] Senftleben et al. (2015), pp. 340–343; Kur (2021), pp. 234–236; Senftleben (2023a), pp. 16–17.

[184] Senftleben (2023a), p. 18; Senftleben (2023b).

[185] Kur (2021), pp. 234–236; Senftleben (2023a), pp. 17–20; Senftleben (2023b); Calboli (2024), p. 245. By contrast, removing an original trademark might not be possible or desirable in the majority of cases of repair, refurbishment, or upcycling, or it can even backfire as it might be regarded as of itself a trademark infringement by the CJEU and, following it, national courts. *See* CJEU, Judgments in *Portakabin*, C-558/08, 8 July 2010, ECLI:EU:C:2010:416; and *Mitsubishi*, C-129/17, 25 July 2018, ECLI:EU:C:2018:594; as well as Norwegian Supreme Court, *Apple v. Huseby*, 2 June 2020, HR-2020-1142-A, sak nr. 19-141420SIV-HRET, reported in Furuta and Heath (2023), p. 1054, note 13. For further discussion, *see* Kur (2021), p. 233.

[186] Kur (2021), p. 236; Senftleben (2023a), p. 17.

[187] CJEU, Judgments in *Viking Gas*, C-46/10, 14 July 2011, paras. 39–42, ECLI:EU:C:2011:485; and *Soda-Club*, C-197/21, 27 October 2022, paras. 53–54, ECLI:EU:C:2022:834. For a more detailed discussion, *see* Senftleben (2023a), pp. 17–19; Senftleben (2023b).

[188] Senftleben (2023a), p. 18; Senftleben (2023b).

[189] Article 14(1)(c) of the EU Trademark Directive. *See also* Art. 14(1)(c) of the EU Trademark Regulation. This broader interpretation of the referential use exception was recently affirmed by the CJEU: *see* CJEU, Judgment in *Inditex*, C-361/22, 11 January 2024, ECLI:EU:C:2024:17.

problematic. As outlined in Section 2, although the quotation exception stands as a potential avenue for accommodating such practices, its application is unlikely due to the CJEU's requirement of a dialogic nature of a quoting work.[190] Another candidate, the pastiche exception, seems even more suitable for upcycling. Arguably, upcycling is a legitimate practice of pastiche – in the sense of a medley and mix of pre-existing copyrighted works. However, pastiche remains one of the most ambiguous copyright exceptions, pending further clarification of its scope by the CJEU. In its forthcoming *Pelham II* judgment,[191] the CJEU might adopt a broad approach to interpreting the pastiche exception as distinct from parody. Should this occur, pastiche could serve as a robust defence for upcycling, especially when viewed in the context of Art. 37 of the EU Charter. Importantly in this regard, some courts in Europe have already adopted this broader reading of the pastiche exception potentially allowing for its application to a larger range of transformative uses of copyright-protected works.[192] However, if, differing from such approaches, the CJEU were to adopt a narrow interpretation of the pastiche exception by considering it merely as a variation of the parody exception requiring a humorous element, or as a variation of the quotation exception necessitating a "dialogue" with the previous protected work, its application to upcycling could be constrained.

No other provision from the closed EU copyright list of exceptions would then appear to qualify as a valid defence to copyright infringement in upcycling cases. Whereas, in the US, the open-ended fair use defence has all the potential of accommodating environmentally friendly upcycling as a type of transformative use,[193] no analogous flexible provision exists in the EU. Arguably, the introduction of such a provision could, to some extent, alleviate the obstacles created by copyright law for upcycling.[194] However, this outcome is unlikely given the CJEU's explicit rejection, in *Pelham*, of an idea of any open-ended "fair use" type of provision under the EU law.[195]

In such a situation, there might be no other defence to upcycling rather than an external recourse to human rights law. Whereas in *Pelham* and its fellow judgments *Funke Medien* and *Spiegel Online* (delivered on the same day) the CJEU rejected the possibility of applying any external, human-rights-grounded defence to the

[190] CJEU, Judgment in *Pelham*, C-476/17, 29 July 2019, para. 71, EU:C:2019:624.

[191] CJEU, *Pelham* (pending), C-590/23.

[192] *See*, notably, in the UK, *Shazam Productions Ltd v. Only Fools The Dining Experience Ltd* [2022] EWHC 1379 (IPEC) (8 June 2022), paras. 185–89 (highlighting that pastiche is distinct from the parody exception, that it can be either an imitation of the style of another work or an assemblage (medley) of a number of pre-existing works, and that, understood as such, the pastiche exception may potentially apply to a broad spectrum of derivative transformative works). *See also*, in Germany, District Court of Berlin (Landgericht Berlin), "*The Unknowable"*, No. 15 O 551/19, 2 November 2021, para. 40 (stating that the pastiche is a communicative act of stylistic imitation, whereby the adoption of other people's works or parts of works is also permitted; the court still indicated, however, that the pastiche presupposes an evaluative reference to an original).

[193] Calboli (2024), p. 246.

[194] Advocating in favour of an open-ended and flexible European "fair use" clause, *see* Hugenholtz and Senftleben (2011); Geiger and Izyumenko (2019).

[195] CJEU, Judgment in *Pelham*, C-476/17, 29 July 2019, paras. 63–65, EU:C:2019:624. Criticizing this outcome, *see*, among others, Geiger and Izyumenko (2020); Senftleben (2020a).

existing catalogue of copyright exceptions,[196] arguably, this might not be an obstacle to raising an external claim alleging a violation of the human right to a healthy environment in copyright proceedings. The rationale behind this lies in the primacy of human rights law over any economic considerations. As far back as the 2000s, the UN was unequivocal on "the precedence of human rights obligations over economic policies and agreements".[197] It is difficult to imagine, for instance, the ECtHR rejecting an otherwise valid claim alleging a violation of one of the Convention rights stemming from restrictions on environmentally friendly businesses simply because such restrictions are IP law-related. While the protection of the rights of others, within which IP protection usually falls when balanced with other human rights, certainly constitutes one of the legitimate grounds for restricting several qualified Convention rights, such as the right to freedom of expression (Art. 10 ECHR) or the right to a private life (Art. 8 ECHR), this is only one of the factors to be considered in the human rights-based proportionality assessment, and certainly not an outright block on the applicability of the relevant human right to IP as such. Indeed, the ECtHR has already conducted an external human rights-based review of copyright law provisions in the past[198] – an approach that is also familiar to several national courts in Europe.[199] In addition, it should not be overlooked that the EU is under a legal obligation to accede to the ECHR,[200] which will subject several EU institutions to direct scrutiny by the Strasbourg Court and is expected to increase the relevance of ECtHR rules of interpretation on the EU fundamental rights order. In any event, ECHR rights are already recognised as general principles of EU law,[201] all EU member states are also parties to the ECHR, and EU fundamental rights have the same meaning and scope as the corresponding ECHR rights.[202] Considering all these factors, rejecting the ECHR approach toward the possibility of (always) applying human rights external assessment to the laws of EU member states, whether copyright or any other laws, appears untenable.

[196] CJEU, Judgments in *Pelham*, C-476/17, 29 July 2019, para. 65, EU:C:2019:624; *Funke Medien*, C-469/17, 29 July 2019, para. 64, EU:C:2019:623; and *Spiegel Online*, C-516/17, 29 July 2019, para. 49, EU:C:2019:625.

[197] UN Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2000/7 on intellectual property and human rights (17 August 2000), para. 3. *See also* Geiger and Izyumenko (2020), pp. 300–301; Shaver (2010), p. 181.

[198] *See, e.g.,* ECtHR, *Ashby Donald and Others v. France*, No. 36769/08, 10 January 2013, CE:ECHR:2013:0110JUD003676908, and ECtHR, *Neij and Sunde Kolmisoppi v. Sweden* (dec.), No. 40397/12, 19 February 2013, CE:ECHR:2013:0219DEC004039712. For a joint commentary on these cases that have manifested a breakthrough for the external-limitation approach to copyright law, *see* Geiger and Izyumenko (2014).

[199] For case law examples and further discussion, *see* Geiger and Izyumenko (2020), pp. 300–301.

[200] An obligation for the EU to accede to the ECHR is enshrined in Art. 6(2) of the TEU as amended by Art. 1(8) of the Treaty of Lisbon and Art. 59(2) ECHR as amended by Art. 17 of Protocol No. 14 to the ECHR.

[201] Article 6(3) of the Treaty on European Union.

[202] Article 52(3) of the EU Charter.

4.2 External Application of the Right to a Healthy Environment to IP

If the authorities (including the judiciary) fail to fully accommodate the right to a healthy environment that is rapidly gaining in its strength and relevance, those affected by such failures should have the standing to allege a violation of their human right to a healthy environment through the external application of this right to IP law.

The problem for the types of cases considered in this paper is that such a claim would have to be made by repair/refurbishment/upcycling businesses in their proceedings against IP rights holders. Arguably, it might prove problematic for such business to rely on either the self-standing human right to a healthy environment or (even more so) on the "greened" traditional human rights to privacy or life on behalf of, essentially, the entire population that would potentially benefit from the improved environment to which such businesses contribute. Indeed, it can be complicated to establish a causal link between the IP-imposed restrictions on such businesses and the ultimate negative effects on the environment.

It would not also escape the attention of the courts in such litigation that an immediate interest which repair/upcycling businesses would seek to protect is, first and foremost, not necessarily their interest in environmental protection, but rather their property interest and/or the interest in operating their business freely without restrictions. From a human rights law perspective, the conflict hence can be characterised as a clash between the right to property[203] (or business freedom[204]) of repairers, refurbishers, or upcyclers, and the right to intellectual property of IP holders (i.e., the property vs. property type of conflict). Nevertheless, it would be crucial for the courts handling such cases to duly acknowledge that the economic interests of repairers/upcyclers also align with the significant societal goal of environmental protection. Due consideration of this fact can be made by evaluating the intellectual property-related restrictions on the right to property of repairers/upcyclers *in the light of* the human right to a healthy environment. Importantly, this type of assessment is not uncommon for human rights courts. The ECtHR, for example, routinely assesses claims of breaches of, in particular, freedom of expression or freedom of religion by reading them *in the light of* freedom of assembly, and vice versa.[205] The Court also examined the right to education in the

[203] Article 17 of the EU Charter and Art. 1 of the First Protocol to the ECHR.

[204] Article 16 of the EU Charter. In the CJEU case law, the freedom to conduct a business had already been recognized as a counterbalance to IP protection: *see*, notably, CJEU, Judgments in *Scarlet Extended*, C-70/10, 24 November 2011, ECLI:EU:C:2011:771, *SABAM v. Netlog*, C-360/10, 16 February 2012, ECLI:EU:C:2012:85, *UPC Telekabel*, C-314/12, 27 March 2014, ECLI:EU:C:2013:781.

[205] *See*, among many other authorities: freedom of expression read in the light of freedom of assembly: ECtHR, *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06 et al., 12 September 2011, paras. 53–79, ECLI:CE:ECHR:2011:0912JUD002895506; ECtHR, *Straume v. Latvia*, No. 59402/14, 2 June 2022, paras. 64–113, ECLI:CE:ECHR:2022:0602JUD005940214; freedom of assembly read in the light of freedom of expression: ECtHR, *Berladir and Others v. Russia*, No. 34202/06, 10 July 2012, paras. 36–62, ECLI:CE:ECHR:2012:0710JUD003420206; ECtHR, *Trade Union of the Police in the Slovak Republic and Others v. Slovakia*, No. 11828/08, 25 September 2012, paras. 51–76, ECLI:CE:ECHR:2012:0925JUD001182808;

light of freedom of expression, right to private life, and freedom of religion.[206] In addition, the right to private life was interpreted by taking into consideration the freedom of religion,[207] and the freedom of religion – by accounting for the prohibition of forced or compulsory labour.[208] Finally, some ECtHR judges expressed an opinion that, in order to assess the legality of a criminal-law interference with the sphere of freedom of expression, the latter must be read in the light of Art. 7 ECHR (no punishment without law),[209] or that the right to marry must be interpreted in the light of the right to a private and family life.[210] By analogy, nothing prevents national courts and, ultimately, the ECHR and the CJEU, from examining alleged violations of the right to property or business freedom of repairers/upcyclers *in the light of* the human right to environmental protection. Arguably, the increasing relevance and importance of this fundamental right, as discussed in Section 3, may even require the national judiciary to make such an assessment.

Furthermore, when called upon to resolve the conflicting fundamental rights of repairers/refurbishers/upcyclers and IP holders, the courts might want to examine the possible impacts of imposing restrictions on environmentally beneficial businesses on larger groups of citizens. The latter, although not parties to the proceedings at issue, can still bear the consequences of such restrictions. Again, this type of assessment is not something uncommon in human rights litigation. Thus, for example, in the recent case of *Preobrazheniye Rossii and Others v. Russia*, the ECtHR, when finding a violation of the applicant organisation's freedom of assembly under Art. 11 of the Convention, took into account the fact that the national court resolving the case "did not analyse the impact of the dissolution on

Footnote 205 continued

ECtHR, *Straume v. Latvia*, No. 59402/14, 2 June 2022, paras. 64–113, ECLI:CE:ECHR:2022:0602JUD005940214; freedom of religion read in the light of freedom of assembly: ECtHR, *Jehovah's Witnesses of Moscow v. Russia*, No. 302/02, 10 June 2010, paras. 99–160, ECLI:CE:ECHR:2010:0610JUD000030202; ECtHR, *Ilyin and Others v. Ukraine*, No. 74852/14, 17 November 2022, paras. 41–82, ECLI:CE:ECHR:2022:1117JUD007485214; freedom of assembly read in the light of freedom of religion: ECtHR, *Church of Scientology Moscow v. Russia*, No. 18147/02, 5 April 2007, paras. 71–98, ECLI:CE:ECHR:2007:0405JUD001814702; ECtHR, *Bektashi Community and Others v. the former Yugoslav Republic of Macedonia*, nos. 48044/10 et al., 12 April 2018, paras. 46–74, ECLI:CE:ECHR:2018:0412JUD004804410.

[206] ECtHR, *Folgerø and Others v. Norway* [GC], No. 15472/02, 29 June 2007, para. 84, ECLI:CE:ECHR:2007:0629JUD001547202; ECtHR, *Çölgeçen and Others v. Turkey*, nos. 50124/07 et al., 12 December 2017, para. 33, ECLI:CE:ECHR:2017:1212JUD005012407.

[207] ECtHR, *Abdi Ibrahim v. Norway* [GC], No. 15379/16, 10 December 2021, para. 142, ECLI:CE:ECHR:2021:1210JUD001537916.

[208] ECommHR, *G.Z. v. Austria* (dec.), No. 5591/72, 2 April 1973, ECLI:CE:ECHR:1973:0402DEC000559172. Note, however, the change of approach in ECtHR, *Bayatyan v. Armenia* [GC], No. 23459/03, 7 July 2011, para. 109, ECLI:CE:ECHR:2011:0707JUD002345903.

[209] ECtHR, Joint Dissenting Opinion of Judges Wojtyczek and Zünd in the case of *Sanchez v. France* [GC], No. 45581/15, 15 May 2023, para. 2, ECLI:CE:ECHR:2023:0515JUD004558115; ECtHR, Party Dissenting Opinion of Judge Wojtyczek in the case of *Tuleya v. Poland*, nos. 21181/19 and 51751/20, 6 July 2023, para. 6.2, ECLI:CE:ECHR:2023:0706JUD002118119.

[210] ECtHR, Separate Opinion of Judge Nußberger in the case of *Delecolle v. France*, No. 37646/13, 25 October 2018, ECLI:CE:ECHR:2018:1025JUD003764613.

the organisation's socially important activities targeting vulnerable groups and the rights of its members."[211] Putting this in the context of allegations of IP infringements presumably committed by repairers/upcyclers, it would be crucial for the national and supranational courts to carefully assess the possible consequences of shutting up such businesses on IP law grounds upon waste handling, circular economy, climate change, and, ultimately, the human right to a healthy environment.

Finally, in the process of balancing the repairer's/upcycler's human rights to property or business freedom (interpreted in the context of the right to a healthy environment) against the IP holder's human right to property (influenced, in contrast, by straightforward economic considerations), the courts may also consider the fact that the trademark or copyright holder has already realized the full economic value of the object for which they seek relevant IP protection through the initial sale.[212] This would, in a way, "externalise" the exhaustion argument, incorporating it as one of the factors in the external human rights law proportionality assessment. This is particularly relevant in case this argument does not prevail within the context of the internal human rights balancing within intellectual property law.

5 Conclusion

It has been demonstrated that current intellectual property laws can inadvertently block sustainable reuse practices, potentially violating the human right to a healthy environment. The "environmental imbalances" within these laws, however, primarily stem from their judicial interpretations and practical applications rather than necessarily from their legislative design. Nevertheless, these interpretations and applications need reconsideration to better accommodate the human right to a healthy environment, which is rapidly gaining strength and expanding its scope of protection in response to the unfolding environmental crisis.[213]

Only by reimagining and reshaping the contours of intellectual property protection to align with our evolving understanding of the human right to environmental protection can we ensure a sustainable future, in which there is a place not only for safeguarding our creative endeavours and free markets, but also for a flourishing and healthy environment.

[211] ECtHR, *Preobrazheniye Rossii and Others v. Russia*, No. 78607/11, 24 May 2022, para. 15, ECLI:CE:ECHR:2022:0524JUD007860711.

[212] *See, mutatis mutandis,* CJEU, Judgment in *Viking Gas*, C-46/10, 14 July 2011, para. 32, ECLI:EU:C:2011:485.

[213] Other fundamental rights, notably freedom of artistic expression and freedom of the arts, can also come into play, tipping the scales further in favour of certain sustainable practices, such as creative fashion upcycling. For a detailed discussion, *see* Senftleben (2023a), pp. 9–14.

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