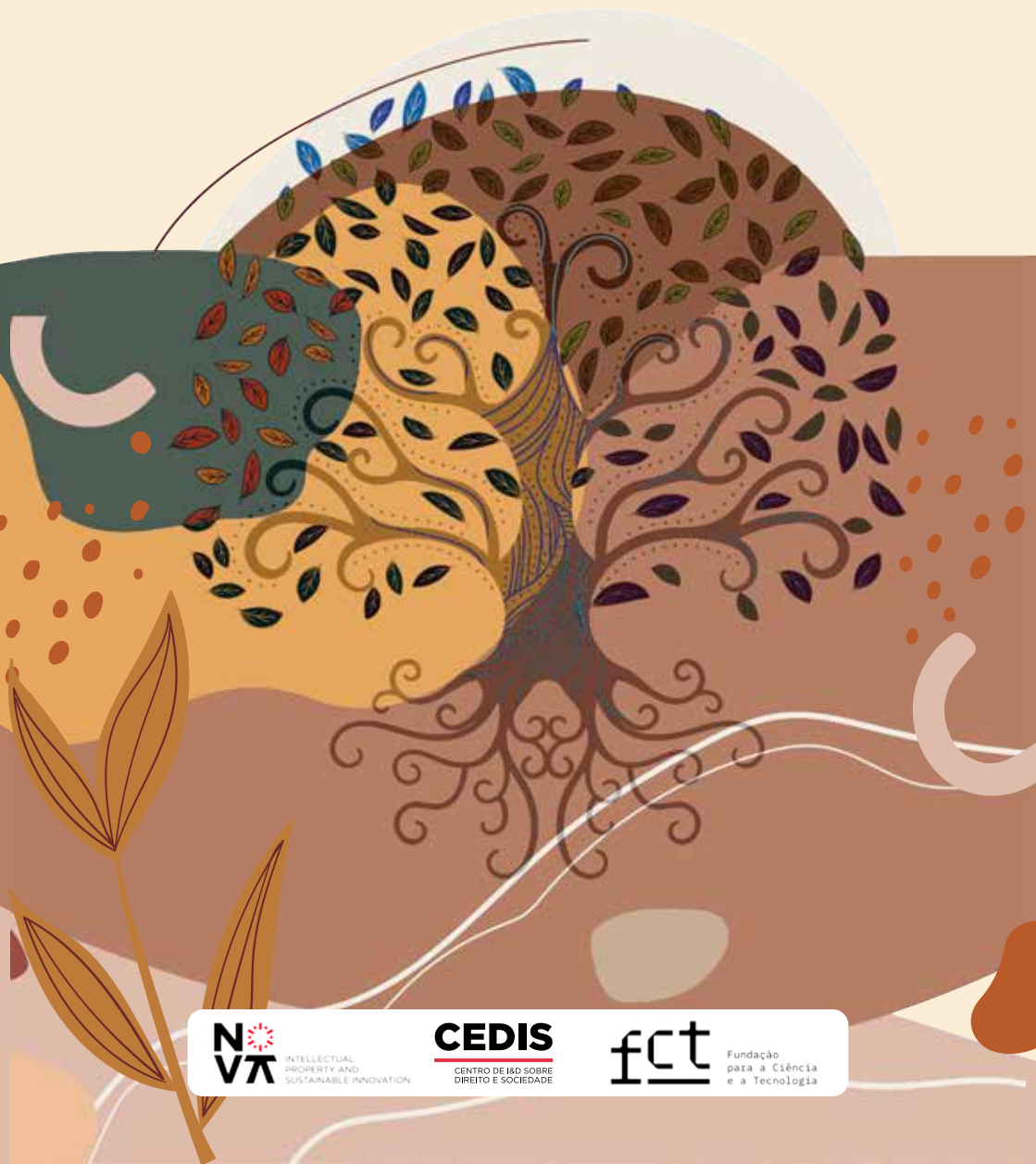


# NOVA IPSI Booklet

## ENVIRONMENT

2025



INTELLECTUAL  
PROPERTY AND  
SUSTAINABLE INNOVATION

**CEDIS**

CENTRO DE I&D SOBRE  
DIREITO E SOCIEDADE

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# Who we are and what we do

Launched in September 2022, NOVA IPSI is a Knowledge Centre located at NOVA School of Law, in Lisbon, entirely focused on the interplay between Intellectual Property and Sustainable Innovation.

We are a group of 16 legal researchers, coming from different countries and backgrounds, at different stages of our study and professional careers, who gathered to study, reflect, and discuss **how IP legal frameworks can better support today's quest for a sustainable world.**

## We currently developing legal research in the specific areas:

- Sustainability aspects in the **acquisition of IP rights**
- Sustainability aspects in the drafting and management of **IP licenses**
- Sustainability aspects in the **judicial enforcement of IP rights**

## Our ongoing activities and main research outputs are:

### • NOVA IPSI Talks

Our regular sessions on research updates and peer-feedback

### • NOVA IPSI Annual Lecture

Our annual gathering to celebrate the end of an activity year and the start of a new one at our Centre, opening the doors of NOVA School of Law to everyone willing to enjoy a keynote lecture on IP and Sustainability, music, and food together with us

### • NOVA IPSI Booklet

Our compilation of reviews of legislative, jurisprudential, and doctrinal readings that inspired us most during our year of research

### • NOVA IPSI Summer Course

Our online course, open to all those who would like to approach for the first time or further advance their knowledge on IP and Sustainability

### • Jean Monnet Module SINPL-EU

Funded by the EU Commission, this project brings together a team of six IP law professors from all across Europe, teaching and discussing with NOVA School of Law students EU IP Law through the lens of Sustainability



# Introduction

*by Giulia Priora*


**Sustainability is, at its core, about protecting the environment.** This is difficult to dispute, as reflected in the recognition of a human right to a healthy environment, an idea whose doctrinal debates are closely intertwined with the very notion of sustainability.

The point is even stronger when we recognize that “environment” goes far beyond the mere preservation of natural resources. As early as 1972, a UN Conference Declaration emphasized “the need for a common outlook and common principles to inspire and guide the **world in the preservation and enhancement of the human environment.**” Similarly, in his Opinion in case C-176/03 concerning the European Union’s power to criminalize acts harmful to the environment, Advocate General Ruiz-Jarabo Colomer read the Treaties as recognizing “**a right to enjoy an acceptable environment,** 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.”

This semantic variety in how legal studies approach the concept of “environment” reflects a normative complexity that deserves close attention and systematic accuracy. **Intellectual property law**, like many other legal fields, must actively engage with this complexity, asking how it can adapt, refine, and align itself with regulatory frameworks aimed at protecting both the natural and human environment.

At NOVA IPSI, we explore these issues through a bottom-up approach: each researcher pursues the entry points they find most relevant, urgent, or inspiring. This process has organically produced clusters of work within the broader theme of IP and the Environment, including **the role of environmental impact information in acquiring IP rights, the case against environment-damaging practices as IP remedies, IP as a tool to empower land valorization, and IP as a contractual mechanism for promoting environmental care across market practices.**

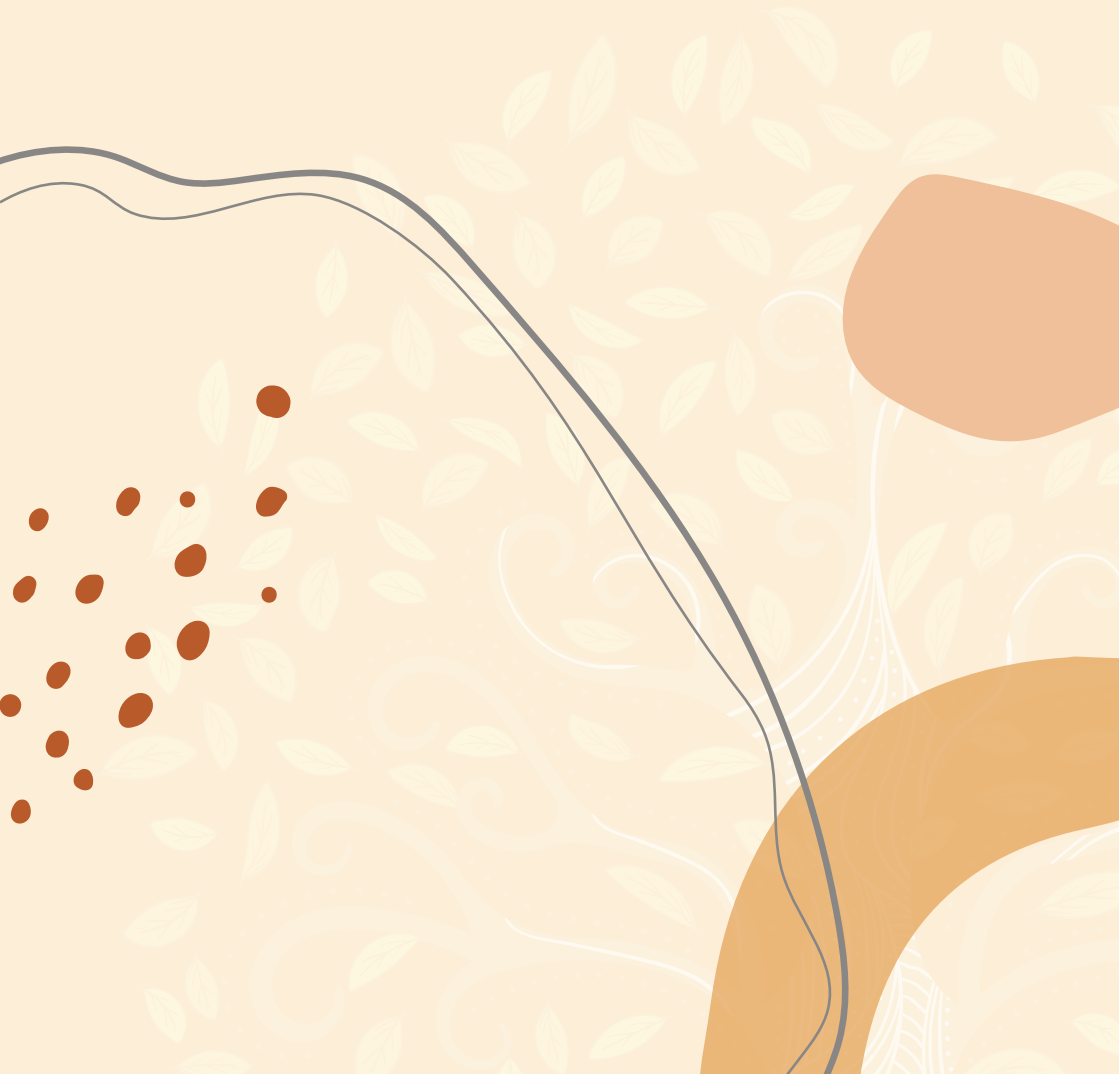
One key takeaway that has already emerged, and that we share here as a call to the global IP academic community, is the urgent need to. And, speaking of collaboration, allow me to share publicly a word of gratitude to all NOVA IPSIers: this year again, this Booklet is as much an act of scientific inquiry as it is one of human care. My hope is that, as you leaf through the following pages, you will sense something of the genuine IPSI spirit that animates our work.



This Booklet is dedicated to Dr. Fátima Leonardo dos Santos,  
to Tequila, and to anyone else inspiring us.

# INTELLECTUAL PROPERTY AND THE ENVIRONMENT

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## "Paving the way for the Environment: Channelling 'Strong' Sustainability into the European IP System"

*by Taina Pihlajarinne in European Intellectual Property Review (2020) 42(4)*

Pihlajarinne explores how the European IP system can be reimagined to better support the goal of sustainability. The author draws an interesting divide between the ideas of "strong" and "weak" sustainability: different from "weak sustainability", which only brings **environmental** concerns into current business structures, "strong sustainability" ensures that economic activities, from the start, genuinely fit within the **environmental** capacity of our planet. She argues that the dominant IP model of "strong property rights" overlooks sustainability considerations, relegating them to narrow exceptions and limitations - an approach she demonstrates is inadequate for addressing the current **environmental** crisis.

Rather than treating sustainability as a secondary consideration, Pihlajarinne asserts it should be embedded directly into the core of IP law - namely, in how rights are defined, granted, and enforced. She illustrates this through the lens of sharing and circular economies, which rely on repairing, reusing, and recycling goods to promote an economy better for the **environment**. Her analysis reveals how the doctrine of *exhaustion*, enabling these sustainable practices, is interpreted so narrowly across IP branches that it reinforces a rigid, consumption-based model that runs counter to circular economy goals.

Building on this foundation, Pihlajarinne proposes concrete reforms to integrate sustainability into IP law from the outset,

rather than as mere exceptions. These include adjusting infringement interpretations to permit sustainable uses such as repair, enabling wider possibilities to use digital copies, as well as offering enhanced protection for **environmentally** beneficial innovations. Her ultimate vision calls for a structural transformation that positions sustainability not as an exception but as a guiding principle of IP law.

Pihlajarinne delivers a compelling analysis that exposes the marginalised role of sustainability in IP law as a fundamental systemic flaw. Grounding her argument in robust theoretical foundations while drawing on concrete examples, she demonstrates that considering the current **environmental** crisis, sustainability is a concept that can no longer remain peripheral to IP considerations. Her strategic use of the exhaustion doctrine as a lens through which to examine various IP branches effectively reveals how the current systematisation obstructs sustainable practices. What distinguishes her contribution is the breadth of actionable proposals she presents. While these suggestions are appropriately ambitious given the transformative goal of making European IP law **environmentally** sustainable, they would benefit from further development to enhance their practical implementation. The scope and vision of her reforms match the magnitude of the challenge, yet additional detail on operationalising these changes could strengthen their potential for real-world application.



## "A Comprehensive Review on the Impacts of Intellectual Property Rights on the Global Agricultural Economy"

by Manohar Lal Meghwal et al in *Asian Journal of Agricultural Extension, Economics & Sociology* (2023) 41(12)

Agriculture, as the foundation of human sustenance and economic organisation, has long been shaped by evolving systems of ownership over knowledge and innovation. Over time, IP rights have progressively extended their influence throughout the global agricultural economy, from research to field implementation up to the market. This ongoing convergence has directly impacted patterns of access, equity, and control within global **environmental** governance.

In this context, the article by Meghwal et al delivers a comprehensive review of the intersections between IP rights and the global agricultural sector, providing an interesting twofold perspective. On the one hand, the authors assert that the legal protection afforded by IP rights is fundamental to fostering innovation in agriculture, encouraging research and development that aims to improve productivity and **environmental** sustainability, particularly in sectors like biotechnology and climate-resilient agriculture. Such legal protection ensures a return on investment while smoothing the market entry and broad dissemination of more efficient technologies that increase yields and promote sustainable use of natural resources. Moreover, IP rights are instrumental in modernising agricultural practices by enabling technology transfer and spreading improved tools and methods, thereby increasing efficiency across diverse farming systems and

supporting broader **environmental** goals.

On the other hand, IP rights pose significant challenges, primarily affecting small-scale farmers. Among others, restrictions on access to genetic resources can limit traditional breeding practices and the ability to save, exchange, and reuse seeds, potentially reducing agricultural biodiversity- a key pillar of **environmental** resilience. Moreover, the enforcement of exclusive IP rights inevitably contributes to market power concentration, empowering a few large corporations and creating barriers for smaller actors, which stifles competition within the agricultural sector.

The authors also look at developing countries, where IP rights significantly influence agricultural innovation and technology transfers in a peculiarly nuanced way: the high costs of securing protections exclude smaller stakeholders, while stringent regimes restrict access to essential materials and technologies, exacerbating existing **environmental** and social inequalities.

A key contribution this article brings to the fore in the IP and **Environment** discussion lies in its emphasis on the TRIPS Agreement and the requirement it imposes on WTO members to protect plant varieties either through patents or sui generis IP systems. This international harmonisation supports global trade and standardises innovation incentives. Nonetheless, it has also ignited ongoing debates over farmers' rights vis-à-vis corporate breeders. While the



authors touch upon this tension, they do not suggest alternative legal mechanisms that might offer a more equitable balance, such as open-source seed systems, benefit-sharing schemes, or farmer exemptions, which could support both social and **environmental** justice.

This valuable study serves as an effective starting point to further expand the analysis towards the legal and ethical considerations related to the concept of biodiversity conservation and intergenerational equity, including the asymmetries of power and knowledge embedded in these legal concepts, particularly in light of growing concerns

over biopiracy and the erosion of farmers' traditional knowledge.

Studying the legal, ethical, and economic impact of IP rights in agriculture confirms itself as a fascinating angle of the rising scholarly focus on IP and the **Environment**. Much can be explored anew in this domain: future legal research should move beyond merely listing, *in abstracto*, benefits and drawbacks of IP legal rules, and engage, instead, in a thorough examination of the regulations and their applications within the agricultural sector, especially regarding their **environmental** consequences and the involved sustainability trade-offs.

## “Intellectual Property Rights Regime in Green Technology: Way Forward to Sustainability”

by Zubair A Khan and Shireen Singh in *Nature Environment and Pollution Technology* (2023) 22(4)

In this ambitious and comprehensive contribution, Khan and Singh claim that IP legal regimes are necessary tools for sustainable growth, which can be fundamental to protect the **environment**. The article commendably starts by mapping and defining key concepts, such as those of green technology, clean tech, green IP, green patents, and green growth. The legal strategy the authors envision by looking at IP law through the lens of these concept is a regulatory path toward sustainability, for developed and developing countries as well as for their cooperation in protecting the **environment** globally.

The article significantly focuses on the aspect of granting green patents as a way to attract investment in **environmentally** friendly technology. For the authors, green technologies are necessary tools to tackle **environmental** degradation. The analysis provides examples of global green patent initiatives such as WIPO GREEN, which offers a network for green innovation and diffusion, and green growth indicators by the OECD. It also highlights how the WIPO and the UN 2030 Sustainable Development Agenda reaffirmed the importance of IP protection for green technology. The authors also analyse national initiatives toward green technology protection: examples include the UKIPO fast-track green patent procedure, the Green Transformation Inventory in Japan, and India’s AGNI technology market program

and the Climate Launchpad competition.

Two claims stemming from the analysis in the article are particularly interesting. First, **environmental** degradation can and should be seen as a national emergency in the context of Article 31 of the TRIPS Agreement regarding the application of compulsory licence mechanisms. Second, some green technologies can and should be excluded from patentability for reasons of **environmental** prejudice and public order, under Article 27 of the TRIPS Agreement.

Regarding the former, the authors critically investigate the pros and cons of compulsory licenses, acknowledging that such mechanisms might jeopardise patentees’ rights and potentially freeze independent research-based technology in the countries where they are granted. However, their legal assessment solidly focuses on the need to address **environmental** degradation under an urgent need for coordinated legal and policy action.

The authors’ call for clearer and more effective IP legal frameworks especially when it comes to the regulation of global technology transfers compulsory licenses, and green technologies fully stems from this contingent urgency: according to them, a green IP legal framework is not only possible, but quintessential to fight **environment** deterioration without further delays.



## “Making Space for Indigenous Intellectual Property Rights Under Current International Environmental Law”

*by Laurel Godshall in Georgetown International Environmental Law Review (2003) 15*

Godshall considers the **environment** as a combination of physical, cultural, and spiritual matrix in which indigenous people live and through which their collective identity and knowledge are reproduced. When oil exploration severs that matrix, both biodiversity and the indigenous heritage might be simultaneously endangered.

The author notes that international **environmental** law already offers tools to safeguard indigenous creativity and knowledge in cases where current IP legal regimes might not. Western-shaped IP legal frameworks focus on individual, novel, economic expressions, whereas indigenous knowledge is communal, cumulative and spiritual. In other words, the mainstream IP legal categories require identifiable authorship, novelty and mostly commercial purposes, concepts that are ill-suited to the protection of indigenous knowledge. Nonetheless, Godshall emphasizes, extensive treaty-level recognition exists: among others, Article 8(j) of the Convention on Biological Diversity obliges states to respect, preserve, and maintain indigenous and local knowledge, Article 18(2)(b) of the UN Convention to Combat Desertification requires protection of and benefit-sharing towards traditional knowledge owners; the ILO Convention No.169 affirms indigenous authority over cultural and economic development.

According to Godshall, indigenous communities should bypass inadequate domestic IP regimes and rely on more solid

international legal provisions, securing settlements or litigation in international forums outside the IP legal regime. By way of this strategy, for instance, **environmental** degradation could be framed as an international wrongdoing, which jeopardizes indigenous cultural practices and their right holders. In this vein, the reputational and diplomatic costs of non-compliance with international law might pressure States to better safeguard indigenous knowledge and achieve **environmental** justice.

Aligned with this doctrinal interpretation, recent important developments at international level have turned long-overdue regulatory attempts into enforceable law, narrowing the gap between Western-shaped IP legal frameworks and indigenous knowledge. From the Nagoya Protocol of 2010 to the latest WIPO Treaty of Genetic Resources and Applied Traditional Knowledge of 2024 move steps towards a more transparent and equitable disclosure of origins, consent, and benefit-sharing mechanisms in patent law worldwide. Similar trends can be seen in the human rights case law: cases such as *Poma Poma v Peru* (UN Human Rights Committee, 2009) and *Saramaka People v Suriname* (Interamerican Court of Human Rights, 2007) recognised communal property rights over land and natural resources, linking **environmental** integrity with cultural survival. States and customary law also increasingly refer to indigenous knowledge, especially when regulating climate-related issues.

These recent developments demonstrate that Godshall's concern is being addressed, shifting indigenous knowledge from the margins of soft law into the realm of enforceable rights. This is also reflected, consistently, in international **environmental** law – a domain that needs to be better accompanied and finetuned with international IP legal rules and treaties. First attempts in this direction, even though still wanting, are the domestic regulatory experiences of,

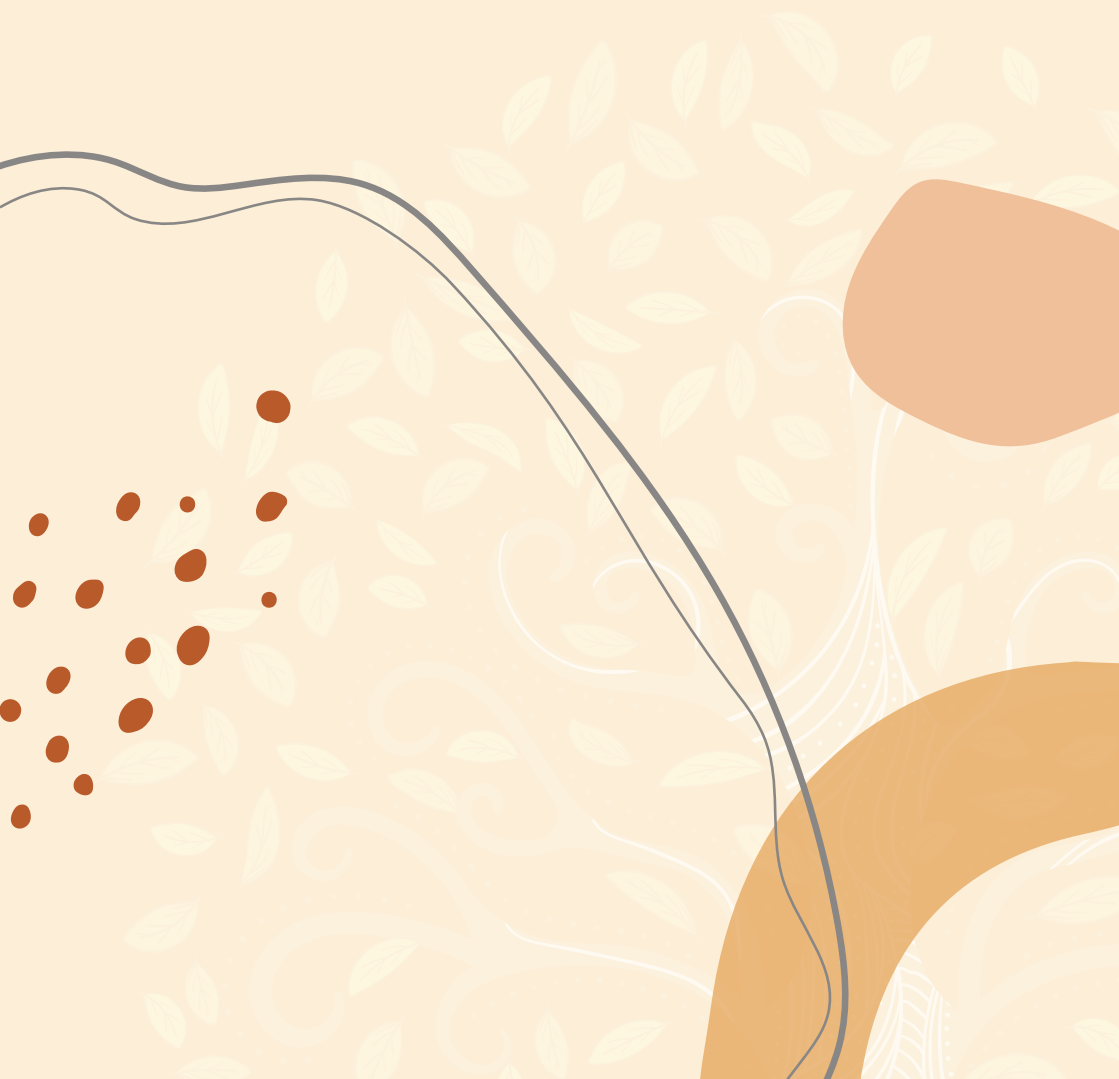
among others, Peru and South Africa, which have adopted sui generis laws that confer enforceable rights to indigenous communities to exercise control over their knowledge and obtain economic benefits. Without interventions of this kind, indigenous intellectual property and heritage risks to remain, perpetually, vulnerable, confirming Godshall's key concern of a resilient **environmental** injustice.





# PATENTS AND THE ENVIRONMENT

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## **"Intellectual Property from a Global Environmental Law Perspective: Lessons from Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge"**

*by Claudio Chiarolla in Transnational Environmental Law (2019) 8(3)*

Traditional knowledge is an interesting angle in the IP and Sustainability discussion. It notably represents the wisdom passed down through generations by indigenous people and local communities. This knowledge is deeply rooted in the environment from which it stems and often closely linked to natural biodiversity, representing more than just ancient customs but rather real and living know-how related to natural resources. Consider, for instance, the therapeutical use of plants by communities living in the Amazon rainforest or farmers in India growing drought-resistant crops after having carefully selected seeds over many years.

This knowledge is valuable because it often holds the key to sustainable innovation especially in areas like medicine, agriculture, and climate change. Many modern drugs, such as aspirin and anti-malarial, for example, have their origins in plants that were first used in traditional medicine. Nonetheless, the communities that nurtured and protected this knowledge tend to be left out of the picture.

The patent system has often been used to claim ownership over genetic resources and applied knowledge that were not stemming from a laboratory, but rather inherited from traditional practices and wisdom. This has led to some notorious

cases of misappropriation and misuse of such resources, generally labelled as biopiracy. One illustrative example is the so-called Brazzein sweetener case, in which a protein found in a West-African fruit was patented by the University of Wisconsin without sharing any benefits to the local Gabonese community who had used the fruit for generations and causing a loss of income to those who once relied on harvesting the fruit.

Setting the focus on these flaws of the patent system, Chiarolla made a solid case in favour of intervening on the patent disclosure requirements, strictly requiring information about the involvement of genetic resources and communities' knowledge – thus tuning this article, published in 2019, an important prescient contribution in light of the latest WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge (GRATK) adopted in 2024.

Chiarolla's main goal with this article is to provide practical guidance for integrating such patent disclosure requirements into national patent legal systems, in alignment with the principles of the Convention on Biological Diversity (CBD) and its Nagoya Protocol. At the time of publication of the article, patent disclosure rules only covered genetic resources and traditional knowledge only in some countries, with the need to expand their applicability



to cover all countries signatories of the Nagoya Protocol.

This small but powerful reform – which has become reality thanks to the new GRATK Treaty –, as explained by Chiarolla, has the potential to make it easier for both user and provider countries to monitor and ensure legal compliance, strengthening the overall access and benefit-sharing system that is part of international patent law. Otherwise said, this development enhances the balance between parties involved, tilting it towards a more solid

fairness, ensuring that local communities are recognised and compensated for their traditional knowledge over natural resources.

Chiarolla interestingly points out that, besides the alterations in blackletter laws, a gradual and constant process is needed to implement effectively these rules, especially in conjunction with the main principles of international **environmental** law promoting justice, transparency, and inclusion.



## “The Untapped Potential of Patent Law in Deterring Environmentally Unsustainable Innovation”

by Giorgio Spedicato in *GRUR International* (2024) 73(8)

In this seminal article, Spedicato builds a solid core claim, stating that patent law should be applied, by IP offices, taking into account the purpose of deterring **environmentally** unsustainable innovations. To ground this claim, he clarifies that the word **environment** should be understood as encompassing all natural resources and the vital functions they support. As a consequence, **environmental** harm arises from any measurable adverse change to these resources or their functions, in line with relevant EU legislation, such as Article 2 of the Environmental Liability Directive 2004/35/EC and Article 17 of the Sustainable Investments Regulation (EU) 2020/852.

On this basis, Spedicato develops his central argument, according to which patent law cannot be treated as ethically and **environmentally** neutral due to its own provisions on *ordre public*, namely Article 27(2) of the TRIPS Agreement and Article 53(a) of the European Patent Convention (EPC). According to Spedicato, these provisions oblige to exclude from patentable subject matter inventions whose commercial exploitation would harm the **environment**.

However, the author identifies a substantial gap between this legal interpretation and the practical reality within patent examination procedures. He acknowledges that no European patent, to date, has been refused or revoked

exclusively on **environmental** grounds. He attributes this ineffectiveness to a narrow interpretation of the concept of **environmental** *ordre public* by the European Patent Office, which confines Article 53(a) EPC to extreme abhorrent cases and requires substantial proof of harm.

Spedicato proposes a reinterpretation anchored in three EU legal principles: the **environmental** integration under Article 11 of the Treaty on the Functioning of the EU (TFEU); the a high level of protection of the environment under Articles 35 and 37 of the Charter of Fundamental Rights of the EU; and the precautionary principle stemming from Article 191 of the TFEU. Under this approach, patent offices have the power to require patent applicants to ensure **environmentally** sound exploitations of their inventions. By scrutinising the application, patent examiners can reject, conditionally grant or revoke patent protection if the use of the invention proves **environmentally** damaging. To perform this assessment, patent examiners can request opinions from experts or **environmental** agencies, as allowed by Rule 117(1)(e) of the EPC.

Spedicato's contribution represents a legal interpretation of high doctrinal solidity, despite posing practical challenges, which have been highlighted also by other scholars, among which the potential increased costs, delays, and new margins of uncertainty of patent

examinations. Examiners would have to analyse and decide on long-term potential **environmental** harm and weigh it against social benefit, a step that should not to be underestimated (see also Brown in “Intellectual Property, Climate Change and Technology”; Hilty and Batista in “Potential and Limits of Patent Law to Address Climate Change”).

A different perspective on this topic is also present in the scholarship. Stemming from the same observation that Spedicato supports, namely that patent protection is vital in securing investments and incentivizing green technologies, some scholars argue that overly rigorous **environmental** assessments might cause a chilling effect, diminishing investor confidence, and potentially backfiring the patent potential to support green innovation (see Hall and Helmers, “Patent Protection and Innovation Incentives: Evidence from Renewable Energy”). This adds to empirical research that

demonstrates that rising uncertainty tends to slow down innovative cycles and potentially the transition to sustainable technologies (see Farooq et al in “The Nonlinear Effects of Economic Policy Uncertainty on Green Innovation: Evidence from OECD Countries”).

By and large, Spedicato’s article presents a valuable legal argument, which would require a careful practical application, finetuning patent law with **environmental** sustainability objectives. This would translate into a combination of *ex-ante* **environmental** disclosure requirements and *post-grant* regulatory measures, licensing flexibilities, and incentive-driven mechanisms for green patents. The **environmental** *ordre public* exclusion from patentability should be reserved for inventions that pose serious and objectively proven **environmental** threat, to make sure that patent law complements and aligns with, without replacing, **environment protection law**.



## “The Eco-Patent Commons and Environmental Technology Transfer: Implications for Efforts to Tackle Climate Change”

*by Mark Van Hoorebeek and William Onzivu in Carbon & Climate Law Review (2010) 4(1)*

The intersection between IP rights and **environmental** sustainability raises questions about how technological innovation can be shared to support climate action. In this context, Van Hoorebeek and Onzivu examine how the so-called Eco-Patent Commons, a corporate-led initiative established in 2008 that encourages the royalty-free sharing of **environmental** patents, can serve as a pathway to promote the diffusion of **environmentally** sound technologies, particularly to developing countries. The authors frame this voluntary mechanism as a potentially valuable complement to traditional IP systems.

The article presents a well-articulated case for how patent law, typically viewed as a barrier to the dissemination of technology, can be harnessed to support **environmental** objectives. By creating a platform where patents are shared openly, the Eco-Patent Commons provide an alternative route to accelerate the diffusion of technology. Drawing parallels with open-source models, the authors highlight how mechanisms such as invention disclosures and defensive publications can facilitate broader access to technological knowledge.

The authors also highlight important challenges that may limit the effectiveness of such voluntary mechanisms. Legal uncertainty, the lack of standardised contractual terms, and the risk of limited uptake due to outdated or commercially marginal patents are identified as key

issues. They emphasise that openness alone is insufficient for effective technology transfers and stress the need for clearer governance, performance standards and more coordination between the parties at stake.

The article situates the Eco-Patent Commons within the broader IP legal landscape, including the TRIPS Agreement. In particular, the authors refer to the limited enforcement of Article 66(2) of the TRIPS Agreement, which requires developed countries to promote technology transfers to least-developed countries, the authors pointing out that progress in the implementation of this specific provision has been minimal. Although Van Hoorebeek and Onzivu touch on systemic barriers, such as financing models and infrastructures, this is an aspect that still requires in-depth analysis in the scholarship, to better understand the practical challenges faced by technology recipients.

The authors also mention the relevance of IP flexibilities, such as Article 27(2) of the TRIPS Agreement, which permits countries to exclude **environmentally** harmful inventions from patentability, as well as Article 31, which governs compulsory licensing. They suggest that these legal tools, if interpreted dynamically, could also play a pivotal role in enhancing the dissemination of critical technologies.

All in all, Van Hoorebeek and Onzivu offer a very thoughtful examination of how voluntary IP mechanisms can support

objectives of environmental protection. While the Eco-Patent Commons is neither the only nor the most comprehensive solution, it represents a constructive step towards greater global distribution of **environmentally** sound technologies. Its effectiveness, however, depends on the soundness of the legal frameworks, the enhancement of its implementation and

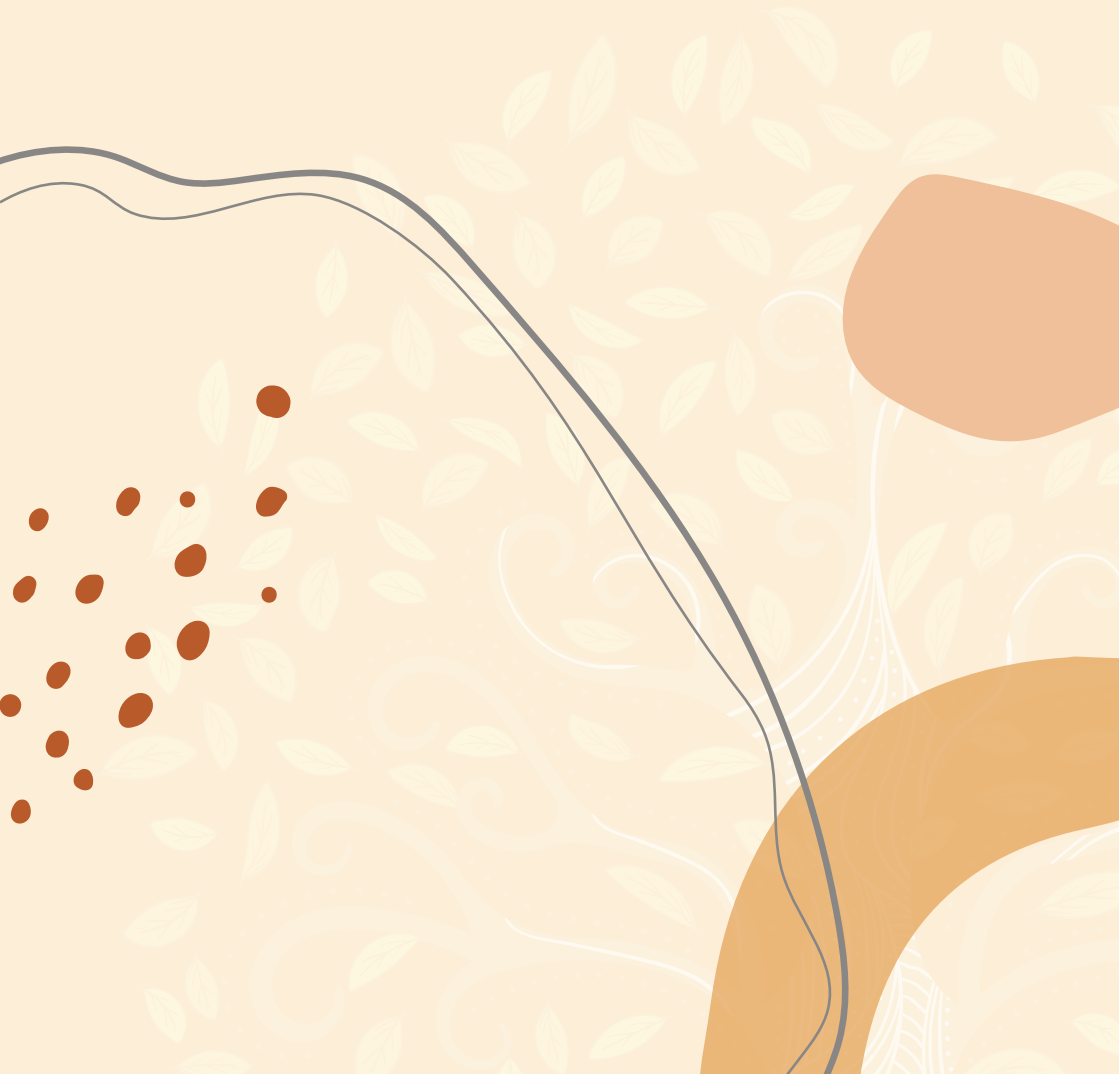
governance, and the targeted support of recipient countries to fully tap the potential of shared innovation. As the authors highlight, the real challenge lies in operationalising patent openness into equitable technology transfers, exposing enduring disjunctions between legal frameworks and practical outcomes.





# TRADEMARKS, COPYRIGHTS, AND THE ENVIRONMENT

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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”

by Elena Izyumenko in IIC (2024) 55

Acts such as upcycling, repair and refurbishment often face unpredictable and unwelcoming legal frameworks. This has prompted scholars to navigate IP legislation and case law to find ways to lawfully frame sustainable practices. Izyumenko’s article focuses on the existing IP legal obstacles to these practices while introducing the human rights perspective epitomized by the right to a healthy **environment** and examining how the current copyright and trademark frameworks need to reconcile with it.

She starts the analysis illustrating how IP laws tend to place early-stage obstacles to acts involving the repurposing of protected works. Any time a work falls under the scope of IP exclusive rights, to survive infringement claims, circular businesses using it need to rely on available exceptions or limitations, Izyumenko considering the doctrine of exhaustion being the most promising one.

Nonetheless, her analysis also illustrates how courts have consistently reduced the potential of the existing IP – in particular, trademark and copyright – legal frameworks in embracing the lawfulness of circular business practices. The provided examples demonstrate this in a variety of scenarios, from the restrictive interpretation of “legitimate reasons” in Art.15(2) of the EU Trademark Regulation to the copyright exhaustion doctrine in the CJEU *Allposters v Pictoright* judgment (C-419/13), from referential uses of trademarks to quotations and pastiche in copyright law.

To understand whether the current IP legal landscape runs counter to the human right

to a healthy **environment**, Izyumenko examines their respective evolutions. She points out how the climate crisis has helped to this human right take centre stage through legislative initiatives and case law, either “greening” human rights law or through what Izyumenko refers to as a self-standing right (such as in Art.37 of the Charter of Fundamental Rights of the EU). She also explains how the existing right to a healthy **environment** could push the IP framework to better reconcile with human and fundamental rights – a finetuning possible by way of recognizing these rights as internal of the IP legal framework or external to it. As an example of the latter, businesses whose activities are focused on circular and **environmental** practices could see their fundamental right to conduct a business reinforced when interpreted in light of the human right to a healthy **environment**.

This proposed external human rights-centred solution features an interesting conceptualisation of **environmental** protection. Central to this proposal towards a “greening” of the freedom to conduct a business is a clear circular economy rationale. This approach recognises that **environmental** protection encompasses not only direct conservation measures but also sustainable business practices that serve broader **environmental** goals. The key insight is that replacing linear economy models with circular ones is fundamental to effective **environmental** protection. Through this lens, we can better understand why sustainable business models are desirable and how certain rights should be framed in light of these broader **environmental** objectives.



## “Fashion Waste, Trade Mark Protection, and the Circular Economy: Towards a New Public Domain for Sustainable Reuse”

by Martin Senftleben in Rosati/Calboli (eds) *The Handbook of Fashion Law*  
(Oxford University Press 2025)

The focus of this article is to be contextualized within the debate on the **environmental** harms caused by the fast-paced production cycles of the fashion industry. Senftleben adds to this debate advocating in favor of a reinterpretation of current EU trademark legal rules to better promote reuses of fashion products.

He begins by explaining how upcycling can lead to claims of consumer confusion and unfair free riding- a consequence of a legal system that, in his opinion, overprotects trademark owners at the expense of **environmental** sustainability goals. He further argues that the use of trademarks in upcycled goods should be part of the public domain, posing a highly interesting legal perspective in the notion of freedom of reuse. His analysis delves into specific key aspects of EU trademark law, touching upon the interpretation of the gatekeeper requirement of “use as a trademark” as a condition for infringement and the statutory limitations established in Article 14 of the European Trademark Regulation.

Through Senftleben’s analysis, it becomes evident that the Court of Justice of the European Union (CJEU) shows a tendency towards an expansive protection of trademark rights – this turning fashion products embedding trademarks into so-called “special waste”, more difficult to be reused, in contrast with the efforts promoted by the EU Circular Economy Action Plan.

Building on this critique, Senftleben looks into two main possible solutions. He first proposes reinterpreting the gatekeeper requirement to provide greater legal certainty for fashion re-users. He also suggests introducing a legal presumption of non-infringement, which would

apply within the context of the circular economy, where a trademark is used as a decorative element, without intent to mislead consumers or cause dilution. This would prevent *prima facie* infringements by circular economy re-users.

The second solution offered by Senftleben is the reinterpretation of the norm on referential uses of trademarks. He argues that the goal of achieving **environmental** sustainability supports the idea that trademark use in upcycled products is a form of critical commentary or a mere reference to the original brand. There is an assumption that upcycled fashion is inherently a critical stance, which can be misleading. Upcycled items can simply derive from an artistic or aesthetic inclination, with no intent of criticising the fashion industry or the original brand.

Lastly, the author highlights the importance of applying the honest practices test more effectively than the CJEU has done up until now in its case law. Senftleben argues that proper labelling and clear identification of the re-user’s brand are essential, emphasising the importance of evaluating the re-user’s diligence and intent. For a trademark infringement claim to succeed, the re-user must intentionally seek to mislead, cause harm, or derive undue benefit.

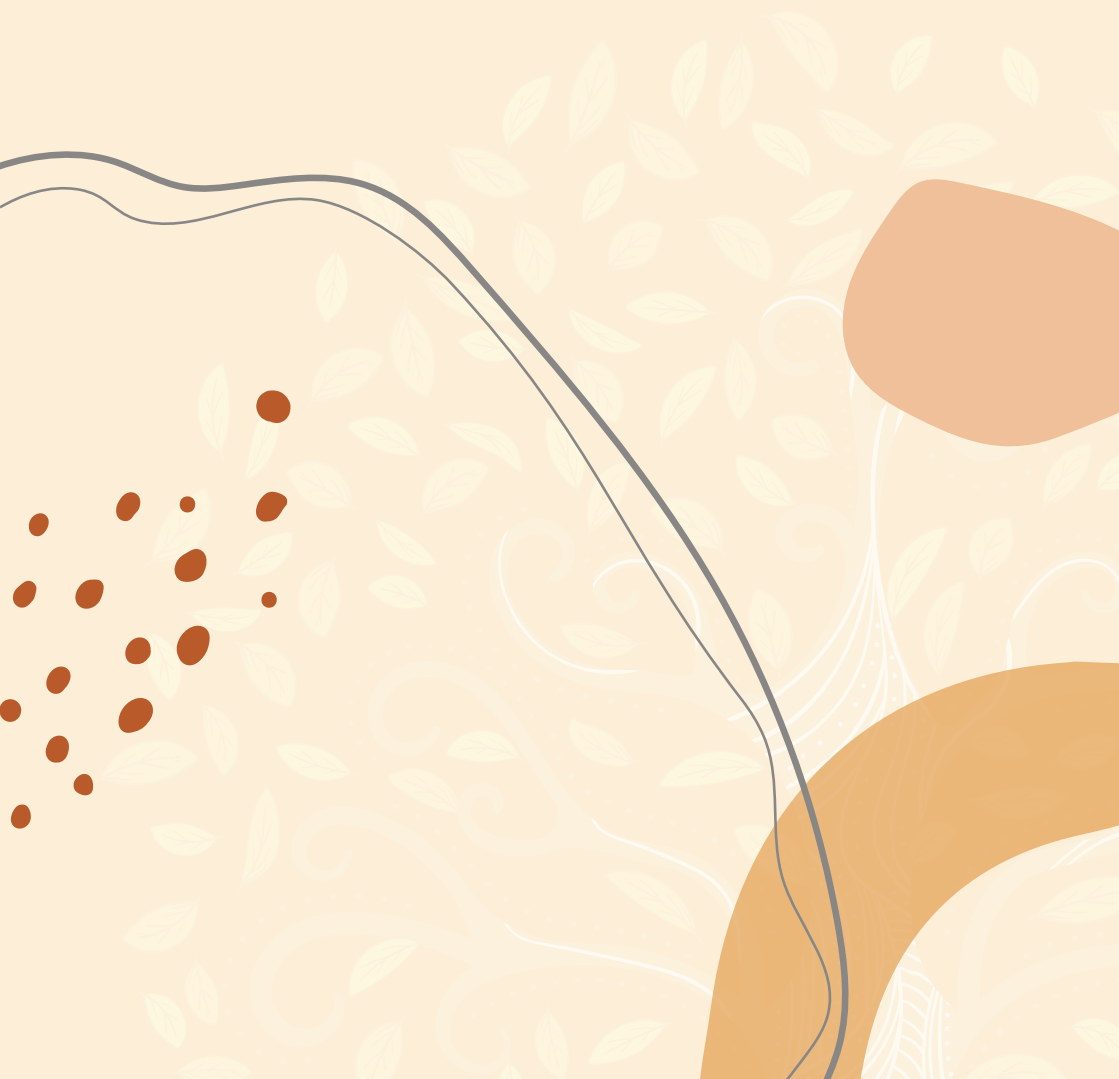
By and large, Senftleben’s chapter offers a compelling approach to reconciling IP Law and **environmental** sustainability, focusing on possible re-interpretations of EU IP laws. His contribution also inspires further research in the field of IP and Sustainability: his view leads to further inquire into the notion of “average consumer”, its evolving interpretation in the age of **environmental** care, and possible new applications in the case law.





# GEOGRAPHICAL INDICATIONS AND THE ENVIRONMENT

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## “Can Geographical Indications promote environmental sustainability in food supply chains? Insights from a systematic literature review”

by Silvia Falasco, Paola Caputo and Paola Garrone in *Journal of Cleaner Production* (2024) 444

Silvia Falasco, Paola Caputo, and Paola Garrone provide a comprehensive and critical overview of the relationship between Geographical Indications (GIs) and **environmental** sustainability in the food sector. Based on a systematic review of 20 selected academic articles, the authors explore the extent to which GIs either contribute or hinder **environmentally** sustainable practices. The analysis is structured around three main dimensions: the categorisation of the articles under the United Nations’ Sustainable Development Goals (SDGs), the **environmental** impacts attributed to GIs, and the substantive factors of these impacts.

Falasco, Caputo and Garrone confirmed with their results what previous works had already claimed: that the link between GIs and **environmental** sustainability depends on several causes, which can flow into a positive or negative impact on the **environment**. Although it might sound like this is always a case-by-case scenario, the authors came up with four general factors which would always help the legal protection of GIs on food products, regardless of their specific characteristics, to achieve a positive impact on the **environment**: (i) rules and regulations – or, as they call them, “specifications” - with **environmental** sustainable targets, (ii) producers’ **environmental** consciousness and cooperation, (iii)

collective governance to pursue higher **environmental** sustainable standards, and (iv) the link between the GI-protected product and its natural environment, namely its *terroir*.

According to the authors, previous qualitative studies have shown that these factors are key to promoting GIs as names that serve a dual purpose, identifying both the geographical origin and the **environmental** responsibility behind a product.

In order to promote the categorisation of each article under an SDG, Falasco, Caputo and Garrone performed a deductive coding. Only SDGS with **environmental** targets were included. In turn, to impact categorisation, in the sense of attributing positive or negative **environmental** impacts, they adopted ISO standards. Accordingly, the authors adopted a technical understanding of the concept of **environment**, using indicators such as resource use, pollution, and land and water quality to connect the **environmental** impacts of GIs with the SDG framework.

However, the notion of **environment** is analysed by the authors under a broader context of sustainable practices. In this sense, Falasco, Caputo and Garrone base themselves on a concept of sustainability that encompasses not only the **environment**, but also societal,

economic and governance aspects. This means that although the article has the focus of providing a systematic review on **environmental** sustainability, the causes of positive and negative **environmental** impacts caused by GIs are, inevitably, connected to the substantive factors mentioned above.

Ultimately, the authors anticipated that Regulation (EU) 2024/1143 would introduce measures on **environmental** sustainability. Current Articles 7 and 8 of Regulation 2024/1143 set on specific provisions towards sustainable practices. However, although it represents progress when compared to previous EU Regulations on GIs, it is still too early to know if these provisions represent a true commitment to sustainable practices or if it is going to amount to little more

than symbolic gestures, (Zappalaglio, “A short history of the relationship between EU agricultural GIs and the Common Agricultural Policy: from the beginning to Regulation 2024/1143” 2025).

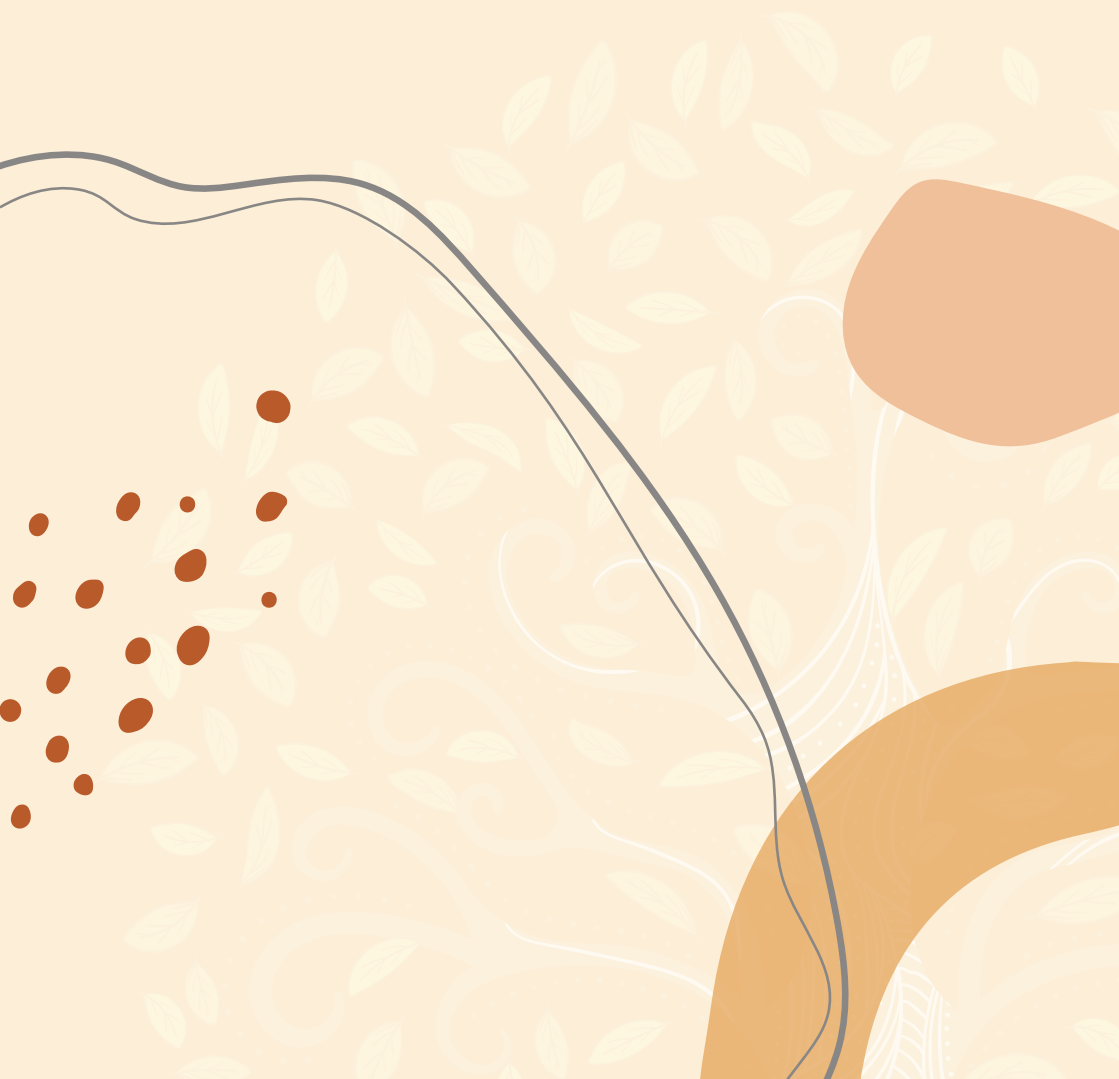
By and large, Falasco, Caputo, and Garrone identify key factors that may condition positive **environmental** outcomes, and that cannot be isolated from broader dimensions of sustainability. Their findings underscore the potential for GIs to move beyond mere indicators of origin and take on a more active role in advancing sustainable practices. While the recent inclusion of sustainability criteria in the EU’s regulatory framework signals a new specification, its actual impact on **environmental** sustainability remains to be seen.





# ZOOMING IN ON JUDICIAL INTERPRETATIONS

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## “Towards a Judicial Sustainability Test in Cases Concerning the Enforcement of Intellectual Property Rights”

by Charlotte JS Vrendenburg in *GRUR International* (2023) 72(12)

In her article, Vrendenburg critically assesses the **environmental** implications in IP legal enforcement, specifically the entrenched practice of removal, long-term storage, and destruction of IP-infringing goods as corrective measures. She asserts that **environmental** harm resulting from these remedies is often overlooked and underscores the necessity to consider sustainable alternative remedies. She advocates for the adoption of a “judicial sustainability test” to ensure a balance between the interests of rightsholders in ending IP infringements and the broader societal interest in **environmental** protection in the determination of appropriate remedies.

Vrendenburg grounds her argument in the principle of proportionality embedded in the TRIPS Agreement and in the EU IP Enforcement Directive - Articles 46 and 10(3) respectively - which require judicial authorities to consider not only the seriousness of the IP infringement but also third-party interests when ordering corrective measures. Despite this legal basis, the author observes an inadequate - almost non-existing - recognition of the right to **environmental** protection enshrined in Article 37 of the EU Charter of Fundamental Rights as a relevant third-party interest in judicial practice thus far. However, the applicable law, according to Vrendenburg, offers space for the proposition of such a test, which would help guarantee the consideration of **environmental** interests in the proportionality assessment for remedies.

To illustrate the presence of viable alternatives, Vrendenburg outlines several more sustainable corrective measures: among others, disassembling counterfeit goods to channel them towards recycling or upcycling, debranding or rebranding infringing goods, donating such goods to charities or returning them to rightsholders. However, she concedes that these alternatives may not always be feasible or appropriate for ensuring the effective enforcement of IP rights while safeguarding third-party interests, which might also concern the protection of public health or the maintenance of public security. Thus, the selection of remedies would remain context-dependent, demanding an assessment of the nature of the goods and the infringement as part of the test proposed.

Although Vrendenburg’s proposal marks a significant step towards conceptualising a more sustainable IP enforcement, she refrains from articulating a clear position on whether courts should consider **environmental** interests *ex officio*. This is a missed opportunity, especially given that the author highlights rightsholders’ general reluctance to claim sustainable remedies and the rightholder-centric approach of some Member State courts in the interpretation of the principle of proportionality as potential obstacles standing before the consideration of sustainable remedies. Her emphasis on context-dependency may overshadow the test’s underlying aim to achieve **environmental** protection, particularly



in light of practical barriers such as increased costs and infrastructure limitations for sustainable processing of infringing goods. More fundamentally, the lack of clear empirical evidence on the direct correlation between the current IP enforcement practices and the **environmental** harm caused might hinder the broader acceptance and implementation of the proposed test.

Vrendenburg's article is a valuable invitation to embark on a long-overdue rethinking of IP enforcement through a sustainability lens. The issues highlighted by the author underscore the fundamental necessity for a shift in perspective

within the IP legal system - as well as among rightsholders and the judiciary - towards consistently, systematically, and effectively recognising and protecting the right to **environmental** protection as a legitimate competing interest. Though Vrendenburg's judicial sustainability test is a step in the right direction, the path towards a sustainable IP enforcement regime might require more stringent approaches, such as an explicit rejection of the destruction of infringing goods due to **environmental** reasons, especially in light of the urgency and gravity of the climate crisis.



## Judgment of the First Instance Court of Paris, RG 22/10720, 10 Apr 2025

This is a typical example of judicial interpretation of IP legal rules in a concrete scenario of upcycling. More precisely, the case concerned the commercialisation of denim jackets personalised with patches of existing Hermès (the plaintiff) scarves by the defendants (Maison R&C, Atelier R&C and their manager). The former argued that the companies infringed its IP rights. Very interestingly for the purpose of this Booklet and our work in NOVA IPSI, the defendants argued that their activities ought to be considered to be *sustainable* business practices, asking the Court to pay particular attention to the context of the ecological emergency and the right of **environmental** protection (see para 16 of the ruling).

The case presents a very interesting source to analyse also because of its twofold dimension, as it speaks directly to copyright law and trademark law. Regarding copyright, the Court found that Hermès scarves are original works, rejected the defendants' claim that no copyright was infringed due to the doctrine of exhaustion, and also rejected their argument according to which, under the circumstances of the case at stake, the protection of fundamental rights of artistic freedom and **environmental** protection justifies the interference with the plaintiff's IP rights. From the trademark perspective, the Court found that the defendant's activities infringed the rights to Hermès trademarks by being affixed to (and removed from) goods, used

on the defendants' website and also as a hashtag (#Hermes) on their social media. As a result, the court Condemned the defendants to 20.000€ worth of damages based on these infringements, for a final writ exceeding, in total, 40.000€.

This decision – both in its outcome and in its reasoning – urges meaningful discussions on whether the current IP legal frameworks are fine-tuned with **environmental** protection goals. The reasoning of the French Court is particularly noteworthy for two reasons – namely, the wanting interpretation of copyright exceptions, as the Court limits itself to state that no upcycling exception exists (see para 126); and secondly, the argument according to which **environmental** protection is incompatible with profit-oriented purpose of some activities, developed without fully exploring its impact in the general application of many IP flexibilities and other norms.

By and large, this decision is a must-read for all those researching on the impact of **environmental** protection considerations in the application of IP legal rules – in this case an impact hardly perceptible, which did in no way interfere with the expansive interpretations of the IP exclusive rights, without creating room for upcycling as a practice to be fostered by way of copyright flexibilities, copyright exhaustion, nor trademark referential use.

## Judgment of the Austrian Supreme Court, 4 Ob 72/24b, 2 Apr 2024

In the 1980s, the City of Vienna (“the defendant”), owner of the Hundertwasser/Krawina house (“the work”) and its forecourt, erected the house based on designs by painter Friedensreich Hundertwasser and architect Josef Krawina. The plaintiff operates a business on-site offering touristic information and related merchandise. Krawina granted the plaintiff the rights to use the work and fiduciary management of his moral rights.

In autumn 2023, the defendant began redesigning part of the forecourt by installing a non-accessible tree disc to plant a tree, corresponding to the area in front of plaintiff’s business premises. This measure was in response to public demands for more green space in this area and thus to address climate change.

The plaintiff opposed the project, arguing that the tree planting significantly interfered with the architectural integrity of the forecourt and distorted the artistic concept of the work, thus violating Krawina’s moral right of integrity. It sought a preliminary injunction prohibiting further work associated with tree planting and requesting restoration at the defendant’s expense. Upon rejection of the application for an injunction by lower courts, the case was appealed to the Austrian Supreme Court.

The Supreme Court dismissed the plaintiff’s extraordinary appeal. According to §21 of the Austrian Copyright Act (UrhG), a work is protected against alterations without the author’s consent unless permitted by law. However, the author cannot prohibit parties entitled to use the work from making alterations, in particular those required by the nature or purpose of the permitted use of the work, consistent with accepted practices of fair trade.

The scope of the moral right of integrity under §21 UrhG must be determined upon a balancing of interests, i.e. between the author’s interest in the protection of her work and the interests of the user of the work. A

claim for injunctive relief under copyright law, prohibiting modifications to the work, may also be opposed by constitutional rights, including the right to property (§5 Austrian Constitution; Article 1 of the 1st Additional Protocol to the ECHR).

Here, the Court found the required balancing of interests in favor of the defendant. As a property owner, the defendant’s interest in the use of the work was considered higher than the protection of the work per §21 UrhG. The redesign of the street by the defendant is intended for greening the area and mitigating the consequences of climate change as an important state task. Moreover, the tree planting did not contradict the original architectural vision from the 1980s. Therefore, tree planting by the defendant is not a distortion of the integrity of the work under §21 and cannot be prevented by the copyright holder.

Although the Supreme Court did not explicitly mention **environmental** protection nor the principle of sustainable development - under Article 37 of the EU Charter - and thus lacks a bold approach, its judgement carries significance for sustainability in copyright law.

The Court acknowledged climate change mitigation through the creation of a greener urban space as an important state task, indirectly integrating **environmental** concerns into its balancing of interests. This subtle shift - absent in earlier case law - suggests a nascent judicial openness to incorporating **environmental** factors into the determination of the scope of copyright protection. The citation of the *Verein KlimaSeniorinnen Schweiz* case before the ECtHR supports this reading.

Therefore, the judgment sets a precedent for future cases where alterations of copyright-protected works - especially those of a utilitarian nature, e.g. architectural works used as residential buildings - may be permissible when serving **environmental** interests, even if those interests are not raised by parties to the dispute.



## Judgment of the German Federal Administrative Court, 7 C 1.18, 26 Sept 2019

The decision concerns a dispute over access to expert reports concerning the construction of wind turbines. When a third party requested access to the landscape management plan and the two faunistic expert reports on nature conservation for an inspection, invoking the Environmental Information Act under German law, the plaintiffs, who had authored the documents, objected to their disclosure on the grounds of copyright, specifically citing the moral right of first publication.

This decision is particularly relevant for the purpose of this Booklet, as the German Federal Administrative Court held that the right of access to environmental information does not apply where such access would infringe IP rights, particularly copyright, unless the affected parties have consented or an overriding public interest in disclosure can be demonstrated.

A first layer of analysis on this decision comes from the legal interpretation of the originality requirement in copyright law. The Federal Court's recognition that a technical report about environmental data can embody an original expression of an idea, reflecting a degree of creative expression, is worth a reflection. In the context of textual works of scientific or technical content, the room for creativity lies primarily in how the content is compiled, structured, and organised – as big part of the contents itself might be facts, which lie outside the scope of copyright protection. While upholding the Higher Administrative Court's presumption of copyright protection of the environmental reports, the German Federal Court did not interrogate itself whether scientific and empirical reports must meet a higher threshold of creativity to be protected.

Another layer of the judgement grapples with the interpretation of first publication of the work. The Court explained that the submission of such report to the competent authority as part of an administrative procedure did not constitute first publication of the work, nor it can imply implicit consent by the authors to permit subsequent dissemination. On the basis of these two layers of arguments, the German Federal Court found that the defendant's appeal was without merit and had therefore to be dismissed.

The decision raises some concerns, especially while looking at how the rights and interests of third parties and the public appear to have been overlooked. Among others, it is worth questioning whether the inspection request – which triggered the request to access the environmental documentation – should have been viewed as a part of the administrative procedure that was already open and involving such reports. It also remains unclear how the authority responsible for conducting the inspection differs from the one that was in charge of processing the administrative procedure in the first place. On more substantial grounds within EU and domestic copyright law, it remains completely overlooked in the judgment the need to strike a fair balance of fundamental rights, in this case the one of intellectual Property enshrined in Article 17(2) of the Charter of Fundamental Rights of the EU and the high level of environmental protection mandated by Article 37 thereof.

While the German Federal Court provided a linear reasoning, the defendant failed to demonstrate the points raised here, which, if solidly substantiated, might have warranted a different outcome.

## Judgment of the Austrian Supreme Court, 4 Ob 90/94, 20 Sept 1994

The parties involved in this Austrian case are the manufacturers and sellers of blocks of concrete (as plaintiffs) and a brick manufacturer using the patented “Poroton” process, which involves clay and polystyrene beads (as defendant).

The legal dispute arose in 1992, when the defendant advertised its *Poroton* bricks as “tested organic bricks”, claiming to enable a cheaper and healthier building and living and promoting a better alternative to plastics, which release toxic gases and harm the **environment**.

The plaintiffs considered terms such as “biological” and “organic” used in the advertising of the product to be misleading, given that polystyrene is liable to release harmful substances. Moreover, the plaintiffs claimed that the bricks were not cheaper than others in the construction market. The Court of First Instance ruled in favour of the plaintiffs based on Section 2 of the Austrian Act against Unfair Competition, agreeing with the aforementioned arguments.

However, when reaching the Higher Court, the assessment regarding the branding expressions used in the defendant’s advertising took into great account the **environmental** awareness raised in the public, making it clear that the advertiser had to better clarify the information provided.

This unfair competition case, of expectedly rather common factual background, represents a valuable entry-point for further considerations on the latest evolution of EU IP legal rules and their finetuning with the practices of communication about sustainability and **environmental** care. In fact, since 1992, the EU legal framework has been significantly reinforced with several pieces of legislation in this regard – among others, the Unfair Commercial Practices Directive, the Ecodesign for Sustainable Products Regulation, the proposed Green Claims Directive – one of the emerging objectives of EU law being to prevent and disincentivize greenwashing.

This case suggests that, even in absence of such specific legal tools, national courts could still find a way to ensure justice through competition legal provisions. Both the Austrian Courts’ decisions, indeed, declared it to be unfair to use **environmental** claims not backed by reliable scientific and market data proving the goods to be **environmentally** friendly.

The question arising is whether national competition legal rules could suffice also in the case of IP rights entering the scene in cases of this kind, for instance through environmental claims being communicated in a sufficiently creative form to be copyright or trademark protected.





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