

Intellectual Property and Sustainability in the EU

Trademarks in the Age of Circular Economy and the European Green Deal

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Abstract

The European Green Deal and the subsequent action plans, including the “Action Plan on Circular Economy” and “A new Industrial Strategy for a globally competitive, green and digital Europe”, recently adopted by the European Commission, indicate that sustainability and environmental concerns, among others, are becoming more and more important in the eyes of the legislator. Sustainable development is one of the core objectives of the European Union, as indicated in Article 11 TFEU, Article 3(3) TEU and Article 37 CFR. It is to be expected that even more emphasis will be put on those issues in the future as climate concerns grow bigger.

In this context, one can wonder how the current legal framework, and especially the European Trademark law and its interpretation by the Court of Justice, will be adapted to better match the changing societal needs. Although the current state of case-law surrounding trademark infringement does not involve many cases directly related to sustainability, it must be argued that the position of the CJEU in the past gave quite a strong protection to brands, thereby leaving little room for sustainable initiatives using an existing trademark to take place. Nonetheless, as the political agenda shifts towards including sustainability to a greater extent, it is relevant to investigate how trademark law can change.

Keywords: Sustainability, Trademark, European Green Deal, Circular Economy.

Abbreviations

CFR - Charter of Fundamental Rights

CJEU - The Court of Justice of the European Union

EGD - European Green Deal

EPR - Extended Producer Responsibility

EU - European Union

IP - Intellectual Property

SDG - Sustainable Development Goal

TEU - Treaty on the European Union

TFEU - Treaty on the Functioning of the European Union

TRIPS - Trade-Related Aspects of Intellectual Property Rights

UN - United Nations

WIPO - World Intellectual Property Office

WTO - World Trade Organisation

1. Introduction

1.1 Problem Description

Sustainability is becoming more and more important in the daily life of every actor in the European Union. Multiple initiatives are taking place on both the political scene, with the recent passing of the European Green Deal (EGD) and its subsequent *so-called* Action Plans, and the legal scene with the passing of multiple legislations *directly* aiming at achieving climate neutrality and safeguarding the environment¹. All of this can be inscribed in the bigger picture of a global push for achieving a more sustainable way of producing and consuming, which will allow in return future generations to benefit from the earth's resources in a similar way as past and current generations did.

In light of this, it is clear that many changes will need to occur and that the current state of the law will be challenged to include a more in depth aspect of sustainability. One of those areas of law is Intellectual Property (IP) Law and, more specifically given the scope of this thesis, trademark law. Intellectual property rights are often described as being technology neutral when it comes to sustainability, and trademark itself can be a major obstacle to initiative that aims at promoting sustainable production and consumption. In this context, this thesis investigates the link between sustainability and trademark law, and how the latter can be adapted to better answer the current societal needs driven by climate change and sustainability issues.

1.2 Background

Intellectual property rights?

Intellectual Property refers to the intangible rights conferred for the recognition and the protection of individuals and corporations' intellectual creation that have

¹ See, for example, Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law), COM(2020) 80 final.

been brought about.² IP rights are *exclusive* economic rights in the sense that they grant the right holder the legal ability to prohibit third parties from engaging in some behaviours and, in particular, making any use of the protected object or subject. Broadly speaking, there are four main different IP rights existing in the European Legal system:

- Trademark;
- Patent;
- Copyright;
- Design;
- Other protection rights related to intellectual property.

Intellectual Property rights can be regulated on different levels. First, they can be regulated on an international level. For example, the Berne Convention regulates copyrights and related rights, and the Paris Convention regulates patent rights and the Madrid Agreement regulates Trademarks. These conventions lay out the minimum standards that must be applied for the protection of the aforementioned rights in each of the jurisdictions of the contracting parties, and are regulated by the World Intellectual Property Office (WIPO). Similarly, there is an international agreement on Intellectual Property rights regulated by the World Trade Organisation (WTO). This is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which sets minimum standards and lays out the ground for how IP rights should be regulated for nationals of other contracting members of the agreement. Second, IP rights are regulated on a national level. This implies that each country has its own sets of rules. Finally, IP rights can be regulated by contract between different parties, whether those parties are public (e.g. states) or private bodies (e.g. individual or corporations).

Having different levels on which regulations of IP rights can be found can make it complicated to have a uniformized system overall. If we take the European Union as an example, it must be noted that each Member State can provide their own rules and conditions for the recognition and protection of copyright (among other

² Justine Pila and Paul Torremans, *European Intellectual Property Law* (2nd edn, Oxford University Press 2016) 4.

rights) and, in spite of some efforts from the European legislator to uniformize those rights, there is still no unitary *European* copyright. Only Trademark and Design can be regulated both on the national level (by national laws and by European directives aiming at harmonising those laws) and on the European level since the introduction of a Community Design³ and Community Trademark.⁴

As mentioned before, a trademark is a type of intellectual property right. It is an important indicator of a product's quality by guaranteeing its origin.⁵ Trademarks have historically been part of the private sectors and, in that sense, were acquired through use, rather than by grant of the state. However, changing industry and ever-evolving requirements and competition standards made it necessary for the trademark system in Europe to be changed in order to match the needs brought by those changes. To achieve this purpose, different legislations regarding trademarks were introduced progressively, culminating with the creation of a European Community Trademark in 1993.⁶ This shows that laws - and especially in that case - trademark laws, have evolved to match the needs of society then.

Towards a more sustainable world?

When looking at the current state of the world, as of 2022, it must be argued that some of the main threats to society are climate change, pollution and waste management, according to the World Economic Forum.⁷ One initiative proposed to tackle those issues is the integration of the concept of sustainability in daily life, which can induce a drastic change of paradigms and, in turn, tackle climate change.

Sustainability, as it is understood under the common definition introduced in the Brundtland Commission in 1987,⁸ is an overarching term that englobes, traditionally, three dimensions: social, financial and environmental. Those are

³ See Regulation 6/2002 on Community Designs.

⁴ See Regulation 2017/1001 on the Community Trademark.

⁵ Justine Pila and Paul Torremans, *European Intellectual Property Law* (2nd edn, Oxford University Press 2016) 343.

⁶ "Community Trademark: Everything You Need to Know" (UpCounsel)

<<https://www.upcounsel.com/community-trademark>> accessed April 11, 2022.

⁷ Whiting K, "Global Risks Report 2022: What You Need to Know" (World Economic Forum January 11, 2022) <<https://www.weforum.org/agenda/2022/01/global-risks-report-climate-change-covid19/>> accessed April 11, 2022.

⁸ World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987), 43.

known as the three pillars of sustainability⁹. Although the definition given in 1987 started much of the political push towards the achievement of a more sustainable society, it remained vague and unclear as to its goals¹⁰. In the early 21st century, the definition given to sustainability was further made more specific in the sense that sustainability should mean “the development that meets the needs of the present while safeguarding Earth’s life-support system, on which the welfare to current and future generations depends”.¹¹

On the international scene, there have been different political pushes towards sustainability. The most notable example of such initiatives is the Agenda 2030 of the United Nations¹² (UN) adopted in 2015. This agenda consists of 17 Sustainable Development Goals (SDGs) and 169 sub-targets that the UN member states have agreed to work on in order for them to be achieved by 2030.¹³ The scope of these SDGs is wide and ranges from ending poverty and hunger to developing sustainable cities. In spite of this wide range of objectives, there is a major emphasis on the protection of the environment and, in more general terms, the fight against climate change. For example, SDG 13 states ‘Take urgent action to combat climate change and its impacts’ which indicates a direct relationship between the measures and policies adopted in the context of this goal and the fight against Climate Change. However, some other SDGs can be linked, maybe more indirectly, to contributing to fighting Climate Change as well. An example of this would be Goal 12 which states ‘Ensure sustainable consumption and production patterns’. Although it does not clearly state that it aims at tackling Climate Change, waste is one of the major sources of pollution in Europe (especially batteries and electronic devices)¹⁴. In fact, 5 tonnes of waste is produced annually

⁹ Purvis B, Mao Y and Robinson D, “Three Pillars of Sustainability: In Search of Conceptual Origins” (2018) 14 Sustainability Science 681.

¹⁰ Ole-Andreas Rognstad and Inger B. Ørstavik, “Introduction”, Intellectual property and sustainable markets (Edward Elgar Publishing 2021) 2.

¹¹ David Griggs et al. “Sustainable development. Goals for People and Planet”, 495 *Nature* (2013) 305-330, 306.

¹² “Transforming Our World: The 2030 Agenda for Sustainable Development ”(United Nations) <<https://sdgs.un.org/2030agenda>> accessed April 4, 2022.

¹³ “Sustainable Development Goals” (World Health Organisation)

<https://www.who.int/health-topics/sustainable-development-goals#tab=tab_1> accessed April 9, 2022.

¹⁴ Ole-Andreas Rognstad and Inger B. Ørstavik, “Revisiting the concept of Trademark piracy in light of sustainable development goals: a discussion of the Norwegian Apple Case”, Intellectual property and sustainable markets (Edward Elgar Publishing 2021) 110.

on average by each European inhabitant.¹⁵ For this reason, it can be argued that SDG 12 is strongly linked to the fight against Climate Change.

The integration of sustainable development in the European Union started with the entry in force of the TEU and TFEU, and made the Charter of Fundamental Rights legally binding. The most recent culmination of such interest can be attributed to the European Green deal, introduced at the end of 2019. The EU will focus on Clean Energy, Sustainable Agriculture, Biodiversity and Sustainable Industry. There is a strong emphasis on sustainable development with regards to the environment. Targets 1, 2 and 3 all seek to promote a shift towards a more environmentally sustainable society.

The intersection between Trademark and sustainability

There is a quite extensive on-going discussion about the impact of *patents* on innovation, and the subsequent role they play in the greening of the economy. There is, however, a less extensive discussion on the same role trademarks can play despite its legal and economic relevance. For example, it was determined that sectors that rely on trademarks account for 37% of EU GDP.¹⁶

Therefore, the question about trademark law remains: is it adequate to match the needs for a more sustainable society?

It is usually commonly accepted that Intellectual Property rights are neutral when it comes to sustainability. If we take the example of patents, it can be asserted that patent law is technology neutral insofar as it will not reward sustainable technologies more, as compared to other technologies.¹⁷ Similarly, a trademark, in its very nature, does not promote sustainability. However, with the introduction of the European Green Deal, its objectives and targets, it is fair to assume that new products will be created and brought on the European Market while already-existing products may need to be reconsidered in order to match the new standards.¹⁸

¹⁵ “Waste and Recycling” (European Commission)

<https://ec.europa.eu/environment/topics/waste-and-recycling_en> accessed April 9, 2022.

¹⁶ EUIPO, *Green EU Trademark: Analysis of goods and services specifications, 1996-2020* (2021).

¹⁷ Ole-Andreas Rognstad, Inger B. Ørstavik, “Intellectual Property rights, technology development and market dynamics in the renewable energy sector”, *Intellectual property and sustainable markets* (Edward Elgar Publishing 2021) 163.

¹⁸ EUIPO, *Green EU Trademark: Analysis of goods and services specifications, 1996-2020* (2021).

There is therefore some room for discussion as to how intellectual property rights, especially Trademark, could be adapted to better fit the current situation regarding sustainable development.

1.3 Purpose and research question

Against the given background, the purpose of this thesis is to investigate the current European Trademark framework in light of the new political objectives regarding sustainable development. More specifically, this thesis will investigate whether the current state of trademark law fosters companies to engage in more sustainable practices, including activities such as repairing, reusing, recycling and upcycling. Finally, this thesis will suggest amendments to the current legal system in order to match the current societal aspirations and political pushes related to sustainable development. To achieve this, the following research questions will be answered:

1. What place does sustainability hold in European law, and what are the current political considerations for it in the European Union?
2. In what way, if any, does trademark law allow companies to engage in environmentally sustainable behaviours ?
3. How could trademark law be changed to answer the current societal needs better?

1.4 Delimitations

This thesis focuses on the link between trademark and sustainable development from a European perspective. Therefore, only European legislation will be investigated although some international texts, being part of the EU legal corpus, will be mentioned.

It is assumed that the reader is familiar with the general functioning of the European Institutions and the European rule of law. Although some general knowledge about important milestones in European law will be provided throughout this thesis to support some positions brought forward, it is not the purpose of this thesis to give a full explanation and history of the different steps that lead to the current legal situation in the EU.

It must also be noted that this thesis will investigate specifically some issues that already exist when it comes to sustainability and trademark, including the right to repair, reuse, recycle and upcycle protected goods.

The final delimitation of this thesis that should perhaps be more considered as a remark is the fact that this thesis will focus on sustainable development in itself, and will not consider environmental law. Where the former consists more of a way of thinking and a specific manner of approaching the policy-making process, the latter targets specific areas of action such as anti-pollution, waste management, etc.¹⁹

1.5 Materials and method

This thesis follows the EU legal method, which aims at analysing the different sources of binding and non-binding laws in the European Union, put them into perspective and draw conclusions from the analyses and comparisons. This EU legal method also relies on a teleological approach which aims at highlighting the significance of the general objectives laid out in the EU Treaties.²⁰

More specifically, this thesis takes into account the norm structure and the legal sources that regulate sustainability and trademark. For that matter, the EU treaties and the Charter of Fundamental Rights and the Directives, Regulations, Decisions on the one hand, and the case-law of the Court of Justice of the European Union (CJEU), on the other hand, will be analysed to understand the position that sustainability currently holds in the European Legal corpus and the intersection between that and the European Trademark law.

Additionally, a substantial part of this thesis will rely on suggesting amendments to the existing trademark law. Overall, this thesis can be understood as a mix of *lex lata* and *lex ferenda* as it analyses the current state of the European Trademark law, and builds on that to suggest how that area of law could be in the future. Given the quite new area of law that is sustainability, it is normal to include a substantial part of *lex ferenda* as it is an evolving topic that must be integrated in the policies.

¹⁹ Beate Sjøfjell and Anja Wiesbrock, “Corporate governance for sustainability: the necessary reform of EU company law”, *The Greening of European Business under EU Law* (Routledge 2015) 97.

²⁰ *ibid* 52.

This thesis will rely on the following material primarily, although other legal, academic, organisational and discussional sources will be included throughout this work to support some findings or ideas. In terms of academic resources, these reference books will be mainly used as they provide some clear understanding as to what place sustainability currently holds in the European Union and, more specifically, what role IP (including trademark) plays on that level.

- Sjøfjell B and Wiesbrock A, *The Greening of European Business under EU Law* (Routledge 2015)
- Pila J and Torremans P, *European Intellectual Property Law* (2nd edn, Oxford University Press 2016)
- Rognstad O-A, Ørstavik IB, *Intellectual property and sustainable markets* (Edward Elgar Publishing 2021)

It must be noted that a significant amount of sources used in this thesis are non-legal because of, again, the fact that sustainability and law is a very new area that must be explored. Those non-legal sources remain important as they argue how key concepts can be defined and could be interpreted by courts.

1.6 Structure

This thesis will be divided into three main different parts. The first chapter will focus on providing a deep understanding of the current legal and political situation regarding sustainability as well as an understanding of European trademark law. The second chapter will build upon the foundational knowledge laid out in the first chapter and will first investigate the intersection between trademark law and sustainability, and will then look at some improvements possible to be made to trademark law. The final part of the thesis will seek to directly answer the research question and open the door to future investigation.

2. Overview of the current situation in the matter of Sustainability and Trademark in the European Union

The purpose of this first chapter is to lay down the legal ground behind sustainable development in the European Union, as well as trademark law in the Union. To achieve this, the first section of this chapter will provide an overview of the European Treaties and the provisions of sustainable development therein. The second section of this chapter will build on the first one and provide an overview of the current political agenda regarding sustainable development in the EU. Finally, an introduction to European Trademark law will be included.

2.1 Overview of Sustainability in the European Union

This first section will analyse the first area of law that this thesis covers, namely sustainability. The former does not exist in one legislation or treaty on its own, as it is a fairly new area that has not been fully codified in the legal corpus of the European Union. For this reason, the first subsection will investigate the European Primary legislation and will further look at the state of secondary legislation.

2.1.1 General understanding of Sustainability in EU law

Sustainable development has a strong position in the European legislation as it is outlined in the European Treaties. And because those treaties encompass the ultimate goals and targets of the European Union,²¹ it tells us that sustainable development has (or should have) an important place in the interpretation of the treaties provisions and laws. In fact, the interpretation of EU law is based on a teleological approach which implies that understanding what the objectives of the European Treaties are will shed a light on which direction the law-making should go to be in line with those treaties' objectives.

²¹ Beate Sjøfjell and Anja Wiesbrock, "The legal significance of Article 11 TFEU for EU institutions and Member States" *The Greening of European Business under EU Law* (Routledge 2015) 52.

The following section will first give a quick historical overview of the different treaties that have been signed which lead to the current situation in the EU. Following this, this section will investigate in depth the legal significance of sustainability in the European Treaties.

2.1.1.1 European Treaties

Towards more European integration

The European legislation ensemble is complex and varied. The primary sources of law in the EU can be found in its Treaties while the more detailed legislations are expressed by the secondary source of law such as the directives and regulations. The European Union went through multiple waves of integration in which different legal instruments were used to achieve the underlying goals. The most recent achievement of European Integration can be attributed to the entry in force of the Treaty of Maastricht (also known as the Treaty on European Union (TEU)) in 1993 which sought to establish a ‘new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen’.²² Following the signature of this treaty (which was not as straightforward as it was initially thought²³). Following its entry in force, further pushes for deeper European integration led to the signature of the Treaty of Amsterdam, which sought to amend the TEU and further establish the competences held by the EU as well as the European Communities.

The European Primary Legislation

Since 2009, the current structure and functioning of the EU is regulated by the Treaty of Lisbon, which represents the culmination of more than 10 years of discussions about how the EU and its institutional implications could be reformed.²⁴ The inherent purpose of the Lisbon Treaty is the establishment of the goals of the EU and its ways of action. This purpose is translated in the TEU (in

²² Article 1 TEU.

²³ Several Member states (including Denmark, France and the UK) held referendums seeking to have a clear understanding of the opinion of the population regarding the ratification of the TEU. The first referendum conducted in Denmark in 1992 resulted in the non-ratification of the Treaty; France’s referendum showed that only 51% of the population was in favour while much political turmoil occurred in the UK for the same reason. Eventually, after amending some provisions, the Treaty was ratified in 1993.

²⁴ Eeva Pavy, “Facts Sheet on the European Union: The Treaty of Lisbon” (European Parliament October 2021) <<https://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon>> accessed April 15, 2022.

its most recently amended state) and the Treaty on the Functioning of the European Union (TFEU) which are both treaties of the same value.²⁵ The TEU focuses on a limited set of items such as the definition of the mission and values of the EU and the legal personality of the Union, whereas the TFEU focuses on the explicit competencies of the Union.²⁶

Similarly, the Charter of Fundamental Rights (CFR) became binding in 2009²⁷ after the Lisbon Treaty was signed, as set out in Article 6(1) of TEU which states:

The Union **recognises the rights, freedoms and principles** set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the **same legal value as the Treaties**.

In brief, there are 3 main pieces of primary law that need to be investigated to understand the place that sustainable development and sustainability play in the European Union. Those treaties are in nature binding,²⁸ and have direct and indirect effects as indicated in *Van Gend en Loos*.

2.1.1.2 Sustainable development in EU law

Sustainable Development was included in the Primary Legislation of the European Union as an overarching goal the first time in 1987 in the Single European Act (SEA), following some actions that took place in the 1970s and, most importantly, the decision for the CJEU in the *ADBHU* case. The wording of the provision on sustainable development was changed multiple times with the entry in force of the different Treaties. Notably, it was reinforced by the Treaty of Maastricht,²⁹ in which the provision was worded as it is currently in the TFEU.

²⁵ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Text and Materials* (Cambridge University Press 2019) 32.

²⁶ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Text and Materials* (Cambridge University Press 2019) 32.

²⁷ “European Charter of Fundamental Rights: Five Things You Need to Know” (European Parliament December 1, 2019)

<<https://www.europarl.europa.eu/news/en/headlines/society/20191115STO66607/european-charter-of-fundamental-rights-five-things-you-need-to-know>> accessed April 15, 2022.

²⁸ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Text and Materials* (Cambridge University Press 2019) 113.

²⁹ The wording of the provision on sustainable development was changed from “shall be competent” to “must be integrated”, which is much more explicit in terms of integration. The provision became more legally binding whereas it used to be worded in a way that suggested that it should be to the discretion of the member states to implement it, or not.

In the TFEU, Article 11 states:

Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.

Additionally, Article 3(3) states:

The Union shall establish an internal market. **It shall work for the sustainable development of Europe** based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

Finally, in the Charter of Fundamental Right, Article 37³⁰ states:

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.

It appears therefore clearly that sustainable development has a strong legal position in the objectives outlined in the Treaties of the European Union. As it was previously mentioned, the TEU, TFEU and CFR are all binding legislations. Article 11 TFEU particularly matters when considering the question of sustainable development in the EU, and it brings up some duties for the European institutions namely the duty to (1) stay within the *framework* of the general objectives laid out in the treaties, (2) find balance between those different objectives, (3) act and (4)

³⁰ Article 37 CFR lies in the category of 'principles' in the Charter, rather than in the category of rights. In that sense, it provides a framework for public bodies to design policies, but fails to provide any sanctions for failure to comply with the article. For more information about Article 37, see Marin-Duran, Gracia and Morgera, Elisa, Commentary on Article 37 of the EU Charter of Fundamental Rights - Environmental Protection (2013). Edinburgh School of Law Research Paper No. 2013/20, Europa Working Paper No. 2013/2.

take specific actions in specific circumstances.³¹ The second duty provides that all objectives must be taken into account when designing policies, and in that case, there is a special emphasis on sustainable development in the Treaties. It has therefore a certain importance and should be considered accordingly.

Specifically regarding environmental protection, the CJEU even more stated that ‘any legal basis in the Treaties is also a legal basis for environmental protection’.³² This principle was further followed in *Concordia Bus*³³ as, in this case, the Court emphasised the importance of environmental protection in a situation where a traditional economic area was under investigation.³⁴ In the *ADBHU* decision, the CJEU held that the Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils ‘must be seen in the perspective of environmental protection, which is one of the Community’s essential objectives’.³⁵ Additionally, Advocate General Bot stated in his Opinion in *Bois de Vielsalm* that the fact that the environmental protection is raised in the different Treaties of the European Union³⁶ raises the concern to the rank of EU target, which should therefore be addressed more seriously.³⁷ Subsequent to this opinion, Advocate General Sharpston stated that the Treaties provision regarding environmental protection (Article 3(3) TEU and Article 37 CFR) had become guiding goals for the development of EU policies.³⁸ The importance of the three provisions on sustainable development and protection of the environment was further highlighted more recently by Advocate General Kokott.³⁹

It can be therefore asserted that the importance of the protection of the environment and sustainable development, as inscribed in the European Treaties, has been emphasised multiple times, though in different contexts. Given its

³¹ Beate Sjøfjell and Anja Wiesbrock, “The legal significance of Article 11 TFEU for EU institutions and Member States”, *The Greening of European Business under EU Law* (Routledge 2015) 54.

³² Judgement of the Court of 21 September 1989, *Greece v Council*, Case C-62/88, EU:C:1989:339.

³³ Judgement of the Court of 17 September 2002, *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne*, Case C-513/99, EU:C:2002:495.

³⁴ Beate Sjøfjell and Anja Wiesbrock, “The legal significance of Article 11 TFEU for EU institutions and Member States”, *The Greening of European Business under EU Law* (Routledge 2015) 63.

³⁵ Judgment of the Court of 7 February 1985, *Procureur de la République v Association de défense des brûleurs d’huiles usagées*, Case 240/83, EU:C:1985:59, para 13.

³⁶ See Opinion of AG Bot in Case C-195/12, *IBV & CIE*, EU:C:2013:293, para 82.

³⁷ Alicja Sikora, “European Green Deal – Legal and Financial Challenges of the Climate Change” (2020) 21 ERA Forum 681.

³⁸ See Opinion of AG Sharpston in Case C-557/15, *Commission v Malta*, EU:C:2017:613, para 44; See also Opinion of AG Sharpston in Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, EU:C:2017:760, para 68.

³⁹ See Opinion of AG Kokott in Case C-723/17, *Craeynest and Others*, EU:C:2019:168, para 53.

position in the three main Treaties, it can be argued that including sustainable development in the policy-making of the Union is a general EU target. Generally speaking, the CJEU insisted on the fact that ‘environmental protection measures can be effectively enacted on the basis of any legal basis of the treaties, as long as the requirements of the basis are met.’ In other words, it is asserted by the CJEU that it is possible to pass pieces of legislation that will target sustainable development as it is both inscribed in the European Treaties, and there is an underlying willingness and competence from the Union to act on it.

2.1.2 For a greener Future?

The integration of sustainable development in the European Union started, as explained in the previous section, with the entry in force of the Lisbon Treaty, which introduced the TEU and TFEU, and made the Charter of Fundamental Rights legally binding, all of which have provisions that target sustainable development.

It can be therefore inferred that the general interest for sustainable development has been increasing over the past decades both in the legal and political. The most recent culmination of such interest can be attributed to the European Green deal, introduced at the end of 2019. The EGD can be understood as the translation of the UN SDGs in the European policy-making framework. The purpose of the EGD is to improve the well-being of people⁴⁰ and represents the ‘new growth strategy that helps [...] cut emissions while creating jobs’ according to Ursula Von Der Leyen, the President of the European Commission. The EGD lays out four targets, namely:⁴¹

- 1) Become climate-neutral by 2050;**
- 2) Protect human life, animals and plants, by cutting pollution;**
- 3) Help companies become world leaders in clean products and technologies;**
- 4) Help ensure a just and inclusive transition.

⁴⁰ “What Is the European Green Deal”

<https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en> accessed April 9, 2022.

⁴¹ *ibid.*

It appears clearly from these four main targets that there is a strong emphasis on sustainable development with regards to the environment, as target 1, 2 and 3 all seek to promote a shift towards a more environmentally sustainable society, which goes along the lines of the core objective of the UN SDGs.⁴² Regarding environment protection, more specifically, the EU will focus on Clean Energy, Sustainable Agriculture, Biodiversity and Sustainable Industry (for which the EU will develop its Sustainable Industry strategy that fosters the development of a circular economy).

Although the EGD is a political document that aims at laying out the future aspirations of the European Union and gives indications regarding the direction towards which the policies that will be passed in the future will go, it remains non-legally binding in its nature. In fact, the EGD can be considered as a package of initiatives and targets with the ultimate goal of achieving climate neutrality by 2050.⁴³ Since it was adopted, a few directives and regulations directly targeting climate change have been passed. For example, Regulation 2021/1119 establishing the framework for achieving climate neutrality and amending Regulation 401/2009⁴⁴ and Regulation 2018/1999,⁴⁵ or the recent proposal of the European Commission for a directive on Corporate Sustainability Due Diligence, suggested in February 2022.

Following the EGD, the European Commission introduced the European Green Deal Investment Plan which sets out the financial strategy of the European Union that will allow the successful achievement of the objectives laid out in the EGD. The Investment Plan seeks to reach at least €1 trillion over the upcoming decade, that will be targeted towards sustainable investment.⁴⁶ The ultimate goal being to

⁴² Marisa De Schepper, "How Does the EU Green Deal Contribute to the UN SDGs?" (Greener EU September 23, 2021) <<https://www.greenereu.com/post/how-does-the-eu-green-deal-contribute-to-the-un-sdgs>> accessed April 9, 2022.

⁴³ "European Green Deal" (Consilium March 21, 2022) <<https://www.consilium.europa.eu/en/policies/green-deal/>> accessed April 9, 2022.

⁴⁴ Regulation on the European Environment Agency and the European Environment Information and Observation Network.

⁴⁵ Regulation on the Governance of the Energy Union and Climate Action.

⁴⁶ "Financing the Green Transition: The European Green Deal Investment Plan and Just Transition Mechanism" (European Commission January 2020) <https://ec.europa.eu/regional_policy/en/newsroom/news/2020/01/14-01-2020-financing-the-green-transition-the-european-green-deal-investment-plan-and-just-transition-mechanism> accessed May 3, 2022.

enable public and private bodies to effectively be engaged in a climate-neutral and green economy that mainly relies on the Circular Economy.⁴⁷

In addition to the transition of the economy towards climate-neutrality, the European Commission also introduced a change of industrial strategy. The objective thereof is to make the European Union the world leader in the circular economy, thereby decarbonising its processes along the entire supply chain.⁴⁸

To achieve this new industrial strategy, the European Commission introduced the Action Plan on Circular Economy⁴⁹. The purpose of this document is to list the strategy of the European Union when it comes to decarbonizing the economy, shifting the industrial strategy, and goes one step further than the EGD as it focuses on actionable measures that will have a positive impact on the environment in the EU.⁵⁰ The Action plan highlights:

The plan presents a set of **interrelated initiatives** to establish a strong and coherent product **policy framework** that will **make sustainable products, services and business models the norm** and transform consumption patterns so that no waste is produced in the first place. This product policy framework will be progressively rolled out, while key product value chains will be addressed as a matter of priority. Further measures will be put in place to **reduce waste** and ensure that the EU has a **well-functioning internal market for high quality secondary raw materials**. The capacity of the EU to take responsibility for its waste will also be strengthened.

There is a special emphasis on repairing and recycling in the document, which states:

⁴⁷ Alicja Sikora, “European Green Deal – Legal and Financial Challenges of the Climate Change” (2020) 21 ERA Forum 681.

⁴⁸ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, A new Industrial Strategy for a globally competitive, green and digital Europe, COM (2020) 102 final.

⁴⁹ See Appendix I for a representation of the different concepts revolving around the Circular Economy.

⁵⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A new Circular Economy Action Plan For a cleaner and more competitive Europe, COM(2020) 98 final.

Many products break down too quickly, cannot be **easily reused, repaired or recycled**,⁵¹ and many are made for single use only. At the same time, the single market provides a critical mass enabling the EU to set global standards in product sustainability and to **influence product design** and value chain management worldwide.

The Action further specifies:

In order to make products fit for a climate-neutral, resource-efficient and circular economy, reduce waste and ensure that the performance of front-runners in sustainability progressively becomes the norm, the Commission will **propose a sustainable product policy legislative initiative**.

This is a clear indication that there is a willingness from the legislative bodies in the European Union to include Climate Change and Sustainable Development in the future legislations and policies. The general conclusion that can be drawn from the recent achievement related to sustainable development (i.e. the EGD and the Circular Economy Action Plan) and the already-existing legal framework that circulates around it in the EU Treaties is that there is both a legal and political ground that exist for including to a greater extent sustainable development in the everyday life and the policy making in the EU.

2.2 Overview of the European Trademark Law

This second subsection will investigate the state of trademark law in the European Union by considering both the European Directive on Trademark (which aims at harmonising national laws), and the European Regulation on trademark (which created a Community Trademark).

⁵¹ See Kirchherr, D Reike, and M Hekkert, “Conceptualising the Circular Economy: An Analysis of 114 Definitions” (2017) 127 Resources, Conservation & Recycling 221. Reusing refers to “Reuse by another consumer of a discarded product which is still in good condition and fulfils its original function”; Repairing refers to “Maintenance of defective product so it can be used with its original function”; Recycling refers to “use of discarded product or its parts in a new product with a different function.”.

Trademarks today are a key component in the commercial scene.⁵² Trademark cover objects that range from logos and images to catch-phrases and fragrances.⁵³ As it is the case with all IP rights, trademark is mostly regulated on a national level,⁵⁴ although there have been many international agreements signed in order to streamline the treatment of foreign trademarks in the territory of the contracting members of those international agreements.⁵⁵ With the integration of European countries in the European Union, it became more and more necessary to harmonise the trademark laws and develop a single European trademark that would be valid in the entire community.

This resulted in the passing of two main legislations: the Directive 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 (hereunder referred to as the Trademark Directive), and the Regulation 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (hereunder referred to as the Trademark Regulation). Both legislations are constructed in a similar way and use relatively the same wording and, for that reason, some provisions of the Trademark Directive *only* will be explicitly explained, although the equivalent article in the Trademark Regulation will be mentioned.

In the European Union, a trademark can be roughly defined⁵⁶ as *any sign*⁵⁷ that has a *distinctive character*⁵⁸ and that is *capable of being registered on a register*.⁵⁹ The three components are of equal importance. The first criteria (i.e. any sign) was later defined more in depth by judgements of the CJEU. Notably, in *Philips Electronics BV*, it was argued by the defendant that Article 3 of the Trademark Directive could mean ‘anything that can convey information’ can be registered as

⁵² Justine Pila and Paul Torremans, *European Intellectual Property Law* (2nd edn, Oxford University Press 2016) 343.

⁵³ Judgement of the Court of 12 December 2002, *Sieckmann*, Case C-273/00, ECLI:EU:C:2002:748.

⁵⁴ Emmanuel Kolawole Oke, "Territoriality in Intellectual Property Law: Examining the Tension between Securing Societal Goals and Treating Intellectual Property as an Investment Asset" (2018).

⁵⁵ See the TRIPS agreement for example that requires a certain level equivalent protection for all the contracting members.

⁵⁶ Justine Pila and Paul Torremans, *European Intellectual Property Law* (2nd edn, Oxford University Press 2016) 347.

⁵⁷ See Article 3 Trademark Directive: A trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds [...].

⁵⁸ See Article 3(a) Trademark Directive: distinguishing the goods or services of one undertaking from those of other undertakings.

⁵⁹ See Article 3(b) Trademark Directive: being represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.

a trademark. However, the CJEU argued later in *Dyson Ltd* that there *needs* to be a sign, that is, bland signs are not capable of being registered as a trademark. The second criteria (e.g. distinctiveness of character) requires the trademark to be recognisable by the average consumer that is reasonably well informed and circumspect.⁶⁰ The final criteria (e.g. capable of being registered on a register) emphasises the need for the mark to be clear to the competent authorities so that what is registered cannot be equivocal. In brief, any sign can be registered as a trademark if it satisfies the condition of being capable of being represented graphically and be distinguishable from other undertakings' signs. In European Law, a trademark aims at fulfilling some essential functions such as guaranteeing the origin⁶¹ or the quality, the investment, communication or advertising function.⁶²

In addition to defining the scope of registration of trademark, both legislations lay out the grounds for absolute and relative refusal, which can be found under Article 7 and 8 of the Trademark Regulation, and Article 4 to Article 9 of the Trademark Directive. The absolute grounds for refusal include, among others, if the trademark goes against the public interest, or if it is inherent to the property of the sign. The relative grounds for refusal, on the other hand, mainly refer to the fact that a trademark registration may be refused if the said trademark is found to be in collision with other rights.⁶³

Those legislations also include provisions on the rights granted to the trademark holder. For example, Article 10 of the Trademark directive lists the rights conferred to the right holder once the trademark has been registered.

Additionally, the two legislations lay out the grounds for revocation and limitation of use of the trademark.⁶⁴ Article 14(1)⁶⁵ of the Trademark Directive states:

⁶⁰ Judgement of the Court of 8 May 2008, *Eurohypo AG v European Union Intellectual Property Office*, C-304/06, ECLI:EU:C:2008:261.

⁶¹ Judgement of the Court of 12 November 2002, *Arsenal v Reed*, C-206/651, ECLI:EU:2002:651, para 47.

⁶² Judgement of the Court of 18 June 2009, *L'Oréal v Bellure*, C-487/07, ECLI:EU:C:2009:378, para 58.

⁶³ E.g. the trade mark collides with an earlier trade mark (Article 5(1) Trademark Directive); the trade mark collides with another intellectual property right (Article 5(4)(b)).

⁶⁴ See Article 14, 15 and 16 of the Trademark Regulation.

⁶⁵ Article 14 of the Trademark Directive lays out the limitation of use of trademark while Article 15 lays out the exhaustion of the rights conferred by a trademark. Article 19, 20 and 21 of the Trademark Directive refer to the revocation of the trademark.

A trade mark shall **not entitle the proprietor to prohibit a third party** from using, in the course of trade:

- (a) the name or address of the third party, where that third party is a natural person;
- (b) **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;**
- (c) the trademark 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.

Following this, both legislations introduce a provision on exhaustion, known as the *doctrine of exhaustion*. Article 15(1)⁶⁶ of the Trademark Directive states:

A trade mark 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 trade mark by the proprietor or with the proprietor's consent.

However, the legislation also specifies that the doctrine of exhaustion also has limitations. Article 15(2) of the Trademark Directive indeed states:

Paragraph 1 shall 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.

⁶⁶ Article 15 of the Trademark Regulation.

Finally, one important addition brought by the Trademark Directive and the Trademark Regulation is the provision related to Certification mark, laid out in Section 6 of the Trademark Directive (more specifically Article 27 and Article 28 of that said Directive), and in Article 83 and Article 84 of the Trademark Regulation. In the Directive, it is provided⁶⁷ that:

‘guarantee or **certification mark**’ means a trade mark which is described as such when the mark is applied for and is capable of distinguishing goods or services which are certified by the proprietor of the mark **in respect of material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics, from goods and services which are not so certified.**

The Directive further specifies:⁶⁸

Member States may provide that **a guarantee or certification mark is not to be registered** unless the applicant is competent to certify the goods or services for which the mark is to be registered.

Examples of certification marks include CEBEC⁶⁹ and the CE mark, which is mandatory for putting products in the European Economic Area (EEA) and that certifies the product complies with the general requirements for placing a product in the common market that are laid down by the European Commission.⁷⁰

Clearly, there are already provisions in European Trademark Law that targets Green Certification, as stated in Article 27(a). This could seem to be a partial answer to the purpose of this thesis, although the core purpose is not to investigate whether there are some sorts of green certification in Europe, which is the case. Rather, the purpose is to investigate whether the current state of trademark law allows for third parties to make a sustainable use of existing trademarks.

⁶⁷ See Article 27(a) of the Trademark Directive.

⁶⁸ See Article 28(2) of the Trademark Directive.

⁶⁹ CEBEC is a Belgian certification mark that rates the quality of electrical appliances.

⁷⁰ Official Journal of the European Union, C 272, 26 July 2016.

2.3 Summary

This first chapter focused on giving a detailed description of the legal framework existing in the European Union in different topics. The first section of this chapter focused on laying out the current legal ground that exists within the European Union regarding sustainable development. When it comes to primary legislation, sustainable development is included in the three European Treaties, namely in the Treaty on the European Union (under Article 3(3)), in the Treaty on the Functioning of the European Union (under Article 11) and in the Charter of the Fundamental Rights (under Article 37). Having sustainable development included in the Treaties implies that it *is* an overarching goal, as those treaties (specifically TEU and TFEU) indicate what are the general *objectives* of the EU. Furthermore, it indicates that there is a legal basis for the European Institutions to include sustainability in every piece of legislation and policy passed on the European level, and that there are different duties that exist for the European Institutions in light of Article 11 TFEU, notably the duty to act, and the duty to find balance between the different objectives laid out in the European Treaties. Following this, an overview of the current political background regarding sustainability in the EU was provided. It was found that the latest achievement in the matter can be attributed to the European Green Deal which lays out a strategy and a packet of policies that aim at ensuring the EU becomes carbon-neutral by 2050, and that it is usually considered as the implementation in the EU of the Sustainable Development Goals introduced by the United Nations in the context of Agenda 2030.

The second part of this chapter focused on providing a general understanding what trademark law consists of in the EU. Trademarks are regulated in two ways in the EU. First, they are regulated by a Regulation, which creates a Community Trademark, valid in all the Member States of the European Union while requiring a single registration. Second, trademarks are regulated by a directive, which aims at harmonising the national laws of the different Member States. Both legislations include similar provisions and use similar wordings. According to these legislations a trademark can be roughly defined as any sign that has a distinctive character and that is capable of being registered on a register. Additionally, the legislations include a provision best known as the doctrine of exhaustion which

states that the trademark right fulfils its intended economic purpose once it is sold, and that the free movement of the trademarked product cannot be hindered after it is being put in the common market for the first time. Finally, those regulations also lay out the foundation for a certification mark, which certifies the holder that the mark fulfils some specifications, for example in terms of mode of manufacturing, materials and emphasise that the applicant must be capable of certifying those specifications. The distinction between certification mark and trademark is important to be made as it lifts any possible confusion about the argument of an already existing certification that can be used for sustainable purposes.

3. The intersection between Trademark and Sustainability

As explained in Chapter I, sustainability and sustainable development are becoming more and more important in the current society and are most likely to become even more important in the future. That is mainly because of the urge to tackle climate change, and achieve, overall, a society that is better fitted to host and sustain life for the generations to come. The role of companies, to achieve this goal, cannot be undermined⁷¹ and there are many areas of law that influence the way companies do business, including Intellectual Property Rights. Given the scope of this thesis, the focus of this chapter will be on the intersection between trademark law specifically and sustainability.

To achieve this, the first section of this chapter will focus on describing what the current situation is in terms of trademark and sustainability in the European Union by looking at the decision of the CJEU in that matter.

The second section of this chapter investigates how trademark law could go next based on implementation of the European Green Deal. To achieve this, a few different definitions will be provided, and building on that, a proposal for a new article in the Trademark Directive will be provided.

3.1 Overview of the current situation

Generally, strong IPR protections lead to more incentives for manufacturers. From a perspective that includes sustainable development, however, it cannot be asserted that, in their current states, IPRs and, a fortiori trademarks, foster sustainable products.⁷²

⁷¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A renewed EU Strategy 2011-14 for Corporate Social Responsibility, COM (2011) 681 final.

⁷² Ole-Andreas Rognstad, Inger B. Ørstavik and Taina Pihlajarinne, “Repairing and Re-Using from an Exclusive Rights Perspective: toward Sustainable Lifespan as Part of a New Normal?,” Intellectual property and sustainable markets (Edward Elgar Publishing 2021) 86.

One of the issues that can be raised when it comes to sustainability and trademark is the fact that products using parts that have a trademark as a raw material might be infringing the trademark holder's right. It can be argued that such specific case fall under the scope of the doctrine of exhaustion, which indicates that once a product has been put in the common market, the trademark fulfilled its purpose and the product should remain free to circulate⁷³. However, in practice, it is not as straightforward. In the case of recycling, for example, the presence of a trademark on products represents a direct obstacle to the recycling of those said products. The right holder could indeed rely on Article 10(2)(a)⁷⁴ and 10(2)(b)⁷⁵ if there is a great similarity between the recycled product and the protected good. Depending on the state of the recycled goods, the right holder could also rely on Article 15(2).

Another example where there is an overlap between trademark protection and sustainable issue is that of upcycling, which consists of using trash to create new objects insofar as the initial raw material (waste) can be recognized. Unlike in the example of recycling, it is unlikely that Article 10(2)(a) and Article 10(2)(b) will be invoked by a trademark holder to prevent the upcycling activity from taking place, as the resulting goods are most usually *different* from the trademarked goods⁷⁶. Nonetheless, the protection of the trademark can still be invoked by the right holder under Article 10(2)(c).⁷⁷ Additionally, the CJEU granted a strong protection of the image of luxury brand with regards to the doctrine of exhaustion,⁷⁸ which seems to leave little place for the argument of sustainability.

Generally speaking, the idea of whether a certain use of a product negatively affects the function of the trademark is central in EU trademark law, and it is the

⁷³ See Article 15 Trademark Directive.

⁷⁴ See Article 10(2)(a) of the Trademark Directive: the sign is identical with the trade mark and is used in relation to goods or services which are identical with those for which the trade mark is registered.

⁷⁵ See Article 10(2)(b) of the Trademark Directive: the sign is identical with, or similar to, the trade mark and is used in relation to goods or services which are identical with, or similar to, the goods or services for which the trade mark is registered, if there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark.

⁷⁶ Ole-Andreas Rognstad, Inger B. Ørstavik and Taina Pihlajarinne, "Repairing and Re-Using from an Exclusive Rights Perspective: toward Sustainable Lifespan as Part of a New Normal?," Intellectual property and sustainable markets (Edward Elgar Publishing 2021) 94.

⁷⁷ See Article 10(2)(c) of the Trademark Directive: the sign is identical with, or similar to, the trade mark irrespective of whether it is used in relation to goods or services which are identical with, similar to, or not similar to, those for which the trade mark is registered, where the latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.

⁷⁸ Judgement of the Court of 23 April 2009, *Copad SA v Christian Dior couture SA, Vincent Gladel and Société industrielle lingerie*, Case C-59/08, ECLI:EU:C:2009:260.

starting point to prove that there has been infringement of the said trademark. The CJEU, through multiple case-laws,⁷⁹ developed a set of rules to determine whether the use of a trademark by a third party negatively affects the image of the trademark holder. Additionally, the CJEU further held in *Adam Opel* and *Adidas* that only the use of a trademark in relation to a good that is similar to the initial products (which are covered by the trademark) are to fall within the scope of the limitation of Article 14(1) of the Trademark Directive. In other words, using a trademark for decorative purposes does not fall in the limitation granted by that article.

However, when talking specifically about sustainability issues, there is little case-law of the CJEU regarding trademark infringement, and even less in the context of recycling or upcycling of products that are based on trademarked raw materials.⁸⁰

This lack of judgement of the Court does not prevent, in any case, from inferring, from what has been decided in the past and the current political agenda of the EU, how the already-existing trademark law could be interpreted in the future to give a stronger position to sustainable development. The current situation of trademark law and the decisions of the CJEU regarding the protection of trademark lead to a little opportunity for sustainable initiatives to be encouraged as a holder of a trademark could rely on their prerogatives to prevent such activity from taking place if they deem it unfit to match the brand's image. It remains crucial to understand that the economic rights of a right holder may need to be balanced to allow such initiatives to be encouraged as they greatly contribute to reducing waste which, in turn, helps contribute to achieving the different sustainable targets laid out by the European Union.

3.2 Where could it go next?

As it was shown in the previous sections (in particular Chapter I), there has been in the past two to three years a great political push to implement sustainability more consistently in policy-making in the European Union. The European Green

⁷⁹ See, for example, Judgement of the Court of 23 May 1978, *Hoffmann-La Roche & Co. AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH*, Case C-102/77, ECLI:EU:C:1978:108.

⁸⁰ Ole-Andreas Rognstad, Inger B. Ørstavik and Taina Pihlajarinne, "Repairing and Re-Using from an Exclusive Rights Perspective: toward Sustainable Lifespan as Part of a New Normal?," *Intellectual property and sustainable markets* (Edward Elgar Publishing 2021) 97.

Deal and the Circular Economy Action Plan both lay out the current environmental objectives the EU is trying to achieve, and both argue for a more incremental inclusion of sustainable principles in all policies passed on the European level, and especially in policies targeting production.⁸¹

The transition to the circular economy has been described as entailing four fundamental building blocks, namely (1) materials and product design, (2) new business models, (3) global reverse networks, and (4) enabling conditions.⁸² Clearly, the first block corroborates with the claims found under the Circular Economy Action Plan which argues that materials and design of products can greatly impact the sustainability of those products. And while the second and third block are not, in essence, directly actionable from a legislative point of view,⁸³ it can be argued that the last block (enabling conditions) refers to the ability of the legislative body (in this case, the European Union) to adopt the necessary changes that will enable the Circular Economy to be developed and reach its full potential.

Referring to this, it must be stated that it was proven in Chapter I that sustainability was a general objective of the European Union as it is inscribed in its Treaties (Article 11 TFEU and Article 3 TEU). Consequently, it appears that both the legal framework and the political agenda allow for more inclusion of sustainable aspects in the policy making.

Regarding the intersection between trademark and sustainability, it can be argued that with the existing legal framework, it is possible for the CJEU to put more emphasis on sustainable aspects.⁸⁴ This would minimise the amount of changes necessary in the legislation regulating trademarks. Yet, it remains interesting to think about how trademark law could intrinsically be adapted to better match the changing needs.

⁸¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A new Circular Economy Action Plan For a cleaner and more competitive Europe, COM(2020) 98 final.

⁸² Ole-Andreas Rognstad, Inger B. Ørstavik and Taina Pihlajarinne, “Repairing and Re-Using from an Exclusive Rights Perspective: toward Sustainable Lifespan as Part of a New Normal?,” Intellectual property and sustainable markets (Edward Elgar Publishing 2021) 86.

⁸³ It remains in the power of businesses and private bodies to change their business plans to include sustainability.

⁸⁴ Ole-Andreas Rognstad, Inger B. Ørstavik and Taina Pihlajarinne, “Repairing and Re-Using from an Exclusive Rights Perspective: toward Sustainable Lifespan as Part of a New Normal?,” Intellectual property and sustainable markets (Edward Elgar Publishing 2021) 100.

3.2.1 Full product life-cycle and Extended Producer Responsibility

As emphasised by European Union with the European Green Deal and the Action Plan on Circular Economy, there must be a shift from the traditional view of a product's lifespan, which consists of a linear consumption pattern defined by "take-make-use-dispose",⁸⁵ to a more sustainable way of consumption, which would take into account a more holistic view of a product's lifecycle. Obviously, defining what *product life-cycle* means is crucial as it gives direction as to the stage of its lifecycle a product will be. Different views have evolved and changed, but it can be asserted that a more conservative and economic profit-oriented view would suggest a shorter lifespan so that more sales can be registered for one said product whereas a more sustainable-oriented view might suggest a more holistic life-cycle of the product which would in fact increase the product's lifespan.⁸⁶ The clear advantage of introducing the consideration of a holistic life-cycle view in policy-making is that it allows us to consider all possible environmental impacts generated by a product.⁸⁷ In other words, the purpose of taking the life-cycle of a product into consideration is to analyse all the inputs and outputs from an environmental perspective at each stage of a product's life-cycle.⁸⁸

Another area of reflection for the policy-makers to decrease the environmental impact of product and incentivize sustainable behaviours is to increase the responsibility of producers to what is known as the *extended producer responsibility* (EPR).⁸⁹ The idea behind EPR is that producers are made accountable for the impact of their products after the product has fulfilled its intended purpose.⁹⁰ Having to cope with the potential harmful consequences of managing the waste their products produce can be an effective way to incentivise the producers to let other undertakings deal with the products. Indeed, once it has fulfilled its purpose, the product can be used for other purposes and having the

⁸⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A new Circular Economy Action Plan For a cleaner and more competitive Europe, COM(2020) 98 final.

⁸⁶ Walter Kloepffer and Isa Renner, "Life Cycle Sustainability Assessment of Products" (2008) 13 The International Journal of Life Cycle Assessment 92.

⁸⁷ Beate Sjøfjell, Anja Wiesbrock and Eleonore Maitre Ekern, "Towards an integrated product regulatory framework based on life-cycle thinking", The Greening of European Business under EU Law (Routledge 2015) 149.

⁸⁸ *ibid.* 150.

⁸⁹ OECD, Extended Producer Responsibility. A Guidance Manual for Governments (Paris: OECD, 2001) 18.

⁹⁰ Beate Sjøfjell, Anja Wiesbrock and Eleonore Maitre Ekern, "Towards an integrated product regulatory framework based on life-cycle thinking", The Greening of European Business under EU Law (Routledge 2015) 156.

initial producer liable for the management of the product post-consumption creates an opportunity for recycling and upcycling activities to take place without the risk of being sued for trademark infringement. If that were the case, the recycler/upcycler could retort that the initial producer and right holder did not comply with its obligations to manage the product after it was consumed.

The idea of Extended producer responsibility is not new⁹¹ and was even implemented in some European directives in the past. For example, Preamble 27 of the Waste Framework Directive⁹² states:

The introduction of extended producer responsibility in this Directive is one of the means to support the design and production of goods which **take into full account and facilitate the efficient use of resources during their whole life-cycle including their repair, re-use, disassembly and recycling** without compromising the free circulation of goods on the internal market.

This preamble shows that already in 2008, there was a willingness from the policy-maker to include the EPR in the European legislations.

3.2.2 A new provision in Trademark Law

The previous section emphasised the importance of redefining the life-cycle of a product to expand it. The section also focuses on the concept of extended producer responsibility which, if implemented correctly in the European policies, could result in the achievement of a stronger position of sustainability in those policies.

It could be possible to amend trademark law in order to include those two concepts in the exemptions of trademark infringement. This additional exemption could be found under Section 3 of the Trademark directive for example, as this section covers the rights conferred by a trademark and the limitations. The article could be named ‘Exhaustion of the trademark rights in case of sustainability concern’ and could be included, in wordings, as follows:

⁹¹ Thomas Lindqvist, *Extended Producer Responsibility in Cleaner Production: Policy Principle to Promote Environmental Improvements of Product Systems* (Doctoral Dissertation, Lund University, 2000) 30–4.

⁹² See Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste. This directive was amended by the Directive 2018/851 of the European Parliament and of the Council of 20 May 2018.

The proprietor of a trademark shall not be entitled to prevent third parties from using the trademark in case:

- (a) that said third party manages the trademarked good in the post-consumption phase of the product;
- (b) the third party aims at achieving a sustainable purpose when using the trademark; and
- (c) the proprietor failed their duty regarding their extended producer responsibility in the post-consumption phase.

Point (a) of this provision ensures that there will not be any justification of trademark infringement that happens in the regular course of trade of the good. This provision could be used by a third party that relies on trademarked goods in case of recycling or upcycling where the affixed trademark remains visible.

Point (b) specifically highlights that, in order for the right holder to not be able to invoke its right, there must be a clear sustainable purpose that is trying to be achieved by the third party.

Point (c) specifies that the proprietor must have been found to have failed their duty in terms of extended producer responsibility. One example of how this provision could be used in favour of upcycling and recycling is that the waste generated by the trademarked goods is made freely available for third parties to dispose of. In that sense, it is up to the proprietor to ensure that their products do not become waste, and if those products are still available as waste for third parties to use, it should then become free of trademark and freely disposable for those third parties.

Not only an additional exemption allowing for sustainable initiatives which may rely on pre-existing trademarks is needed to be added to the current trademark framework, the corresponding definitions also need to be included in the directive so that no reasonable doubt can be emitted about the meaning of the words used in the additional provision.

Therefore, the first part of the article, paragraphe 1, should define the idea of life-cycle and, especially the concept of ‘post-consumption’. This paragraph should also define extended producer responsibility.

For the purpose of this directive, the following definition applies:

- (a) ‘Post-consumption’ means the stage of life of a product during which a product can be considered as having fulfilled its intended purpose;
- (b) ‘Extended-producer responsibility’ means that the right holder of a trademark is responsible for the the design and production of goods which take into full account and facilitate the efficient use of resources during their whole life-cycle including their repair, re-use, disassembly and recycling without compromising the free circulation of goods on the internal market, as indicated in Preamble 27 of the Directive 2008/98/EC on Waste.

Having such an article included in the Trademark Directive could not only contribute to solving the current issue faced by parties which rely on trademark in case of recycling, repairing, upcycling or reusing, as shown in the first section of this second chapter, but this article could also contribute in further sustainable initiatives to take place which could be different that those aforementioned, but have not yet been brought about on the market.

3.3 Summary

This chapter investigates the current situation in the European Union when it comes to trademark law and sustainability. It was first found that multiple sustainable initiatives that would rely on using a trademark could be stopped by the proprietor invoking their rights, as found under Article 10(2)(a) and 10(2)(b), which regulate the refusal of further commercialisation of the goods in case of high level of similarity found between the protected goods and the new goods. This is particularly relevant for cases of recycling, reusing, repairing and

upcycling in which the trademark in itself can be used as an indication of origin. Overall, the CJEU ruled, in past cases such as *Christian Dior*, that there was a strong protection of luxury brands' image in relation to the doctrine of exhaustion. Yet, the current amount of case-laws directly related to those specific issues linked to sustainability remains quite little and it could be the case that, with the shift of political agenda that now gives more importance to sustainable goals, the CJEU counterweights the traditional economic incidence to achieve a more balanced judgement that gives more room for sustainable concerns.

If one were to consider, however, how the trademark law could be changed in order to include a full provision directly related to sustainability. To achieve this, it was argued that a few different concepts should be included in that provision, including the concept of *extended producer responsibility* and *full product life-cycle*. Such an article would not only give more room for sustainable initiatives relying on reusing, repairing or recycling a trademarked good to not be found as infringing the rights of the proprietor of that said mark, but it would also allow further initiatives that may have not yet occurred to take place, fostering therefore sustainable development.

4. Discussion and concluding remarks

4.1 Answer to research questions

What place does sustainability hold in European law, and what are the current political considerations for it in the European Union?

Sustainability is one of the overarching goals laid out in the European Treaties, namely in the Article 3(3) of the Treaty on the European Union, Article 11 of the Treaty on the Functioning of the European Union and Article 37 of the Charter of Fundamental Rights. Those provisions, and especially Article 11 TFEU, create some duties, notably the duty to take all objectives laid out in the Treaties into account when designing policies. For this reason, there is a special emphasis, or at least there can be a special emphasis, on sustainable development in the policy-making.

Specifically about environmental protection, which is one of the three pillars of sustainability, the Court of Justice of the European Union stated in *ADBHU* that the provisions of a directive (directive 75/439/EEC on the disposal of waste oils) had to be interpreted in the perspective of environmental protection as it is in essence one of the Community's core objective and target. Later, in *Chernobyl I*, the Court held that 'any legal basis in the Treaties is also a legal basis for environmental protection'. In *Concordia Bus*, the Court held that environmental criteria were as equally important as traditional economic criteria. In addition to those judgements, multiple Advocate Generals, including AG Bot in *Bois de Vielsalm*, AG Sharpston in *Commission v Malta* or AG Kokott in *Craeynest*, repeatedly opinionated that environmental protection, being enshrined in the European Treaties, ought to be addressed seriously. The integration of sustainable development, as explained, started with the different European Treaties, and was commented on multiple times by the Court of Justice of the European Union and

Advocates General. More recently, however, the political interest for sustainable development took a turn with the passing of the European Green Deal, which lays out a strategy for the European Union to become climate neutral by 2050. The Green Deal consists of four 4 objectives, namely (1) Becoming climate-neutral by 2050, (2) protecting human life, animals and plants, by cutting pollution; (3) helping companies become world leaders in clean products and technologies and (4) helping ensure a just and inclusive transition. Clearly three of the four objectives directly relate to environmental sustainability. This shows that there is a clear push for more environmental integration in policy-making.

Following the European Green Deal, the European Commission later released the Action Plan on Circular Economy, which lays out different industrial and economic strategies that have the overarching goal of making the European Union the leader when it comes to circular economy. The Action Plan specifically targets unsustainable ways of producing and consuming and directly highlights reusing, recycling and repairing as being key components of the circular economy. It also mentions the fact that, in order to fulfil the climate objectives, the role of the Commission to propose environmentally-oriented legislations is crucial.

In what way, if any, does trademark law allow companies to engage in environmentally sustainable behaviours ?

In the European Union, a trademark can be roughly defined as *any sign* that has a *distinctive character* and that is *capable of being registered on a register*. The first criteria (i.e. any sign) was defined more in depth by different judgements of the CJEU such as *Philips Electronics BV* or *Dyson Ltd*. The second criteria requires that the trademark must be recognisable by the averagely informed and circumspect consumer. The final criteria emphasises the need for the mark to be clear to the competent authorities so that what is registered cannot be equivocal. Additionally, one important aspect of trademark law in Europe is the fact that a trademark aims at fulfilling a *function* such as guaranteeing the origin of the goods, advertising or gauging their quality. Additionally, the doctrine of exhaustion is of particular importance as it argues that once a product has been put on the market, the trademark has fulfilled its purposes and the good should then

remain free to circulate. This is, in practice, to be nuanced, notably by some judgements of the Court of Justice, as found in *Christian Dior*.

Trademark law, in its current form, allows for very little - or none at all - sustainable initiatives. It must be noted nonetheless that both the Trademark Directive and the Trademark Regulation include a provision on certification marks (respectively under Article 27 and Article 83), which aims at creating a specific type of mark that certifies the respect of certain 'material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics, from goods and services which are not so certified'. Nonetheless, a trademark in itself (and not a certification mark) is neutral to sustainability concern. In fact, it can be argued that trademark rights can be a direct obstacle to recycling, repairing and reusing initiatives. Right-holders are entitled to bring an action to the relevant court for trademark infringement under Article 10(2)(a) and Article 10(2)(b) of the Trademark directive and argue for a great similarity of the recycled (or repaired, reused, etc.) goods and the initially protected goods. Right holders can also rely on Article 15(2) of the Directive if the state of the goods has been significantly impaired, arguing for legitimate reasons to oppose the further commercialisation of the goods.

It must be noted that overall, the CJEU granted a quite high level of protection of the image of luxury brand with regard to the doctrine of exhaustion which means that sustainable initiatives that may rely on using products affixed with a trademark may be hindered by the conclusions found in the previous rulings. However, it must still be argued that, as of today, very little case-laws and judgements of the CJEU directly related to sustainability issues and trademark have been pronounced, which allows to leave a door open for discussion as to how sustainability principles could be implemented to a greater extent in further cases brought to the Court.

How could trademark law be changed to answer the current societal needs better?

Based on the different arguments brought forward in the two previous sections, it remains to be explained how trademark law could be changed to incorporate the new political agenda of the European Union when it comes to sustainable

development, circular economy and climate protection. Specifically, those documents emphasise the importance of policies targeting production. As a reminder, one of the current objectives of the European Union is to make the EU a leader when it comes to the circular economy. The transition to the circular economy has been commonly described as being composed of a few different blocks or areas, of which one of them clearly requires the policy-maker to make the necessary changes to the legislation to allow the transition to occur and, although it could be possible for the European Institutions to simply give more importance to sustainable concerns (as shown in *Concordia Bus*), it remains interesting to suggest amendments to the current state of trademark law that would give more room for companies to engage in sustainable behaviours.

To understand how the changes should be phrased, some key concepts must be first well integrated as they will be the basis for the suggested changes. The first key concept is that of *product life-cycle* and, more specifically, how the view of a product life-cycle must be shifted from a more conservative point of view, which could be defined as ‘take-make-use-dispose’, to a more sustainable-oriented point of view, that would take into account a more holistic view of the product life-cycle, consider all its environmental implications and de facto increase the product’s lifespan. Building on this, the second key concept is that of extended producer responsibility. This concept encompasses the idea that producers are accountable for the output of their products even after the consumption of the product occurred, or the initial purpose of it was fulfilled. Implementing the concept of extended producer liability in trademark law is a way to discourage right holders to invoke their rights in potential infringement case where the alleged infringer is using a good on which was affixed a trademark in instances related to sustainability, such as repairing, reusing, recycling or upcycling (among others). Building upon this, it is possible to include a new article under section 3 of the Trademark Directive, as the section refers to the rights conferred by a trademark and its limitations. The new Article will need to include the definition of the different concepts aforementioned, and build on those to lay out the rules that circumvent the right holder from invoking their rights in an infringement action. The final new article that allows for more sustainable behaviours to be engaged could therefore look similar to this:

Article X - Exhaustion of trademark in case of apparent sustainability concern

- (1) For the purpose of this directive, the following definition applies:
 - (a) 'Post-consumption' means the stage of life of a product during which a product can be considered as having fulfilled its intended purpose;
 - (b) 'Extended-producer responsibility' means that the right holder of a trademark is responsible for the the design and production of goods which take into full account and facilitate the efficient use of resources during their whole life-cycle including their repair, re-use, disassembly and recycling without compromising the free circulation of goods on the internal market, as indicated in Preamble 27 of the Directive 2008/98/EC on Waste.
- (2) The proprietor of a trademark shall not be entitled to prevent third parties from using the trademark in case:
 - (a) that said third party manages the trademarked good in the post-consumption phase of the product;
 - (b) the third party aims at achieving a sustainable purpose when using the trademark; and
 - (c) the proprietor failed their duty regarding their extended producer responsibility in the post-consumption phase.

4.2 Concluding remarks

As sustainability is becoming more and more important in today's society, it is the logical consequence that legislations change so that they can better be suited to represent the new needs. This thesis investigated the current state of sustainability in the European legislation (both primary and secondary) as well as the political agenda targeting sustainable development and circular economy. This thesis further highlights how trademark law, in its current state, can be an obstacle to parties which would show an interest in engaging in sustainable behaviours such

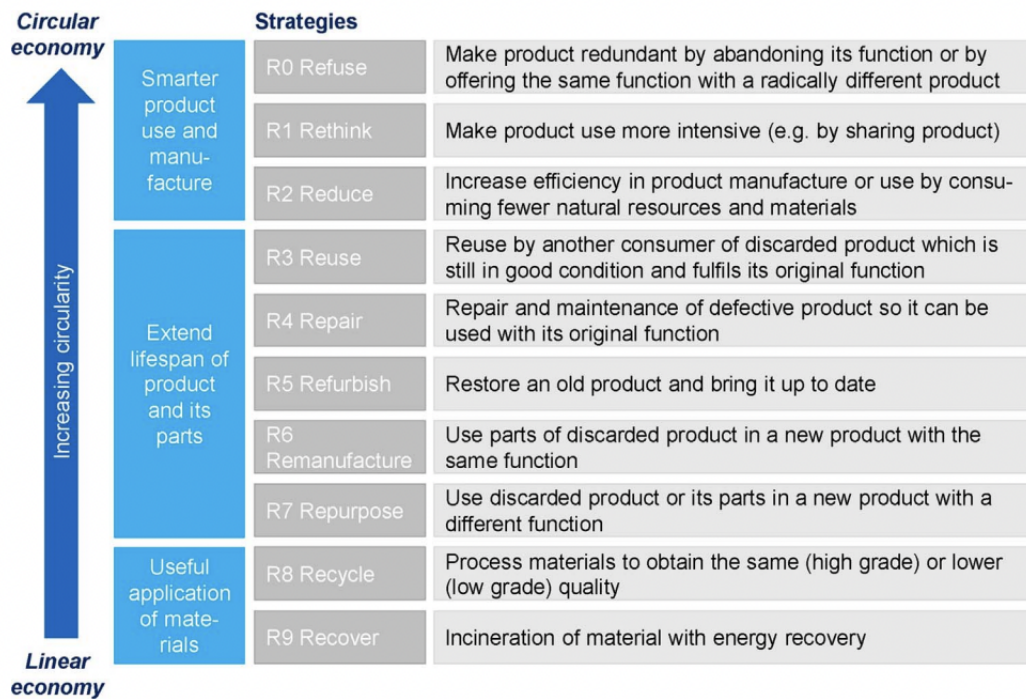
as recycling, reusing, repairing or even upcycling, but would not do so in fear of being sued for trademark infringement.

In hope to palliate this, this thesis brings forward some key concepts related to sustainability which, if implemented into trademark law, would have the potential to incrementally foster sustainable initiatives based on the use of trademarks. This represents the first step in law-making as it opens the door for discussion on the ground, validity and potential impact of those amendments.

If we take a perspective that is more business-oriented, the following step of this thesis is to further investigate with empirical studies what the effects of such change in trademark law would be on the economy by researching within companies what the monetary consequence would be, and what the overall impact on the economy would be. Concluding results could lead to effective changes both in businesses and legislations, and could further justify the need for those amendments to be made to Trademark Law.

Appendix

Appendix A: Existing strategies and definitions in the Circular Economy



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⁹³ Kirchherr, D Reike, and M Hekkert, "Conceptualising the Circular Economy: An Analysis of 114 Definitions" (2017) 127 Resources, Conservation & Recycling 221.

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