

IPKat reports “Upcycling under EU copyright law: from infringement risks to protectability requirements”

Eleonora Rosati Thursday, July 31, 2025 - copyright, EU copyright, exhaustion, Guest post, IP research, originality, Spyros Sipetas, upcycling

*The IPKat has received and is pleased to host the following guest post by Katfriend **Spyros Sipetas** (Stockholm University), discussing upcycling from the perspective of EU copyright law, in light of a **recently published journal article** that he co-authored with Eleonora Rosati. Here’s what Spyros writes:*

Upcycling under EU copyright law: from infringement risks to protectability requirements

by Spyros Sipetas



*Kat rocking eco-conscious
upcycled couture
(non-performatively)*

In efforts to bridge the gap between fashion and its (often unmet) sustainability pledges, several initiatives have taken hold – ranging from the hype-fuelled second-hand market surge to circular production models such as upcycling, referring to the repurposing of objects in order to extend their lifespan.

Upcycling has, in recent years, been gaining traction – shedding its DIY roots to become both a fashion-forward statement and a (sometimes performative) nod to environmental conscience. And with the commercialisation of a once-niche practice, came growing legal interest in its treatment under IP law – as is also evident from recently emerged national cases, including a recent decision discussed on The IPKat [here](#).

While much of the IP debate has focused on trade mark implications brought by the appearance of brand insignia on upcycled goods, the copyright dimension has remained relatively unexplored. Yet the questions it raises are far from marginal: What happens when an upcycled item incorporates elements of an original, copyright-protected work? Does such a transformation amount to infringement? And can the resulting object attract protection in its own right?

These are the issues explored in a recent article by Professor Eleonora Rosati and me, published in the *European Intellectual Property Review*. The piece looks at both sides of the coin: whether upcycling may give rise to copyright liability, and whether the resulting object might itself be eligible for copyright protection.

(Spoiler alert) The answer to both is yes – and the article unpacks the legal basis for each in detail.

Do upcycled objects infringe third-party rights?

When looking into upcycling from an infringement perspective, the most immediate question is whether the act of repurposing an existing product engages any of the copyright owner's exclusive rights. At first glance, one might assume that the issue lies with the right of reproduction. However, upcycling – at least in its typical, analogue format – does not usually involve copying or fixation of the protected work on a different medium. That is because the object is not being reproduced, but it is rather transformed through the repurposing of its existing tangible support. As long as there is no copying (of original parts of a copyright work), there is no engagement of the right of reproduction under, e.g., Article 2 of the [InfoSoc Directive](#).

As a result, it is the right of distribution that becomes central in this context.

Now, the right of distribution under Article 4(1) of the InfoSoc Directive grants authors the exclusive right to authorise or prohibit the distribution of the original or copies of their works to the public by sale or otherwise. This right is subject to the principle of exhaustion, which

applies once a protected object has been lawfully sold within the EU/EEA by the rightholder or with their consent.

However – as clarified by the CJEU in **Art & Allposters** [IPKat [here](#)], in line with other exhaustion doctrines under IP law – exhaustion only extends to the tangible item placed on the market in its original form (the work's *corpus mechanicum*). When an object is materially altered – as is usually the case in upcycling – the result may be considered a new object, falling outside the scope of exhaustion.

In addition, as clarified by the CJEU in **Soulier and Doke** [IPKat [here](#)] (although in relation to other exclusive rights) the notion of consent presupposes that the rightholder was informed of the intended downstream use; absent such information, consent cannot be presumed.

It follows that exhaustion may also be precluded where consent is either lacking or expressly qualified at the time of sale. Thus, in such cases, the act of distributing or offering the transformed object to the public may infringe the distribution right unless the upcycler has secured the rightholder's authorisation.

Continuing, in digital contexts, the right of communication to the public (Article 3 of the InfoSoc Directive) may apply, a right which – unlike distribution – is not subject to exhaustion. For instance, this may be triggered where photographs of upcycled goods incorporating protected elements are made available online. Importantly, it is only in such instances – where the protected elements of the works incorporated in the upcycled object are 'copied' or transferred to a digital format – that the right of reproduction might also be applicable.

Can upcycled products be protected by copyright?

Moving away from infringement risks, the other key issue is whether an upcycled object can qualify for copyright protection itself. Given their derivative nature, upcycled goods lie at the intersection of adaptation and originality – adding an extra level of complexity to the already challenging assessment of their protectability as works of applied art.

Having said that, the correct standard for copyright subsistence in such works is still one: they need to be original in the sense that they are their author's own intellectual creation(s), according to the seminal **Infopaq** guidance [IPKat [here](#)]. What their duality, being both aesthetic and functional, means in practice is that, according to the **BSA/Brompton Bicycle** mandate [IPKat [here](#)], for the end-product of the upcycling

process to be original, the author needs to make use of the leeway left for creative choices both by the functionality of the objects' elements, as well as by the original author's own original choices. In the upcycling context this could translate into reimagining the form, arrangement, or purpose of the existing materials to reflect the upcycler's own personality. Therefore, what is key is for the creator to still make free and creative choices in the reconfiguration of the upcycled object's components, in a way that surpasses the technical constraints of the reused materials.

In line with most human creativity (and the well-known image of dwarves standing on the shoulders of giants), upcycled products are also derivative by nature – representing a reimagined form of existing designs, textiles, or materials. The treatment of such objects under copyright law as regards their protectability has already been the subject of some consideration by the CJEU, though only in infringement scenarios (namely in *Painer*, *Deckmyn*, *Pelham*, and *Renckhoff*).

Further guidance is expected from the CJEU in the context of the pending *Institutul G. Călinescu* referral, where AG Spielmann has advised the Court to confirm that a derivative work enjoys “new” copyright protection, provided it meets the originality threshold [IPKat here]. What is particularly significant in that case is the opportunity for the Court to clarify what renders a derivative work eligible for copyright protection and how the cumulative requirements of freedom and creativity apply in this specific context.

In sum

Upcycled products can trigger complex questions under EU copyright law too – both in terms of potential infringement and their own protectability. While reproduction is often not at issue, the distribution right and its exhaustion limits are central in such instances. In digital contexts, the right of communication to the public may also come into play.

On the protection side, the threshold remains the same as for any other work: the upcycled object must be original in the sense that it is its author's own intellectual creation, reflecting their personality. Yet how that standard applies to derivative works and works of applied art still lies at the core of referrals pending before the CJEU – namely *Institutul G. Călinescu* and *Mio/konektra* [IPKat here], respectively. Ultimately, the question is not whether copyright can accommodate upcycling as both a legal and creative act, but how such protection should be awarded – and how national courts will implement the CJEU's forthcoming guidance.

Where to read more

The full article is available in the *European Intellectual Property Review* (issue 47(8) 2025) and a pre-print version can be accessed [here](#).