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

*This article focuses on upcycled products from two different copyright perspectives: first, it considers the extent to which—if any—such goods could be regarded as infringing of third-party rights; second, it addresses the question of protection under EU law. To this end, it reviews available case law of the Court of Justice of the European Union (*CJEU*) on copyright's exclusive rights and subsistence requirements before providing a reasoned and critical review of the potential treatment of upcycled objects under EU law. The main conclusions are as follows. Insofar as infringement aspects are concerned, the right of reproduction under copyright is likely to play a very minor role (if any at all) in determining potential liability of upcyclers: the main exclusive right that will serve to establish upcyclers' liability is rather the right of distribution and its lack of exhaustion under EU law. Turning to the protectability of upcycled objects, as long as upcyclers make free and creative choices in repurposing existing objects, they may enjoy a "new" copyright in their own works, with such protection being detached from and independent of any potential liability considerations.*

Introduction

Broadly speaking, upcycling refers to the practice of repurposing existing objects so to give them a "new life": whether it is the leather of a handbag subsequently used to customise sneakers or the buttons of a jacket turned into custom jewellery, upcycling is—at least in part and to the least cynical of us—also consistent with emerging societal sensitivities and the principles of a circular and sustainable economy.

From a copyright standpoint, upcycling raises two key questions: the first is whether the practice of repurposing an existing object may at least potentially result in claims of copyright infringement; the second is whether an upcycled product can receive protection as a self-standing copyright work.

The answer to both questions is in the affirmative.

Insofar as infringement claims are concerned, contrary to what some commentators (whom we shall not name) have submitted, these are mostly likely to relate to the right of distribution and the lack of exhaustion thereof, not the right of reproduction. The simple reason is that, unless we are referring to a digital situation or instances of mass production, a pure upcycling activity does not engage any act of copying. In turn, claims of infringement of the right of distribution are expected to be made especially when the "upcycler" commercialises their products, not in situations in which there is a prevalent personal, artistic and/or free speech motivation underpinning the upcycling activity. As a result, enforcement initiatives are expected to remain limited to specific situations, which will not affect cases where even common sense suggests that no infringement claim should be brought.

Turning to the very protectability of upcycled objects, this is possible insofar as the relevant requirements for copyright protection are satisfied: the derivative nature of an upcycled product is irrelevant in principle, given that—not only are derivative works expressly protected under international law art.2(3) of the Berne Convention—but an actual case of upcycling is expected to entail the making of free and creative choices on the side of the upcycler, so that they can stamp the resulting work with their personal touch.

This article discussed all of the above: Part 2 focuses on the infringement dimension and reviews the main exclusive rights under EU copyright that might be relevant in contentious scenarios, ultimately highlighting the importance of the right of distribution and, in digital contexts, the right of communication (and making available) to the public, but not the right of reproduction. Part 3 considers protectability requirements, with a focus on originality as shaped in both existing case law of the Court of Justice of the European Union (CJEU) and referrals that are pending at the time of writing. Part 4 wraps the discussion up and concludes.

Upcycled products: A copyright infringement?

Starting with the infringement dimension, under EU law, an upcycled good incorporating a third-party copyright work without authorisation may be prima facie infringing. Importantly, as anticipated in Pt 1, the relevance of copyright to upcycling has very little if not *nothing* to do with the right of reproduction: in fact, in most cases, no act of reproduction does even take place. Rather, the ***454** copyright dimension of potential infringement has mostly to do with the lack of exhaustion of the right of distribution due to the alteration of the original object and, thus, the creation—by the upcycler—of a new object, as well as the applicability—in some contexts—of the right of communication to the public. All of this is discussed in greater detail below. Due to the focus of the first part of this contribution on prima facie liability considerations, defences to infringement shall not be considered.

Can there be infringement without reproduction?

Under EU law, the right of reproduction is described[1] as encompassing the "direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part" of a copyright work (art.2 of Directive 2001/29[2] (InfoSoc Directive)). Legislation like the InfoSoc Directive is adamant that (i) the main objective pursued by the EU legislature is that of a high level of protection (recitals 9 and 11) and (ii) the acts covered by the right of reproduction must be construed broadly (recital 21).[3] In turn, the CJEU has consistently adopted an expansive approach to the interpretation of the concept of "reproduction".[4]

Nevertheless, if there is no copying of *original* parts of a copyright work, no right of reproduction (or adaptation) is engaged under copyright.[5] A common characteristic of upcycled goods in analogue format is precisely that they entail the use and repurposing of a third-party existing good, not the making of a copy thereof. As such, it is doubtful that in cases or pure upcycling the rights of reproduction and—if still considerable as a separate right under EU law[6]—adaptation under copyright law would be relevant to the very creation of, say, jewels incorporating third-party printed fabrics or beauty products sold in cases made out of third-party packaging.

Of course, things would be different if the resulting good was photographed and such a photograph was made available to view on one's own website (for example, to accompany the product listing): in such instances not only would the right of communication to the public be relevant (see further below) but also the right of reproduction, given that a copy of the third-party pre-existing work would be made through the photographic process.

All the above said, the right of reproduction is not the only and—in the case of upcycling—most relevant exclusive right under copyright: the right of distribution and its exhaustion are key to determine the lawfulness or lack thereof of unlicensed upcycling activities.

The right of distribution and its exhaustion under EU law

Like the other exclusive rights under EU copyright, the right of distribution has been also interpreted expansively, the objective being—consistently—to ensure a high level of protection. Article 4(1) of the InfoSoc Directive requires Member States to "provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise". Unlike the right of communication to the public (art.3(3) of the InfoSoc Directive), the right of distribution shall be exhausted following the first lawful sale or other transfer of ownership of the original or copies of the work within the EU/European Economic Area (EEA).

The CJEU has had the opportunity to tackle the (undefined) concept of 'distribution' and the scope of the right under art.4 of the InfoSoc Directive in a number of judgments.[7] Referring to the WIPO Internet Treaties, as early as in Peek & Cloppenburg,[8] the Court held that the notion refers to the exclusive right to authorise the making available to the public of the original and copies of a work through sale or "other transfer of ownership". Hence, the right should be intended as encompassing forms of distribution, which entail a transfer of ownership.[9]

That said, the undertaking of acts that are propaedeutic to the finalisation of a sale or transfer of ownership of a work or copy thereof are also included within the scope of the right of distribution. In both Donner and Blomqvist the CJEU held that distribution to the public is characterised by a series of acts going, *at the very least*, from the conclusion of a contract of sale to the performance thereof by delivery to a member of the public.[10] The CJEU had the opportunity to apply this conclusion expansively in ***455** Dimensione Direct Sales and Labianca ***455** : the holder of the right of distribution is entitled to control not just the actual distribution of the original or copies of a protected work, but also preparatory acts, including third-party unauthorised advertisements for sale of copyright works or other protected subject-matter.

As stated, the right of distribution is subject to exhaustion following the first lawful sale or other transfer of ownership of a work or copy thereof within the EU/EEA. EU exhaustion rules are specifically linked to the EU internal market-building project. As Advocate General (AG) Szpunar effectively summed up in his Opinion in Tom Kabinet:

"According to that rule, once a copy of a work protected by copyright has been lawfully placed in circulation, the copyright holder can no longer object to that copy being resold by the person who has acquired it. The reason is that copyright cannot take precedence over the right of ownership held by the person who has acquired a copy of the work in question as an object. Furthermore, when a copy of the work has been placed in circulation by the author or with his consent, the author is deemed to have obtained the remuneration due in respect of that copy.

It was also via the case-law that the rule of exhaustion of the distribution right of objects protected by copyright was introduced into EU law. Although that rule already existed in the legal orders of the Member States, the Court extended its scope to the whole of the territory of the European Union. That case-law was motivated principally by the desire to ensure the effectiveness of the free movement of goods.[11]"

Unlike other regimes under EU intellectual property (IP) law, exhaustion under EU copyright *might* appear irreversible once the relevant conditions—that is: (i) a sale/transfer of ownership, (ii) in the EU/EEA, (iii) by the rightholder or with their consent—are satisfied. So, unlike for example trade mark law, a rightholder would not be entitled to oppose further commercialisation of their goods "where there exist legitimate reasons" to do so[12]: under copyright, if the requirements for exhaustion are fulfilled, there *seems* to be no way to reverse it. Such a conclusion would be, however, hardly correct.

In the context of the present discussion, the final condition—"consent"—is key to determine the applicability of exhaustion to upcycled goods. The wording of the InfoSoc Directive suggests that the notion of "consent" refers to the very decision whether to authorise the sale/transfer of ownership of an object protected by copyright, not also the *conditions* thereof. However, CJEU case law mandates a significantly more careful and less trenchant conclusion than that.

First of all, exhaustion only applies to the tangible support (*corpus mechanicum*) of an object, not to the copyright work (*corpus mysticum*) embodied therein. In Art & Allposters International such was the conclusion of both AG Cruz Villalón in his Opinion[13] and the CJEU in the resulting judgment.

The Court identified the purpose of the right of distribution within art.4 of the InfoSoc Directive, this being only to encompass a work or a tangible copy thereof. This would be because art.4(2) refers to the first sale or other transfer of ownership of "that object".[14] According to the CJEU this conclusion could be drawn from recital 28: EU legislature, by using the terms "tangible article" and "that object", intended to give authors control over the initial marketing in the EU of each tangible object incorporating their intellectual creation.[15] As such, exhaustion of the right of distribution would only apply to the tangible copy of a work.

This interpretation is supported by international law, notably the WIPO Copyright Treaty. The CJEU thus concluded that "exhaustion of the distribution right applies to the tangible object into which a protected work or its copy is incorporated if it has been placed onto the market with the copyright holder's consent".[16] In turn—and this is key—exhaustion does *not* apply to the alteration of an existing object that has been lawfully sold or transferred if the object in question, because of those alterations, is to be regarded as a *new* object.

It is clear that such a conclusion is not devoid of ambiguities: at what point does an alteration give rise to a new object?[17] And, within this, are upcycled objects to be considered 'new'? While some commentators have submitted that the exhaustion doctrine under EU copyright may be construed in such a way that it applies to unlicensed upcycling activities,[18] such a conclusion might struggle to find general applicability. The holding in Art & Allposters International is clear (and aligned with other exhaustion doctrines under IP law): the physical ***456** transformation of an object precludes exhaustion.[19] Such a conclusion is further supported by several, additional considerations. If we limit our analysis to copyright law, two in particular stand out.

First, copyright's exclusive rights are all preventive in nature, including the right of distribution. The CJEU has held in this regard that, consistent with the provisions of the Berne Convention, protection includes both the enjoyment and *exercise* of rights.[20] As a result, rightholders are entitled to intervene between possible users of their works and the doing of restricted acts which such users might contemplate undertaking, in order to prohibit or authorise them.[21]

Albeit with specific reference to the rights of reproduction and communication to the public, in Soulier and Doke the CJEU unambiguously stated that the notion of consent presupposes that an author is informed about the intended use of their work: in the absence of any actual prior information relating to that future use, authors are not in a position to prohibit such use, if necessary, so that the very existence of implicit consent appears purely hypothetical in that regard. Thus, without guarantees that authors are actually informed as to the envisaged use of their works and the means at their disposal to prohibit it, it is virtually impossible for them to adopt any position whatsoever as to such use.[22]

Second, even where a rightholder is not in a position to consent to the use of their work without an authorisation (as it is for example the case where an exception or limitation applies in principle), it is never the case that a rightholder must tolerate any use a third party can make of their work. In this sense, both general structural safeguards like those presented by the three-step test under art.5(5) insofar as exceptions and limitations are concerned (it goes without saying that exhaustion is something different) and the application of (unassignable) moral rights under national law do indicate that it is possible to object to certain transformations of one's own work.[23]

In light of the foregoing, it thus appears possible to conclude that not only is exhaustion precluded where the object at issue is changed but also where the consent of the rightholder is lacking or is qualified at the outset regarding the conditions and modalities of the sale/transfer of ownership. It would contrast with the safeguards inherent to the EU copyright system—all meant to achieve a fair balance of rights and interests—to hold that, as long as one has consented to the initial sale/transfer of ownership of their object, then exhaustion applies indiscriminately. This is simply not the case. As a result, the right of distribution could be enforced against upcyclers selling or otherwise distributing objects incorporating third-party copyright works or parts thereof.

Upcycling and the right of communication to the public

In inter alia digital contexts—including digital upcycling—the right of communication to the public may be also applicable, irrespective of whether acts of reproduction/adaptation and/or distribution have been performed by an upcycler. Furthermore, unlike distribution, such an exclusive right is never subject to exhaustion. Under EU law, the right of communication to the public shall be potentially applicable when, for example, someone published—on the internet—a photograph of an upcycled product incorporating third-party copyright content or provided a link to a third-party website where such a photograph is hosted.

At the international level, the right of communication to the public received its first formulation in art.11bis of the Berne Convention, as adopted in 1928 and later revised with the Brussels Act 1948. The WIPO Copyright Treaty supplemented the Berne Convention[24] and introduced the concept of making available to the public. The wording of art.3 of the InfoSoc Directive is thus derived from art.8 of the WIPO Copyright Treaty.[25] In line with its international and EU[26] counterparts, the InfoSoc provision does define neither the concept of communication to the public nor that of making available to the public.

In Europe, the right of communication to the public has progressively and consistently gained a prominent—if not altogether primary—role in copyright law. The CJEU itself has received multiple references for a preliminary ruling since 2005 (that is when SGAE[27] was referred) concerning specifically art.3 of the InfoSoc Directive. This has been also—though not exclusively—due to the objective significance of this exclusive right in the online environment. ***457**

The essential requirements of the right are an "act of communication", directed to a "public". We refer to earlier work for an in-depth discussion of such constitutive elements.[28] Consideration of additional criteria, which are not autonomous and are interdependent, and may—in different situations—be present to widely varying degrees, is also possible. Despite the lack of an express textual basis, such criteria must be applied both individually and in their interaction with one another.[29] Determination of whether the performance of a certain act falls within the scope of application of art.3 requires, in essence, an individual assessment.[30]

Unlike other jurisdictions, under EU copyright, the provision of a link to a copyright work may also fall within the scope of application of the right of communication to the public. That has been the case since the 2014 CJEU judgment in Svensson.[31] Such a conclusion has been however devoid of neither uncertainty nor criticism.[32]

Broadly speaking, having regard to the case law on communication to the public AG Szpunar also considered it such as to have envisaged approaches that "are not always immediately obvious and may raise some questions, in particular in relation to three major issues: the classification of links as "acts of communication" (of making available), the introduction of the subjective criterion of knowledge of the facts into the definition of the concept of "communication to the public" and the application to the internet of the "new public" criterion".[33] The AG further submitted that that the statement that a link to a protected work accessible on the internet constitutes an act of communication to the public of that work is "from a technical perspective, far from self-evident".[34]

Upcycled products: Can they enjoy copyright protection?

When dealing with upcycled objects, as seen in Pt 2, the question of them being potentially infringing of third-party rights may arise at the outset, due to their inherently derivative nature. Equally important from a copyright perspective is their potential protectability. Not only, as mentioned, does international law mandate the protection of derivative works but the acknowledgment of upcycled creations as being eligible for protection could, in line with copyright's incentivising function, encourage their production on a larger scale. Nevertheless, providing a straightforward answer is challenging, given the complexities of the EU copyright framework—particularly when considering the designation of upcycled products as being both works of applied art and derivative works. To clarify the implications of their treatment under copyright law, it is essential to explore not only the standard of originality within the EU framework, but also the conditions under which a derivative work may be considered original. This will be done in what follows.

Protection of works of applied art under EU copyright

As AG Szpunar noted in his Opinion in Cofemel "[t]he legal protection of works of applied art is virtually as old as the legal protection of intellectual property in general. However, it still struggles to find its place within an intellectual property law system".[35]

Historically, the protection of works of applied art has indeed faced different treatments at the level of individual EU Member States. The root of this issue is not only their potential to be protected by design rights as "natural" form of IP protection, but also the wording of art.17(2) of the (old) Design Directive,[36] as well as art.96(2) of the (old) Design Regulation,[37] which purportedly left the conditions for and the extent of such protection to the discretion of the individual Member States.

Against a backdrop of uncertainty, the CJEU has been called to clarify the matter on several instances, despite repeated guidance from the Court itself that originality alone is enough, including for works of applied art.[38] Recently, all of this was confirmed, first, by AG Szpunar in his Opinion in Kwantum[39] and, then, the resulting CJEU decision.[40] Prior to the latest instalment at the time of writing (Kwantum), such historical reluctance to accept the not so hidden internal market-building rationale of most of CJEU case law in the copyright field is what led to the referrals in Cofemel[41] and, subsequently Brompton Bicycle,[42] as well as the (currently) pending referrals in joined cases Mio and konektra. But has the jurisprudence of the CJEU ever really left room for uncertainty? ***458**

Even prior to the landmark judgment in Infopaq,[43] and its progeny, it was apparent that protection under EU copyright law requires the existence of an authorial 'work' (Levola Hengelo[44]) fulfilling the 'originality' criterion.[45] Yet the uncertainty regarding the protection of works of applied art—specifically—has persisted. Aside from the abovementioned—now reformed[46]—provision of art.17(2) of the (old) Design Directive and art.96(2) of the Design Regulation, the international framework set by the Berne Convention could also allow (at least outside of the EU[47]) for such a fragmentation in the treatment

of works of applied art and industrial designs, in accordance with the provision of art.2(7). This was also supported by the 1978 WIPO Guide to the Berne Convention, according to which "national laws are allowed to choose the conditions of protection". Such an approach was somewhat watered down in the 2003 Guide, which introduced a more nuanced balance between national discretion and the need for coherence in the protection of such works.[48]

Anyhow, in spite of this context of some perceived leeway for a differential treatment of works of applied art, the jurisprudence of the CJEU has indicated early on that this is not true in the EU. In Flos, the Court clearly held that works of applied art shall not be treated differently than other works.

While to some it was straightforward that, in light of this, no additional requirements could be envisaged for the copyright protection of works of applied art,[49] national legislations still providing for them have left national judges at a crossroads, potentially having to choose between adhering to their national statutes or follow the more radical CJEU jurisprudence. All of this is what has led to the abovementioned referrals (Mio and konektra), also asking about how the assessment of originality is to be conducted. Furthermore, the 2024 Design Reform, in conjunction with the CJEU's consistent stance that originality is the sole criterion for copyright subsistence in all types of works, represents a significant step towards the homogeneous treatment of different copyright works across the EU.

How to measure originality?

When it comes to upcycled products in particular, several additional hurdles may be encountered. One of the primary challenges lies in determining how the protection of a work which inherently relies on pre-existing materials or designs should arise. Upcycled products have—by default—undergone a transformative process, but the extent to which such a transformation can be considered as constituting "an author's own intellectual creation" may not always be straightforward. To explore these issues further, it is crucial to first examine the assessment of originality in such works, followed by a closer analysis of the implications that their classification as derivative works has with regard to their copyright status.

Starting with Infopaq, copyright within the meaning of art.2(a) of the InfoSoc Directive is liable to apply only in relation to a subject matter which is original in the sense that it is its author's own intellectual creation. The EU concept of originality has been refined in subsequent case law. It entails "creative freedom" (FAPL[50]), "the author's personal touch" (Painer[51]), and that the work is the result of "free and creative choices" (Football Dataco[52]). As AG Mengozzi pointed out in his Opinion in Football Dataco,[53] followed by the CJEU in the resulting judgment,[54] as the EU standard of originality encompasses a creative aspect, the "labour and skill" put in the creation of a work do not suffice. Also: originality is not satisfied when a work was dictated by technical considerations, constraints, and rules, leaving no space for creative freedom (Bezpečnostní softwarová asociace[55] and Brompton Bicycle[56]). Overall, the EU understanding of originality can be summarised as follows:

"It is for the national court to ascertain whether […] the author was able to make free and creative choices capable of conveying to the reader the originality of the subject matter at issue, the originality of which arises from the choice, sequence and combination of the words by which the author expressed his or her creativity in an original manner and achieved a result which is an intellectual creation.[57]"

Fast forward to today: the pending (now joined cases) Mio and konektra, will hopefully spell out the definitive word as regards the treatment of works of applied art. In any event, the test of originality should be an objective one, without any subjective elements being taken into consideration. In his Opinion in the joined referrals, this was the position that AG Szpunar recommended the CJEU ***459** to take.[58] Outside of the EU, such a conclusion does also align with the position recently upheld in post-Brexit UK: in THJ, Arnold LJ acknowledged that the Copyright, Designs and Patents Act 1988 should be interpreted pursuant to art.2(a) of the InfoSoc Directive and stressed that the assessment of originality shall be objective, rather than artistic

merit-based.[59] This is not the first indication that the UK courts have comprehended this concept quite clearly, with the Response Clothing judgment also recognising that, following the principle set by Cofemel, complete conformity with EU law would remove any aesthetic effect requirement (as well as any need for categorisation).[60]

Nevertheless, subjective elements that have been suggested to potentially play a role in determining the originality of such works are not limited to the artistic value/aesthetic effect criteria. In the context of these referrals, it has been brought up whether other subjective evaluations such as the state of the mind of the author during the creative process could be injected into the originality test. As the need for an objective originality test hints, the creative process—especially in the sense of the author's state of mind or intention—should not be taken into account.[61] Despite the role attributed to the creative process in previous CJEU case law, its assessment merely concerned the extent to which each of its distinct stages allowed the author to make free and creative choices.[62]

Upcycled products—by definition—involve the transformation of existing materials or objects into new works. As such, they lie at the intersection of originality and adaptation. Having said that, for an upcycled product to be protected by copyright the (correct) standard is still one: it needs to be original in the sense that it is its author's own intellectual creation. The duplicitous character of such creations—being both aesthetic and functional—is also reflected in their elements, which embody both of these aspects.

In copyright terms, this means that, according to the Bezpečnostní softwarová asociace/Brompton Bicycle mandate, for the outcome of the upcycling process to be original, the author needs to make use of the margin for creative choices that both (a) the functionality of its elements (and their combination) and (b) the original author's own original choices leave. In the context of upcycling, this could involve reimagining the form, arrangement, or purpose of the existing materials to reflect the upcycler's own personality.

While the functional aspects of reused materials might come along with certain constraints, the creator can still make free and creative choices in their reconfiguration—such as combining the elements in a particular sequence, altering their appearance, or integrating them into an overall innovative design—in order to stamp the work with their so-called "personal touch". Such an approach underscores that originality, in the context of upcycling too, does not stem from the "labour or skill" involved in the process, but rather from the creative transformation that allows the final product to stand as the upcycler's own intellectual creation.

Derivative works under EU copyright

While most of human creativity is derivative in nature, in accordance with the well-known image of dwarves standing on the shoulders of giants, this appears to be the case for upcycled products in an even more straightforward fashion: upcycled products represent a reimagined form of existing designs, textiles, or materials. The protectability of such objects remains a matter of discussion, although the CJEU has already provided guidance regarding their treatment in infringement scenarios concerning transformation (Painer[63] and Deckmyn[64]) and incorporation (Pelham[65] and Renckhoff[66]).

The currently pending Institutul G. Călinescu referral[67] attempts to shed light on the specific protection of derivative works under EU copyright.[68] In his recently issued Opinion, AG Spielmann advised the CJEU to rule that a derivative work enjoys "new" copyright protection provided that it is original.[69] What is of particular importance in this case is that the CJEU will have to address the issue of what renders a derivative work eligible for copyright protection, as well as the significance of "freedom" and "creativity"—the cumulative requirements for copyright subsistence under EU law—in this context.[70]

Although it is a fact—as repeatedly noted—that "translations, adaptations, musical arrangements, and other alterations of a literary or artistic work shall be protected as original works without prejudice to the ***460** copyright in the original work" (art.2(3) of the Berne Convention), the CJEU has also made it clear that meeting the requirements of the EU originality test goes beyond effort, skill, or labour. While the CJEU has been adamant that choices dictated by technical considerations, rules, and constraints preclude copyright subsistence,[71] as previously discussed, the lines of what falls under these notions can become blurry.

Determining the creative input that is required for copyright protection to subsist in derivative works is particularly significant, given that it is somehow the measure that will signify whether a mere aesthetic reinterpretation of the previous work could suffice, rather than demonstrating an entirely personal expression which transcends the pre-existing work's identity.

Conclusion

The preceding analysis has touched upon questions of infringement and copyright subsistence relating to upcycled products under EU copyright.

Starting with the infringement analysis, the realisation and offering for sale of an upcycled good may be relevant under the exclusive rights granted under copyright law. While the right of reproduction might be of limited (if any) relevance in several cases due to the lack of copying inherent to the process of upcycling, other rights may restrict upcycling activities carried out with a licence.

Insofar as it concerns the right of distribution, it is at least doubtful that exhaustion might be triggered if the object incorporating the third-party copyright work is modified to a significant extent. Furthermore, the notion of 'consent' may not be limited to the sole decision whether to place an object on sale, but also the conditions and modalities of the sale/transfer of ownership. Other rights under copyright—including but not limited to moral rights—may also prevent distortions, mutilations and additions to one's own work. Last but not least, the right of communication to the public, for which no exhaustion is possible, may be also applicable in certain situations, thus preventing inter alia the online display and advertising for sale of upcycled goods realised without copyright owners' permission.

Turning to copyright subsistence, the treatment of upcycled objects under EU copyright law is no less complex than that of other works of applied art. Their fate is yet to be sealed, with key referrals—Mio and konektra—currently pending before the CJEU. Amidst this legal landscape, one thing seems clear: the CJEU has long expressed its intention to harmonise the fundamental requirements for copyright protection uniformly across all types of works, despite that several Member States (and their courts) continue to disregard this intention, holding onto national statutes—now directly at odds with EU law. The 2024 Design Reform further confirms that there is no longer any room for diverging national approaches to copyright protection of designs. In all of this, what makes an upcycled product original, given its strongly derivative nature, remains to be seen. The outcome of the also pending referral in Institutul G Călinescu may be decisive in this respect as well.

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Footnotes

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1 Infopaq International A/S v Danske Dagblades Forening (C-5/08) EU:C:2009:465; [2012] Bus. L.R. 102 at [31].

2 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, pp.10–19.

3 Infopaq International (C-5/08) at [42]–[43]. See also Pelham GmbH v Hutter (C-476/17) EU:C:2019:624; [2019] Bus. L.R. 2159 at [30].

4 Recently, Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH v Strato AG (C-433/20) EU:C:2022:217 at [16]–[18].

5 But cf. the position adopted in Opinion of Advocate General Szpunar in Mio (C-580/23) EU:C:2025:330 and konektra GmbH and LN v USM U (C-795/23) EU:C:2025:330, in particular [63]–[72], commented critically upon in *E. Rosati, "Of tables and other furniture: AG Szpunar advises" (8 May 2025) The IPKat*, available at https://ipkitten.blogspot.com/2025/05/of-tables-and-other-furniture-ag.html.

6 Arguing in the negative and so that the right of reproduction encompasses instances of both literal and non-literal copying and, therefore, also to situations that, formally, would fall within the generally unharmonised right of adaptation, see *E. Rosati, Copyright and the Court of Justice of the European Union 2nd edn (OUP:2023), pp.156–157*.

7 They are (in chronological order): Laserdisken ApS v Kulturministeriet (C479/04) EU:C:2006:549; [2006] E.C.R. I-8089. Peek & Cloppenburg KG v Peek & Cloppenburg KG (C-371/20) EU:C:2008:232; [2021] Bus. L.R. 1485,Criminal Proceedings against Donner (C-5/11) EU:C:2012:370; [2015] E.C.D.R. 22, Blomqvist v Rolex SA (C-98/13), EU:C:2014:55; [2014] Bus. L.R. 35, UsedSoft GmbH v Oracle International Corp (C-128/11) EU:C:2012:407; [2013] Bus. L.R. 911, Art & Allposters International BV v Stichting Pictoright (C-419/13) EU:C:2015:27; [2015] Bus. L.R. 268, Dimensione Direct Sales Srl v Knoll International SpA (C-516/13) EU:C:2015:315; [2015] Bus. L.R. 683, Criminal Proceedings against Ranks and Vasiļevičs (C-166/15) EU:C:2016:762; [2017] Bus. L.R. 290, Nederlands Uitgeversverbond v Tom Kabinet Internet BV (C-263/18) EU:C:2019:1111; [2020] Bus. L.R. 983.

8 Peek & Cloppenburg (C-456/06).

9 Peek & Cloppenburg (C-456/06) at [29]–[33]. In the same sense, see Donner (C-5/11) at [23]–[24].

10 Donner (C-5/11) at [26]; Blomqvist (C-98/13) at [28].

11 Opinion of Advocate General Szpunar in Tom Kabinet, (C-263/18) EU:C:2019:697 at [1]–[2].

12 See art.15(2) of Regulation 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification), OJ L 154, 16.6.2017, pp.1–99, and art.15(2) of 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 (recast), OJ L 336, 23.12.2015, pp.1–26.

13 Opinion of Advocate General Pedro Cruz Villalón in Art & Allposters International (C-419/13) at [67].

14 Art & Allposters International (C-419/13) at [34].

15 Art & Allposters International (C-419/13) at [37].

16 Art & Allposters International (C-419/13) at [40].

17 In this sense, T. Headdon, "The Allposters problem: reproduction, alteration and the misappropriation of value" (2018) 40(8) EIPR 501, 503.

18 P. Mezei–H. Härkönen, "Monopolising trash: A critical analysis of upcycling under Finnish and EU copyright law" (2023) 18(5) JIPLP 360, considering instead upcycling practices lawful due to the applicability of the exhaustion doctrine.

19 See also: T. Pihlajarinne–R.M. Ballardini, "Paving the way for the environment: channelling 'strong' sustainability into the European IP system" (2020) 42(4) EIPR 239, 246; *P. Mezei, Copyright Exhaustion 2nd edn, (CUP, 2022), p.61*; E Isyumenko, 'Intellectual property in the age of environmental crisis: how trademarks and copyright challenge the human right to a healthy environment' (2024) 55(6) IIC 864, pp.871–872. From a more general IP perspective, see I Calboli, 'Pushing a square pin into a round hole? Intellectual property challenges to a sustainable and circular economy, and what to do about it' (2024) 55(2) IIC 237, 243, and M Senftleben, "The unproductive "overconstitutionalisation" of EU copyright and trademark law—fundamental rights rhetoric and reality in CJEU jurisprudence" (2024) 55(9) IIC 1471 497–1498.

20 Soulier v Premier ministre (C-301/15) EU:C:2016:878; [2017] 2 C.M.L.R. 9 at [31]–[32]. Most recently, see also FT v Belgium (C-575/23) (ONB) EU:C:2025:141; [2025] E.C.D.R. 12 at [106].

21 VG Bild-Kunst v Stiftung Preussischer Kulturbesitz (C-392/19) EU:C:2021:181 at [21] and the case law cited therein.

22 Soulier v Premier ministre (C-301/15) at [31]–[40]. See further *E. Rosati, Copyright and the Court of Justice of the European Union, 2nd edn (OUP, 2023), pp.102–105*.

23 The discriminatory parody at issue in Deckmyn and Vrijheidsfonds (C-201/13) EU:C:2014:2132 comes to mind as an example: the CJEU held that freedom of parody, as an expression of one's own opinion, is not unlimited: see at [31]. See further *E. Rosati, Copyright and the Court of Justice of the European Union pp.232–233*.

24 Article 1(4) of the WIPO Copyright Treaty mandates compliance with arts 1 to 21 of and the Appendix to the Berne Convention.

25 It may be interesting to contrast EU law-making (and subsequent expansive interpretations of the CJEU) with the US, which took the position that the existing rights of distribution and public performance under the US Act were sufficient to comply with the WIPO Copyright Treaty's making available right and no changes to the statute were needed in light of its new international obligations: see *United States Copyright Office, The Making Available right in the United States—A Report of the Register of Copyrights (February 2016)*, available at: https://www.copyright.gov/docs/making_available/making-available-right.pdf, pp.15–18.

26 Notably Article 8 of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), OJ L 376, 27.12.2006, pp.28–35.

27 Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hoteles SL (C-306/05) EU:C:2006:479; [2007] Bus. L.R. 521.

28 *Rosati, Copyright and the Court of Justice of the European Union pp.162–179*.

29 Recently, Ocilion IPTV Technologies, C-426/21, EU:C:2023:564, para.58.

30 Recently, VG Bild-Kunst (C-392/19) at [33].

31 Svensson v Retriever Sverige AB (C-466/12) EU:C:2014:76; [2014] Bus. L.R. 259.

32 See, e.g., Opinion of Advocate General Wathelet in GS Media BV v Sanoma Media Netherlands BV (C-160/15) EU:C:2016:221; [2016] Bus. L.R. 1231 at [54], criticising the approach adopted by the CJEU in the earlier judgment in Svensson (C-466/12).

33 Opinion of Advocate General Szpunar in VG Bild-Kunst (C-392/19) at [44].

34 VG Bild-Kunst (C-392/19) at [45].

35 Opinion of Advocate General Szpunar in Cofemel—Sociedade de Vestuario SA v G-Star Raw CV (C-683/17) EU:C:2019:363; [2020] E.C.D.R. 9 at [1].

36 Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, OJ L 289, 28.10.1998, pp.28–35.

37 Council Regulation 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5.1.2002, pp.1–24.

38 E. Rosati, "Italian Supreme Court applies CJEU Cofemel decision to make up store layout" (2020) 15(7) JIPLP 501.

39 Opinion of Advocate General Szpunar in Kwantum Nederland BV v Vitra Collections AG (C-227/23) EU:C:2024:698 at [20].

40 Kwantum Nederland BV v Vitra Collections AG (C-227/23) EU:C:2024:914, paras 49–50.

41 Cofemel (C-683/17).

42 SI v Chedech/Get2Get (C-833/18) Brompton Bicycle EU:C:2020:461.

43 Infopaq (C-5/08) EU:C:2009:465; [2012] Bus.L.R. 102.

44 Levola Hengelo BV v Smilde Foods BV (C-310/17) EU:C:2018:899; [2018] Bus. L.R. 2442.

45 E. Rosati, "CJEU rules that copyright protection for designs only requires sufficient originality" (2019) JIPLP 931.

46 Directive 2024/2823 of the European Parliament and of the Council of October 2024 on the legal protection of designs (recast), OJ L, 18.11.2024; Regulation 2024/2822 of the European Parliament and of the Council of 23 October 2024 amending Council Regulation 6/2002 on Community designs and repealing Commission Regulation 2246/2002, OJ L, 2024/2822, 18.11.2024.

47 EU Member States do not enjoy the freedom to set their own reciprocity clauses, as per Kwantum Nederland BV v Vitra Collections AG (C-227/23). See further E. Rosati, "The unavoidable Kwantum judgment" (2025) (in press) JIPLP, available at https://doi.org/10.1093/jiplp/jpae106.

48 *M. Ficsor, Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms (2003), p.33*.

49 *M. Levin, "The Cofemel revolution—Originality, equality and neutrality", in E. Rosati (ed) The Routledge Handbook of EU Copyright Law (Routledge, 2021), p.85*.

50 Football Association Premier League Ltd v QC Leisure (C-403/08); Murphy v Media Protection Services Ltd (C-429/08) EU:C:2011:631; [2012] Bus. L.R. 1321 at [98].

51 Painer v Standard Verlags GmbH (C-145/10) EU:C:2011:798; [2012] E.C.D.R. 6 at [92].

52 Football Dataco Ltd v Yahoo! UK Ltd (C-604/10) EU:C:2011:848; [2012] Bus. L.R. 1753 at [38].

53 Opinion of Advocate General Mengozzi in Football Dataco (C-604/10).

54 Football Dataco (C-604/10) EU:C:2011:848; [2012] Bus. L.R. 1753 at [42].

55 Bezpecnostni Softwarova Asociace—Svaz Softwarove Ochrany v Ministerstvo Kultury (C-393/09) EU:C:2010:816; [2011] E.C.D.R. 3 at [48]–[49].
56 Brompton Bicycle (C-833/18), Kwantum Nederland BV v Vitra Collections AG (C-227/23) EU:C:2024:914, para.26.
57 Funke Medien NRW GmbH v Germany (C-469/17) EU:C:2019:623; [2020] 1 W.L.R. 1573 at [23].
58 Opinion of Advocate General Szpunar in Mio (C-580/23) and konektra (C-795/23) EU:C:2025:330, in particular at [43].
59 THJ Systems Ltd v Sheridan [2023] EWCA Civ 1354, para.24: Arnold LJ explicitly stated that the originality test is an objective one, as well as that nothing in the case law of the CJEU suggests otherwise. See further *E. Rosati, "Originality in copyright law: An objective test without any artistic merit requirement, recalls Arnold LJ" (30 November 2023) The IPKat*, available at: https://ipkitten.blogspot.com/2023/11/originality-in-copyright-law-objective.html.
60 Response Clothing v Edinburgh Woollen Mill Limited [2020] EWHC 148 (IPEC) (29 January 2020), para.63.
61 See also Opinion of Advocate General Szpunar in Mio (C-580/23) and konektra (C-795/23) EU:C:2025:330 at [44]–[50].
62 Painer (C-145/10) EU:C:2011:798; [2012] E.C.D.R. 6 at [89]–[94], referring to the creative choices that can be made during the different production stages preceding the creation of a photograph.
63 Painer (C-145/10) EU:C:2011:798; [2012] E.C.D.R. 6.
64 Deckmyn and Vrijheidsfonds (C-201/13), VG Bild-Kunst v Stiftung Preussischer Kulturbesitz (C-392/19) EU:C:2021:181 at [21] and the case law cited therein.
65 Pelham GmbH v Hutter (C-476/17) EU:C:2019:624; [2019] Bus. L.R. 2159.
66 Land Nordrhein-Westfalen v Renckhoff (C-161/17) EU:C:2018:634; [2018] Bus. L.R. 1815.
67 Request for a preliminary ruling from the Înalta Curte de Casaţie şi Justiţie (Romania) lodged on 31 October 2023—Institutul de Istorie şi Teorie Literară 'G. Călinescu', Fundaţia Naţională pentru ştiinţă şi Artă v HK, heir of TB, VP, GR. (C-649/23).
68 See further *E. Rosati, "When is a derivative work original and thus protectable by copyright? Classicist's critical edition makes its way to Luxemburg in fresh Romanian CJEU referral" (17 January 2024) The IPKat*, available at: https://ipkitten.blogspot.com/2024/01/when-is-derivative-work-original-and.html.
69 Opinion of Advocate General Spielmann in Institutul G. Călinescu (C-649/23) EU:C:2025:488 at [72].
70 E. Rosati, "When is a derivative work original and thus protectable by copyright? Classicist's critical edition makes its way to Luxemburg in fresh Romanian CJEU referral".
71 First in Bezpečnostní softwarová asociace, Funke Medien NRW GmbH v Germany (C-469/17) EU:C:2019:623; [2020] 1 W.L.R. 1573 at [48]–[49] and, subsequently, in Brompton Bicycle (C-833/18) Kwantum Nederland BV v Vitra Collections AG (C-227/23) EU:C:2024:914, para.26.

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