Greenifying Copyright

Economic Rights and User Flexibilities in the Context of Upcycling

Péter Mezei

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Upcycling has become one of the trendiest buzzwords for people with a sustainability-oriented mindset. While the term might refer to various forms of recollection, improvement and reuse of data or (raw) materials, this post adopts a narrower focus. It is limited solely to reviewing how upcycling might be approached from a copyright perspective (for approaches to upcycling from a trademark law perspective, see the previous blog posts in this symposium by Martin Senftleben and Irene Calboli).

For the purposes of this analysis, we might define upcycling as the transformative – recontextualized or repurposed – recycling and redistribution of tangible copies of works or goods (or components thereof) that represent, embody, visualise, or otherwise express content protected by intellectual property (IP) law.

Essential features of upcycling

From a copyright perspective, there are (at least) four essential features of upcycling.

First, the source work or good shall remain objectively recognizable or identifiable by the average observer or consumes. However, the transformed object need not constitute an original work of expression eligble for copyright protection (as the Court of Justice of the European Union has said in the context of parody in its Deckmyn judgement).

Second, although upcycling is most commonly associated with the fashion sector, it may also extend to other parts of the creative economy, including visual art, design, and architecture.

Third, the use may be commercial (see the sale of customized luxury watches), non-industrialised/artisan (e.g., unique upcycled garments), or purely artistic (e.g., the 'Watts Towers'). Upcycling can therefore lead to the production of more or less unique handcrafted goods in a typically do-it-yourself manner. In particular, artisan and artistic forms of upcycling represent a bottom-up approach to reusing otherwise discarded materials in an environmentally conscious manner.

Finally, the added value of upcycling is not necessarily commercial. The added value of upcycled products often lies in their artistic or purely "sentimental" qualities. Upcycling, in many cases, represents a distinctive form of transformative expression—an exercise of freedom of expression.

Not all of these conceptual elements can be paralleled with specific copyright concepts, but each can nonetheless be evaluated in light of current legal doctrine.

Proposition 1

My first proposition is that the actual *manner* of use – rather than the *purpose* of the upcycler, whether commercial, artisanal, or artistic – affects which exclusive right applies in a given case and how the operation of that right might be limited or excluded.

The range of possible applicable rights is notably broad: upcycling somewhat overlaps with the scope of reproduction, distribution, adaptation, and even public display. The quantitative and qualitative features of upcycling are of crucial importance. It makes a significant difference whether the reuse leads to a new, original work of expression – thus triggering the adaptation right (which is more plausible for artistic reuses) – or whether it constitutes mere copying of the whole or parts of the source material. Frequently, upcycled works are also disseminated publicly, either through sale (distribution) or through exhibition (display).

The right that is ultimately engaged will, in turn, influence which limitation or exception is potentially applicable. For instance, exceptions grounded in free-

dom of expression – such as quotation, parody, or pastiche – do typically limit reproductions (as harmonised by the European Union); and they apply to the rights of adaptation, distribution or display only as long as Member States choose to provide for such coverage. In the case of distribution rights, any such domestic exception may be justified under Article 5(4) of the InfoSoc Directive. However, the rights of adaptation and display, along with their corresponding limitations, have not been harmonized at the EU level, thereby leaving it to the Member States to delineate their boundaries (albeit subject to the three-step test, though). As of this writing, the author is unaware of any Member State laws that introduced any upcycling- or sustainability-oriented exceptions to their copyright regime.

Another illustrative example is the doctrine of exhaustion, which is expressly limited to cover redistributions of copies of works whose ownership has been lawfully transferred by the right holder or an authorized party. Consequently, resales of upcycled goods – such as garments – might be excluded if their creation is declared ab initio as reproduction or adaptation.

Proposition 2

The second proposition is that any determination regarding the interplay between exclusive rights and their limitations has direct implications for the balancing of fundamental rights.

More precisely, Article 17(2) of the Charter of Fundamental Rights protects IP rights in line with property rights. At the same time, Article 37 of the Charter declares that "[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" (for a more in-depth analysis of the scope and meaning of this provision, see Jasper Krommendijk's previous blog post in this symposium). Furthermore, Article 52(1) necessitates the balancing of fundamental rights so that the operation of one right does not harm the operation of any other right in a disproportionate manner. Finally, Article 3(3) of the Treaty on European Union requires that the internal market contribute to the sustainable development of Europe.

Taken together, we need to identify a combination of economic rights and corresponding exceptions or limitations that meets the proportionality requirement under the Charter. Which combination best reconciles a high level of protection for intellectual property with a high level of environmental protection?

The Finnish Tableware Jewellery Case

From a copyright perspective, the Finnish *Tableware jewellery and copyright* (2021) case deserves the closest look in Europe. In this case, fragments of broken porcelain tableware were repurposed into necklaces and earrings. The original plates and cups had been decorated, among other things, with floral patterns and berries of different colours. In its statement, the Finnish Copyright Council (FCC) concluded that the decoration met the threshold of originality and was thus protected under copyright law.

The FCC had to consider whether the rights of reproduction, adaptation or distribution in relation to the copyright-protected tableware had been infringed by the defendant's upcycling practices or, alternatively, whether those rights had been limited or exhausted. However, the Council's statement did not offer a definitive resolution. On the one hand, it distinguished the case from the CJEU's famous *Art & Allposters* judgement, as the porcelain pieces were not 'moved onto' (though they were 'incorporated in') other tangible products. Furthermore, the FCC did not consider the classification of the use as 'permitted borrowing' due to the lack of creating new and independent works, and since the requirements of the quotation defence were not met due to the lack of any (artistic) dialogue between the source and secondary objects (as requested by the CJEU's other notable judgment in *Pelham and Others*). Finally, the FCC also excluded the defendant's activities from the scope of the doctrine of exhaustion since the defendant created 'new material objects'. Overall, upcycling seems to be excluded from the scope of almost all possible economic rights –

except reproduction – and from the reach of relevant exceptions and limitations.

The FCC's statement was not unanimous. The dissenting opinion pointed out that the jewellery consisted of the exact same material objects initially sold in the Community by the right holder and, therefore, the distribution right concerning such objects that covers their reuse had been exhausted.

The statement of the FCC was widely criticised and became a catalyst for the first systematic review of the copyright aspects of upcycling in Europe by Péter Mezei and Heidi Härkönen.

Distribution + exhaustion = balanced interpretation

A close look at the FCC statement shows clearly how important it might be to approach transformative reuses in a flexible manner. While the invocation of reproduction (and adaptation) rights aligns with the current doctrinal status quo in copyright law, it also risks imposing undue burdens on secondary creators. These burdens may conflict with broader, socially vital objectives – chief among them, environmental sustainability. By contrast, the applications of the doctrine of exhaustion in upcycling cases presents an opportunity for a more nuanced and equitable balancing of rights, interests, and resources.

A sustainability-oriented (re)interpretation of exhaustion would align with key EU legislative initiatives that are vital for the circular economy, including, but not limited to the Waste Directive, the Textile Strategy, the Green Claims Directive proposal, or the Right to Repair Directive. As previously argued with Heidi Härkönen, interpreting the exhaustion doctrine in a manner which prohibits actions that improve the lifespan of a product simply does not serve the demands, aims and goals of the aforementioned EU legislative pieces. In a circular economy, a right-holder-centric view of exhaustion is simply outdated and must be replaced.

Furthermore, granting right-holders an exclusive right to decide on the distribution of the work, including discarded pieces of it, for the whole lifespan of such works does not comply with the concept and policy considerations of exhaustion at all. Ownership interests, product availability and affordability, and the reward theory (I discussed these policy arguments in my early paper on digital exhaustion and in my monograph) support the logic of lawful downstream commerce. A sustainability-oriented interpretation of the doctrine adds only further depth to this socially relevant concept. It might also foster new types of businesses and circular innovations, which is one of the ultimate goals of the EU to build a thriving and innovative single market.

Elsewhere, I have argued that since exhaustion represents a special limitation to the right of distribution, it "shall benefit from the doctrinal flexibilities developed by the CJEU related to other limitations and exceptions, especially the 'user rights' approach. This approach relies on the fundamental rights of end-users, e.g. freedom of expression, and it offers the effective application of such limitations against rights holders' exclusive rights."

Finally, exhaustion is defined in the EU with a regional scope and effect. As such, it could naturally support reusing trash on a scale far broader than what domestic limitations and exceptions can realistically achieve.

Conclusion: No to monopolizing trash!

In sum, upcycling represents a new philosophy for environmentally conscious producers and consumers, promising new bottom-up approaches to mitigate the adverse environmental impacts of human activity. It fits perfectly within the scope of (re)distribution and is reinforced by the policy rationales underlying the doctrine of exhaustion. There is little doubt that this synergy between an economic right and its inherent flexibilities could play a significant role in the ongoing effort to 'greenify' EU copyright law.

ABOUT THE AUTHOR

Péter Mezei
Péter Mezei is a professor of law at the University of Szeged (Hungary).

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