# Copyright Moral Rights Protection and Environmental Sustainability

## The Case of Upcycling

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When we talk about intellectual property (IP) and sustainability, we rarely pay attention to the *moral rights of authors*. However, it is important to assess these 'authors-only' rights in a world where copyright is often used as a tool to maximise corporate profits. In terms of sustainable development, moral rights can both promote and hinder environmental, social and cultural sustainability in the creative industries. However, their relationship with sustainable development is not straightforward. This blog post looks at some of the key issues that link the protection of moral rights in copyright to sustainable development and the circular economy. It focuses in particular on perhaps the hottest topic in IP law at the moment: upcycling, i.e. the transformative recycling of tangible copies of works or goods protected by some form of intellectual property (IP) law (Mezei, Péter & Härkönen, Heidi: 'A Primer to Upcycling' in P Mezei & H Härkönen (eds), The Research Handbook of Intellectual Property and Upcycling. Cambridge University Press. Forthcoming in 2025).

### Moral rights and sustainability in general

The international legal basis for the protection of moral rights is the Berne Convention for the Protection of Literary and Artistic Works (as amended on 28 September 1979). According to Article 6*bis*(1),

> *Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to [their] honor or reputation.*

The article contains the two most widely recognised moral rights: the right of attribution and the right of integrity. The former ensures that the author is credited for their creative work, and the latter ensures that the work remains in the form and context intended by the author. Respecting the right of attribution leads to transparency about the source of the work, and the right of integrity helps, among other things, to preserve the work and to respect the author's (artistic or literary) intentions. These concepts are almost foreign to some creative fields, such as the fashion industry. The European high fashion sector, for example, largely ignores authors' attribution rights, with the exception of famous "star designers" who often take credit for the creative work of their less famous colleagues (see here for further discussion on fashion and moral rights).

But how does this relate to sustainability? The link is more indirect, but there is one. First of all, transparency about the source of a work is important, especially in creative fields that produce consumer goods, such as fashion. (I'm not going to go into the complicated issue of are fashion designs protected by copyright, and under what conditions, and what does *Cofemel* mean in this context here. But if you are interested, you can read my doctoral thesis on the topic (2021). As we all know, utilitarian works tend to be discarded and treated as commodities more often than, say, works of fine art. Again, fashion is a textbook example of such consumer behaviour. Secondly, in my previous research I have pointed out that transparency about the creative source of the work – i.e. respecting

the author's right of attribution – can promote *social appreciation of creative work and its results*. Thirdly, increased social recognition in turn means increased *cultural sustainability* in these fields. Recognising the creative value of creative utilitarian objects recognises their cultural significance. Finally, this arguably makes it harder for individuals to view them as disposable commodities, meaning that cultural sustainability can lead to increased environmental sustainability. Increased respect for the moral rights of authors could thus promote sustainable development.

It is also possible to argue that moral rights can be an *obstacle* to sustainable development. In theory, one could try to use these rights to oppose the circular reuse of copies of protected works.

Moving on from the philosophical aspect of the role of moral rights in the circular economy, let us now look at more concrete scenarios. I pay particular attention to the possibility of using moral rights as a pretext to intervene in *upcycling* activities.

## Point 1: Who cares about moral rights?

When we talk about copyright in highly commercial areas of creativity (such as fashion and other industrial arts), we often focus on the perspective of corporate rightsholders. Now that works of applied art are increasingly protected by copyright in the EU, economic rightsholders in the fashion and design sectors, for example, have more opportunities to intervene in the (re-)use of their copyrighted products. Unfortunately, we have seen corporate rightsholders try to use copyright as an argument against the upcycling of their products. For example, the rightsholder *Fiskars Group* did not like the fact that an upcycling artist made jewellery from their broken cups and plates and wanted to sell them (see the analysis of this infamous statement of the Finnish Copyright Council TN 2021:9 here). The Finnish design and lifestyle company Marimekko had the online second-hand marketplace *Tori.fi* take down a post in which a private individual attempted to sell a dress upcycled from a vintage Marimekko curtain (see the analysis of this case here). In both cases, the rightsholders' claims are absurd not only doctrinally, but especially because both rightsholders claim to care about sustainability (see here and here).

Indeed, it seems that it is mainly rightsholders who have something against upcycling. Authors, on the other hand, have shown no signs of having problems with the circular reuse of copies of their works. This is important in the context of moral rights because, strictly speaking, the interests of corporate rightsholders are irrelevant to moral rights. Moral rights are not transferable, which means that only authors can enforce them. And authors do not seem to agree with corporate rightsholders when it comes to upcycling. In fact, they do not seem to mind upcycling at all.

But let's say they did – could the rights of attribution and integrity operate as valid claims against upcyclers? I will now consider these two rights separately.

## Point 2: The right of attribution and upcycling

The right of attribution ensures that the author is credited as such. This generally also applies to situations where their work has been upcycled or transformed into something else. (Provided the work is still recognisable), the author should be credited in the context of the upcycled product. If upcyclers do not respect the author's right of attribution, this could be a barrier to upcycling activities.

However, respecting the right of attribution is an 'easy fix' – just credit the author (e.g. on the product label, sales brochure, price tag, etc.), and that's basically it. Most upcyclers probably know that attribution can even add value to the upcycled product by providing interesting background information and authenticity.

## Point 3: The right of integrity and upcycling

The right of integrity is more complicated in the context of upcycling. Since the Berne Convention allows the author to "*object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to [their] honor or reputation",* we might ask: could upcycling be such a prejudicial action?

There are divergent traditions regarding the right of integrity between the countries of the Berne Union and, in particular, between common law and civil law jurisdictions. However, it is generally accepted that more commercial works generally receive a narrower scope of integrity protection. Some countries, such as the Nordic jurisdictions, have specific provisions in their national copyright laws that allow owners of utilitarian items to make changes to them (e.g., Finnish Copyright Act § 25e, Swedish Copyright Act § 26c). Most 'upcycling material' falls into this category of works: tableware, bed linen, curtains, etc., tend to be commercially mass-produced and not unique works of art. The starting point is therefore that their right to protection of integrity is somewhat narrower than, for example, that of a painting.

Another important thing to bear in mind is that "prejudice" is assessed through an objective lens, even though it involves a subjective factor. When assessing the potential harm to the author, we ask: "Would a *reasonable person* consider the treatment of the work to be detrimental to the honour or reputation of the author?". Honour and reputation in this context means the author's honour and reputation *as an author – not as a person*. It thus differs from the assessment of harm in, for example, criminal law contexts (such as in defamation cases).

There is also a subjective element in the assessment of the right of integrity, as the values of the author are taken into account. This is particularly true in jurisdictions that protect the author's artistic individuality, such as the Nordic countries. The Swedish Supreme Court, for example, has held that a television channel infringed the artistic individuality of film directors by showing commercials in the middle of their cinematographic works. By interrupting the atmosphere of the films, the advertising breaks caused changes to the films in a manner which was prejudicial. What was important here is that the films in question were critical of consumer society. The values of the directors were thus taken into account. Similarly, it could be argued that if, for example, an eco-conscious fashion designer creates a design that should be made from biodegradable or recycled materials, it cannot be made from, say, virgin polyester without their consent. To disregard the author's choice of materials in this way would be to alter the work in a way that could damage their honour and reputation and cause resentment among their clientele. So, the question is: could an author rely on the right of integrity to object to the upcycling of copies of their work because such upcycling could be prejudicial to them?

It is important to remember that prejudice is assessed from the perspective of a reasonable person. Let's say an author does not want their work to be upcycled because they do not believe in climate change and are against all kinds of green and circular activities. Would this argument work? I think not. In most cases, no reasonable person would think any less of the author because a copy of their work is being reused according to the principles of the circular economy. Because we are looking at prejudice from the perspective of a reasonable person, the author's values that can be given weight must somehow be generally accepted values in society. Values against public order cannot be considered in the same way. It would also be difficult to rely on the author's values if they were very old-fashioned. For example, objecting to the use of curtains or shirts to make revealing clothing would probably not be the best argument. Also, remember that moral rights (like any intellectual property rights) should not be abused.

To take the opposite example, it should be possible for an author to invoke their right of integrity in e.g. a situation where copies of their work have been used to raise funds for a racist or sexist cause.

## Conclusion

Moral rights need to be taken into account in various circular economy activities, such as upcycling. While the protection they offer may promote sustainability, especially in commercial areas of creativity, they could theoretically conflict with certain types of upcycling activities. But only in theory. Any problems with the right of attribution can be easily dealt with, and the right of integrity only works against upcycling in very rare cases where a reasonable person would consider the upcycling to be detrimental to the author's honour

or reputation. Authors therefore have minimal recourse to their moral rights to object to the upcycling of their works. And this is probably not a problem for authors because (unlike corporate rightsholders) they do not seem to have a problem with upcycling.

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