

Kluwer Copyright Blog

Copyright, Upcycling, and the Human Right to Environmental Protection

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As the environmental crisis [escalates](#) due to overproduction and overconsumption, there is an increasing [recognition](#) of the urgent need for environmental consciousness and a shift towards a sustainable, circular economy (see, in the intellectual property context, [Pihlajarinne & Ballardini \(2020\)](#), [Senftleben \(2023\)](#), [Calboli \(2024\)](#)). Upcycling, notably, which involves reworking old items or their parts into new ones, has emerged as a tangible effort to address the negative impacts of this crisis. However, copyright protection may unexpectedly clash with this sustainable practice, as certain upcycled items could include copyrighted prints, ornaments, or design patterns from the original materials, such as new clothing items made out of old bed sheets, curtains, or tablecloths, or jewellery made from broken porcelain.



Photo by [Dinh Pham](#) on [Unsplash](#)

Copyright exhaustion

At first sight, the doctrine of copyright exhaustion would seem to provide an immediate shelter to such upcycling practices given their focus on repurposing of the *old* items that had previously been already placed on the market with the copyright holder's consent, and not the creation of new, unauthorized items. In the EU, Article 4(2) of the [InfoSoc Directive](#) specifically addresses

exhaustion, stating that the distribution right of the copyright holder is exhausted within the EU after the first sale or other transfer of ownership of a copy of a work with the rightholder's consent. However, the applicability of this provision to copyright-relevant upcycling is, at best, questionable, if not precluded by the *Allposters* judgment of the Court of Justice of the EU (CJEU). In that case the Court held that transferring, by means of a special chemical process, images of copyright-protected works from paper posters to painter's canvas, was "an alteration of the copy of the protected work" that constituted a new reproduction and hence was not covered by the exclusive right of distribution to which only copyright exhaustion applies.

This conclusion has significant implications for upcycling, as the latter is inherently based on alteration of the used old items. Indeed, this has already been confirmed in a recent case from Finland, where the majority of the Finnish Copyright Council explicitly relied on *Allposters* to conclude that the use of broken tableware for creating upcycled jewellery, which retained copyright-protected ornaments from the original tableware, constituted an unauthorized reproduction of the work (see, for further discussion, [Mezei and Härkönen \(2023\)](#)).

Copyright exceptions: Quotation and pastiche

Apart from exhaustion, another possible avenue of "legitimizing" upcycling in the face of copyright infringement allegations could lie with copyright exceptions. Specifically, the quotation exception, enshrined in Article 5(3)(d) of the InfoSoc Directive, seems to be the primary candidate in this context. However, the current CJEU understanding of a quotation, advanced in *Pelham*, as requiring the intention of entering into "dialogue" with the quoted work, might preclude its applicability to upcycling. In the above-mentioned Finnish tableware case, for example, the Copyright Council's majority applied this "dialogue" requirement to the effect of excluding applicability of quotation exception to the broken tableware reworked into jewellery pieces. In the majority's opinion, no quotation-exception-relevant interaction between the original dishes and the new jewellery could be directly observed in that case.

Besides quotation, another exception within the InfoSoc list that could potentially accommodate upcycling is the pastiche exception in Article 5(3)(k). The concept of "[pastiche](#)" broadly aligns with upcycling, as the latter almost by definition involves combining different styles and materials, essentially creating something new from a patchwork of elements. However, the CJEU is yet to clarify the copyright law-relevant meaning of "pastiche", pending the current reference in the *Pelham II* case, which aims to shed light on whether pastiche could serve as a "catch-all" provision for artistic use of copyright-protected works (see e.g. [here](#)). If interpreted broadly, the CJEU's clarification would potentially allow the pastiche exception to cover, among other practices, upcycling. However, a narrow interpretation is also possible, and, until the CJEU provides further clarification, relying on the pastiche defence remains highly unpredictable for upcycling businesses, offering insufficient legal certainty for their operations to thrive.

A solution? The human right to a healthy environment

What could be then a solution to such an "unsustainable" situation under the current copyright law framework in the EU? As a matter of fact, it might lie within human rights law, particularly the increasingly recognized right to a healthy environment.

This right was explicitly acknowledged as a standalone human right by the UN in its [October 2021 Resolution](#). Furthermore, even prior to that, it was already enshrined in Article 37 of the [EU Charter of Fundamental Rights](#), adopted in 2000 and legally binding since 2009. Concerning the [European Convention on Human Rights \(ECHR\)](#), although it does not yet contain a self-standing right to a healthy environment, the Court has a long history of evolutive interpretation of the existing Convention provisions “so as to encompass environmental protection”. Also, in the most recent and groundbreaking twist in its jurisprudence in April 2024, the Court’s Grand Chamber ruled that Switzerland’s failure to implement sufficient measures to combat climate change amounted to a human rights violation. Moreover, negotiations for an Additional Protocol to the ECHR, aiming to establish an autonomous right to environmental protection, are currently [actively underway](#), indicating a potential shift towards a standalone right to environmental protection also within the ECHR system.

There is therefore no lack of normative grounds for adopting more environmentally-friendly solutions within the scope of copyright laws in Europe, and the strength of these normative grounds is only increasing.

How to reconcile copyright with the human right to a healthy environment?

What could this mean for copyright-relevant upcycling? In short, the growing weight of the human right to environmental protection demands that copyright laws are reconciled with it – either internally within the mechanisms inherent to copyright law itself, or externally, via the human rights law’s own balancing approaches.

Internal reconciliation

Concerning internal reconciliation mechanisms, the first way of bringing copyright protection in line with the requirements of the human right to a healthy environment is by ruling exhaustion still applicable by holding upcycling covered by the right of distribution and not the right of reproduction. Interestingly, this was the reasoning in the powerful minority opinion in the Finnish case, where the dissenting member of the Copyright Council ruled that, in upcycling the broken tableware into jewellery pieces, “no copy has been produced”, with the resulting applicability of exhaustion. Importantly, in reaching this conclusion, the dissenting opinion highlighted that the case was also about balancing the fundamental rights to intellectual property and environmental protection as enshrined, respectively, in Article 17(2) and Article 37 of the EU Charter. According to the dissenting opinion, this balancing act required, in the circumstances of that particular case, giving priority to the fundamental right to a healthy environment.

Concerning other options to reconcile upcycling with copyright law, applicability of a quotation exception would perhaps still be problematic, unless somehow the environmental protection considerations would also influence the interpretation of a “dialogue” between the original and upcycled items. The pastiche exception, by contrast, is much more promising in this regard. Still, as mentioned above, its application to upcycling would require its broad interpretation by the CJEU – the issue which is still pending.

External reconciliation

Should authorities, including the judiciary, fail to incorporate considerations for the right to a healthy environment into their interpretation of copyright laws' internal mechanisms, upcycling businesses unjustly blocked on copyright grounds should be entitled to argue that this violates their human right to a healthy environment in its *external* application to copyright laws. Once such claims are brought before the courts, it is important that they not be misled by the fact that upcycling businesses, like any other businesses, are not driven exclusively by environmental protection considerations, but also, quite naturally, by profit-making motives. It would be therefore crucial for the courts handling such cases to duly acknowledge that the economic interests of upcyclers also align with the significant societal goal of environmental protection. Due consideration of this fact can be made by evaluating the copyright-law-related restrictions on the right to property or freedom to conduct a business of upcyclers *in the light of* the human right to a healthy environment. Importantly, this type of assessment is not uncommon to human rights courts. The European Court of Human Rights (ECtHR), for example, routinely assesses claims of breaches of, in particular, [freedom of assembly in the light of freedom of expression and the other way around](#), or [the right to education in the light of the freedom of religion](#). By analogy, nothing prevents national courts and, ultimately, the ECtHR and the CJEU, from examining alleged violations of the right to property or business freedom of upcyclers also *in the light of* the human right to environmental protection. Arguably, the increasing relevance and importance of this fundamental right may even require the judiciary to make such an assessment.

Summing up

In summary, there are numerous avenues available in Europe for reconciling copyright protection with the human right to a healthy environment without the need for a direct legislative intervention. It is, however, imperative that relevant authorities, primarily the judiciary, do not hesitate to utilize these avenues to ensure a sustainable present and future, also insofar as sustainable business practices are at stake.

This blog post contains a shortened and edited version of the author's article on this topic recently published in the IIC.

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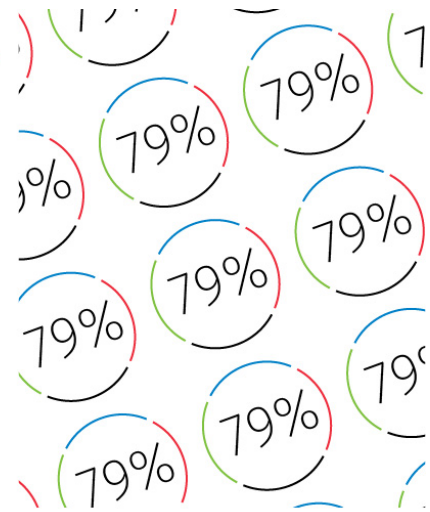
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