

Monopolising trash: a critical analysis of upcycling under Finnish and EU copyright law

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1. Introduction

The doctrine of exhaustion, or the ‘first-sale’ doctrine in the USA, is one of the most fundamental principles of copyright law. Under this doctrine, a rightholder must accept that copies or the originals of copyright works and other subject matter lawfully placed into circulation by or with the authorization of the rightholder, through sale or in any other form of transfer of ownership, are subsequently distributed by the lawful owner of those copies or originals, if the rightholder received proper remuneration for the initial distribution.¹

The doctrine serves as a balancing mechanism to limit the right of distribution under copyright law along the interests of the society, in general, and individual owners of the copies of works, in specific. The doctrine is backed by multiple policy considerations, including primary or direct arguments (the superiority of property rights over copyrights, the reward theory and the restraint of rightholders over market control) and secondary or indirect ones (guaranteeing affordability and availability, preservation of cultural heritage and consumer protection).²

Along these lines, the doctrine of exhaustion was historically introduced to limit the control of redistributions by the rightholders. This was the case both at the national level (eg in the earliest German or US judgments and laws on the doctrine)³ and much later at the international level (eg Article 8 WIPO’s Copyright Treaty on the distribution right).⁴ The doctrine has been approached slightly differently in the European Union (EU), where the Court of Justice of the European Union (CJEU) originally introduced the doctrine to support the freedom of movement of goods and hence the functioning of the internal market.⁵

1 P Mezei *Copyright Exhaustion: Law and Policy in the United States and the European Union* (2nd edn Cambridge University Press Cambridge 2022) 2.

2 *ibid* 13–16.

3 *ibid* 37–42 (for EU Member States) and 72–77 (for the USA).

4 *ibid* 21–30.

5 Judgment in *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*, C-78/70, ECLI:EU:C:1971:59.

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Abstract

- Exhaustion is a fundamental doctrine of copyright law, allowing for the resale of lawfully acquired copies of protected subject matter without prior authorization and payment to the rightholder. Following the debates on parallel importation, freedom of movement of goods, property rights *v* copyright and, most recently, resale of digital files, it is time to assess the relevance of the doctrine to a sustainable economy.
- More precisely, this article addresses whether upcycling (transformative redistribution of materials based on the use of pieces/copies of inter alia works of authorship) fits into the doctrine of exhaustion. Our analysis starts with a recent opinion of the Finnish Copyright Council on the upcycling of broken tableware and follows with the critical analysis of the case law of the European Union (EU) and the USA on transformative redistributions.
- We argue that upcycling doctrinally fits into the concept of exhaustion, and—more importantly—it is supported by sound policy arguments based on the primary sources of EU law and the general aims of sustainability and circular economy.

Nonetheless, there has been some case law on both sides of the Atlantic that accepted the reliance on the

doctrine for the purpose of reinterpretation or transformation of the individual copies of the work. While some of these cases are slightly old, their importance is far from outdated, and they can gain renewed importance in the endeavour towards sustainable development. Climate change and the need for a circular economy urge us to approach almost every aspect of IP law to support a more sustainable and resilient society. As a tiny piece of this puzzle, we shall raise the question, whether upcycling, that is, the sale of the original item of a protected work that underwent some transformation, fits into the concept of exhaustion. In upcycling, new, individual objects are made out of old or used items or waste materials with or without the ‘adaptation’, but certainly without the ‘multiplication’ of the source work, in order to create products with a higher retail value than traditional recycled products.⁶ It is therefore a way for worthless items to remain in circulation rather than heading to landfill, making upcycling an important activity for the functioning of the circular economy.⁷ The question of upcycling arose recently in a Finnish copyright case. There, the Finnish Copyright Council (FCC) published a statement, in which the Council’s majority—against a strong dissenting opinion—ruled out the applicability of exhaustion to upcycling.

This article addresses this conceptually and practically relevant issue as follows. Section 2 introduces the facts of the Finnish case and critically assesses the outcome of the proceeding. Section 3 introduces the existing US and European case law related to transformative redistribution of original copies of protected works. Section 4 then continues with the substantive analysis of upcycling, viewed through the lenses of exhaustion and sustainability to reach the conclusion, presented in Section 5, that upcycling is covered by the doctrine of exhaustion, and it shall be actively encouraged by the EU legislator to target a sustainable, resilient, circular economy.

2. Nay to upcycling works of applied art in Finland

2.1. The Tableware Jewellery case

A recent statement of the FCC, in *Tableware jewellery and copyright* (2021),⁸ assessed the doctrine of exhaustion in the context of upcycling works of applied art.⁹

6 R Aus, H Moora, M Vihma, R Unt, M Kiisa and S Kapur, ‘Designing for circular fashion: integrating upcycling into conventional garment manufacturing processes’ (2021) 8 *Fashion and Textiles* 34 at 3–4.

7 *ibid.*

8 Statement TN 2021:9 ‘Astiakorut ja tekijänoikeus’.

9 Regardless of not being a court of law *per se*, the FCC has a significant role in the development of the interpretation of EU copyright law in Finland.

In the underlying case, upcycling artist A had used pieces of broken porcelain tableware, such as plates and cups to make jewellery (necklaces and earrings) out of them. The tableware was originally produced and marketed by company F. The used plates and cups had been *inter alia* decorated with floral patterns and berries of different colours.¹⁰ Earring and necklaces from each set of broken tableware had been designed and produced in a way that their decoration themes would match each other. It was concluded by the FCC that the decoration passed the threshold of originality, and hence, it would be protected by the copyright of company F.¹¹ The porcelain pieces used for earrings and matching pendants had been chosen among the pieces of the same set of tableware.¹²

The FCC had to consider, among other things, whether the distribution right in the copyright-protected tableware had been infringed by such use or, alternatively, the said right had exhausted in accordance with the Finnish Copyright Act (404/1961) Section 19.¹³ In the event of exhaustion, the upcycling artist would have no obligation to acquire a permission from company F to use the pieces of the original copies to make jewellery out of them. Interestingly, in its response to FCC, company F claimed that it has an extremely favourable attitude towards recycling and ‘in principle’ finds it positive that people are willing to utilize broken or discarded tableware but paradoxically ‘cannot allow’ commercial jewellery making.¹⁴ In

The FCC functions under the Ministry of Education and Culture and consists of, eg copyright law scholars and representatives of various copyright interest groups. Instead of legally binding rulings, the FCC issues statements that have a recommending nature. These statements are widely accepted as important secondary legal sources by Finnish legal academics. Compared to U-M Mylly, ‘Tekijänoikeuden omaperaoisyyden harmonisointi Euroopan unionissa [Harmonisation of the Originality Criterion in Copyright Law Within the European Union]’ (2016) 114 *Lakimies* 6 at 918 and H Härkönen, ‘Muoti tekijänoikeudellisena teoksena: näökoökuomia kaöyttoötaiteen teoskynnykseen ja kopiointiin Suomessa [Fashion as a Copyright-Protected Work: Perspectives on the Copyright Threshold and Copying of Applied Art in Finland]’ (2018) 99 *Defensor Legis* 6 at 914.

10 TN 2021:9 (n 8) para 35.

11 *ibid* para 38.

12 *ibid* paras 35–37.

13 The dispute also concerned other issues. The FCC was asked whether the upcycling artist A had, in free association with the copyright-protected tableware, created new and independent works, in which case their copyright would not be subject to the right in the original works (the tableware) (Finnish Copyright Act Section 4.2). Moreover, the FCC had to analyse whether the quotation right (Finnish Copyright Act Section 22) would apply in this case. In both questions, the FCC’s answer was negative, meaning that neither Section 4.2 nor Section 22 justified upcycling in this case. As this article focuses on exhaustion, analysis of the upcycled jeweller’s status as independent ‘works’ or quotations is excluded from the scope.

14 TN 2021:9 (n 8) para 7: ‘F on antanut asiassa A:n oikeudenhaltijana vastineen kertoen, että F suhtautuu kierrättämiseen erittäin myönteisesti ja on sinällään positiivista, että ihmisillä on halu hyödyntää rikkiniäisiä tai käytöstä poistettuja astioita. Kauppallista astiakorujen valmistusta F ei kuitenkaan voi sallia [...]’.

other words, it sought to *monopolise trash*, instead of encouraging its circular use.

Company F claimed that the upcycled broken pieces of, eg plates and cups would actually no longer be the original copies of the protected works. Instead, company F argued that those copies had undergone alterations of their medium and placed on the market again in a new form (as a new ‘copy’).¹⁵ The FCC’s perception was that the jewellery could not be considered as ‘new and independent works’, when the pieces of porcelain that were chosen as the central elements of the jewellery included copyright-protected decorative elements. According to the FCC, it follows that the issue of using pieces of tableware in jewellery in a manner like the one at hand is not sovereign from the copyright of the original tableware.¹⁶

Among other things, the FCC relied on *Art & Allposters*.¹⁷ In this judgment, the CJEU found that the doctrine of exhaustion set out in Article 4(2) of the InfoSoc Directive does not apply in a situation where a reproduction of a protected work, after having been marketed in the EU with the copyright holder’s consent, has undergone an alteration of its medium, such as the transfer of that reproduction from a paper poster onto a canvas, and is placed on the market again in its new form.¹⁸

The FCC statement was not unanimous. The dissimilarity of *Tableware jewellery* and *Art & Allposters* was spotted in a dissenting opinion to the majority statement.¹⁹ The dissenting opinion pointed out that, unlike in *Art & Allposters*, no reproduction of a work had been made in *Tableware jewellery*. The jewellery were the same exact material objects that were first sold in the EU/European Economic Area by or with the consent of the rightholder, and therefore, the distribution right to such objects was exhausted. The dissenting opinion further drew attention to the way that the CJEU has interpreted Article 36 of the European Commission (EC) Treaty.²⁰ Although this provision allows derogations from the fundamental principle of the free movement of goods by reason of rights recognized by national legislation in relation to the protection of industrial and commercial property, such derogations are allowed only to the

extent to which they are justified by the fact that they safeguard the rights which constitute the specific subject matter of that property.²¹ Using pieces of broken plates and cups cannot be considered to belong in the core of the author’s economic rights that should be protected by limiting the exhaustion of the distribution right.²² The dissenting opinion further noted that the matter regarding exhaustion of the distribution right is a remarkable issue concerning interpretation of legislation that either hampers or fosters circular economy.²³ It refers to Article 37 of the Charter of Fundamental Rights of the EU,²⁴ which requires integrating a high level of environmental protection and improving the quality of the environment into EU policies.

2.2. Critical assessment

In *Tableware jewellery*, the FCC would have had an excellent opportunity to interpret the rule of exhaustion in a manner that is favourable to sustainable development and circular economy. Unfortunately, this opportunity was not taken advantage of by giving significantly more weight to the rightholders’ interests compared to users’ individual and society’s overall interests. In this sense, the FCC’s approach appears also to somewhat differ from the traditional Finnish view, where the position of the owner of a copy has been rather strong.²⁵

Similarly, the reliance—by the majority opinion of the FCC—on the argument that the use of pieces of the broken tableware represents a ‘new form’ overlooks the primary rationale of upcycling: namely, it is not a multiplication of the underlying works but a *reuse* of them. Indeed, the incorrect classification of the ‘new forms’ as reproduction outlawed, in the FCC’s position, the applicability of the distribution right, even if the same identical tangible elements were incorporated in the secondary necklaces and earrings.

This is exactly what makes the FCC’s reliance on *Art & Allposters* questionable. The two cases differ significantly. In *Art & Allposters*, the protected works were actually transferred from a medium (paper poster) to another (a painter’s canvas) with the help of a mechanical

15 *ibid* paras 7–8.

16 *ibid* para 45.

17 While this judgment was of critical nature for the FCC’s opinion, it will only be elaborated in depth in Section 3 on the relevant case law on transformative redistributions.

18 Judgment in *Art & Allposters International BV v Stichting Pictoright*, C-419/13, ECLI:EU:C:2015:27, para 49 and TN 2021:9 (n 8) para 40.

19 TN 2021:9, Dissenting Opinion by FCC Member Maria Rehbinder, 22 November 2021, 14–15.

20 Treaty establishing the European Community (Consolidated version 2002) Case 325/33.

21 See Judgment in *Metronome Musik GmbH v Music Point Hokamp GmbH*, C-200/96, ECLI:EU:C:1998:172, para 14.

22 TN 2021:9 (n 19) 14–15.

23 *ibid*.

24 Charter of Fundamental Rights of the European Union (2012) C 326/391.

25 On the Finnish tradition, see eg U-M Mylly, ‘Tekijaõnoikeuden digitaalinen sammuminen ja teosten jakelulogiikka: tietokoneohjelmat ja muut elektroniset teokset. [Digital Exhaustion of Copyright and Distribution Logic of Copyrighted Works: Computer Programs and Other Electronic Works]’ (2017) 115 *Lakimies* 5 at 609 and M Kivistö *Tekijänoikeus omaisuutena* [Copyright as property] (Suomalainen Lakimiesyhdistys Helsinki 2016) 330–304.

and chemical process. The reproduction of the work on the painter's canvas hence was no longer the same exact copy as the one printed on a paper poster. Consequently, the CJEU considered that the distribution right had not been exhausted in *Art & Allposters*. In *Tableware jewellery*, instead, the jewellery was made out of pieces of the same exact copies that were first sold in the Community by the company F or by its consent. The altered objects were physically the same that were placed onto the market with the consent of the rightholder²⁶ but then shattered to pieces, making them unusable for their original purpose as tableware. Altering these objects by upcycling continued their lifespan. This is exactly the point of upcycling: *items that are generally considered worthless or trash are used in innovative ways to give them new commercial value, hence fostering the circular economy.*

Equally importantly, as analysed in *Tableware jewellery*, the adaptation right (or right to make derivative works under US copyright law) might come into play in case of upcycling. First, the right of adaptation has not been formally harmonized *horizontally* by the EU legislation, hence national laws govern such a question. According to the Finnish Copyright Act Section 4.2, 'If a person, in free association with a work, has created a new and independent work, [their] copyright shall not be subject to the right in the original work'. For the purpose of adaptation, the upcycler shall create a new work of authorship based on the original one, where the reliance on the source work is more than a mere inspiration, and, hence, the original work does not fade in the derivative work. As it will be shown in Section 3, some US and European decisions ruled out the creation of such derivative works by upcyclers. This said that the threshold of protection has been set extremely low by the CJEU in recent years. It is therefore possible that upcycled products fall into the scope of copyright protection. In *Tableware jewellery*, however, the FCC found that the upcycled products were not new and independent works.²⁷ In such cases, where upcycled products fall into the scope of copyright protection themselves, it would be a question of fact, to be judged case by case, whether the upcycler has adapted the original work. Even if such adaptation would look plausible, it looks inevitable to balance the various interests at stake. In Section 4, we will put forward the argument that both policy considerations and substantive norms necessitate the consideration of the goals of a sustainable, circular economy.

Tableware jewellery has sparked debate in Finland about the relationship between sustainable development

and the interpretation of IP laws. The dissenting member's view has received support from, eg Max Oker-Blom, who suggested that when it comes to copyright, weight should be given to the demand for a high level of environmental protection under Article 37 of the Charter, as well as to the requirement to integrate environmental protection requirements into the definition and implementation of the EU policies and activities under Article 11 EC Treaty, in particular, with a view to promoting sustainable development.²⁸

Although this was not the issue in *Tableware jewellery*, it is noted that upcycling may spark trade mark-related concerns as well. Even though in principle it is permitted to commercialize goods lawfully placed into circulation by or with the authorization of the trade mark holder, this principle might not apply when the condition of the product was changed after the first sale. All these said, commentators like Annette Kur and Taina Pihlajarinne have strongly recommended that sustainability and circularity issues be taken into consideration in the trade mark law context as well.²⁹

3. A comparative outlook at transformative redistributions

This article takes the view that the Finnish case could have been decided differently—and for that a massive amount of inspiration could have been derived from pre-existing case law from both sides of the Atlantic.

Transformative redistributions have long been treated as lawful in multiple jurisdictions. To mention a few examples: a German judgment found the reuse of postcards on packaging of chocolate boxes to be covered by exhaustion.³⁰ US courts also allowed the rebinding

28 M Oker-Blom 'IPR edistämässä kestäväää kehitystä' (2022) IPRinfo 4/2022. Available at <https://iprinfo.fi/artikkeli/ipr-edistamassa-kestavaa-kehitysta/> (accessed 3 January 2023) and M Oker-Blom 'Some thoughts on Sustainability and Upcycling from a Copyright and Trademark Law point of view' (2022) IPRInfo 5/2022. Available at <https://iprinfo.fi/artikkeli/some-thoughts-on-sustainability-and-upcycling-from-a-copyright-and-trademark-law-point-of-view/> (accessed 3 January 2023). In the Finnish discussion concerning the rule of exhaustion, Tuomas Mylly has already in 2002 illustrated the unsustainable outcomes that follow from the ever-expanding scope of exclusive rights (in the expense of users), if the InfoSoc Directive is implemented in a manner that limits the rule of exhaustion (see T Mylly, 'Käytetyn kirjan lahjoittaminen on elegantti rikos [Donating a second-hand book is an elegant crime]' (2002) 31 *Oikeus* 4 at 419–420).

29 A Kur, 'As Good as New'—Sale of Repaired or Refurbished Goods: Commendable Practice or Trade Mark Infringement?' (2021) 70 *GRUR International* 3 at 228–236; T Pihlajarinne 'Repairing and Re-using from an Exclusive Rights Perspective: Towards Sustainable Lifespan as Part of a New Normal?' in O-A Rognstad and I B Ørstavik (eds) *Intellectual Property and Sustainable Markets* (Edward Elgar Cheltenham 2021) 92–100.

30 KG 26.1.2001 (5 U 4102/99) 125–126. Compare to U Loewenheim (ed) *Handbuch des Urheberrechts* (2nd edn C. H. Beck München 2010)

26 See *Art & Allposters*, C-419/13 (n 18) para 45.

27 *ibid.*, para. 45.

or reutilization of, eg purchased scarves and towels for the preparation of new handbags,³¹ to affix lawfully purchased postcards and greeting cards on ceramic products,³² as long as the defendants referred to the original rightholders on the new products. Moreover, the sale of discarded *Superman* comics with new covers³³ and the reselling of paperback copies in hardback³⁴ were both found compliant with the first-sale doctrine.³⁵

For the purposes of the present analysis, most importantly, the Netherlands had its own case law related to transformative redistributions. Back in 1979, the defendant of the *Poortvliet* case cut the works of Rien Poortvliet, who was famous for his drawings and paintings of animals and gnomes, from the calendar in which they had been published and sold them attached to plywood. The decision of the Hoge Raad confirmed that there was no breach of the law because the defendant had transformed the works and had not simply resold them.³⁶ Several decades later, in *Art & Allposters*, the Hoge Raad turned to the CJEU for guidance on whether the ‘transfer’ of paintings from posters to canvas was in violation of Dutch and EU law. *Art & Allposters International BV* purchased lawfully produced poster copies of famous paintings and enabled its customers to order copies of the works in the form of posters, framed posters, posters on wood and images on canvases. *Stichting Pictoright*, the competent Dutch collective rights management organisation, demanded the payment of royalties for each copy sold. It argued that the original, paper-based copies were ‘adapted’ to canvas format.

Section 20 Rn. 40; T Dreier and G Schulze *Urheberrechtsgesetz* (4th edn C. H. Beck München 2013) Section 17 Rn. 28.

- 31 Scarves by *Vera Inc v American Handbags* [1960] 188 F.Supp. 255.
- 32 *The C. M. Paula Co v L Gene Logan* [1973] 355 F.Supp. 189; *Annie Lee et al v Deck the Walls, Inc, et al* [1996] 925 F.Supp. 576; *Precious Moments, Inc v La Infantil, Inc, et al* [1997] 971 F.Supp. 66.
- 33 *Independent News Co., Inc, et al v Harry Williams* [1951] 293 F.2d 510.
- 34 *Lantern Press Inc v American Publishers Co.* [1976] 419 F.Supp. 1267. On the US case law, see WA Rothnie *Parallel Imports* (Sweet & Maxwell London 1993) 268–269, 273; S Lauff, ‘Decompilation of Collective Works: When the First Sale Doctrine is a Mirage’ (1998) 76 *Texas Law Review* 4 at 881–883; JD Sanders, ‘Appropriating Artists Face Uncertainty in Interplay between First Sale and Fair Use Doctrines’ (2004) 76 *New York State Bar Journal* 4 at 19–20; MM Billah, ‘Resale of Digital Works under Copyright Laws: A Legal and Economic Analysis’ (2018) 18 *John Marshall Review of Intellectual Property Law* 123 at 135–136.
- 35 To the contrary: if the original authorization to sell the products containing the likeness of public figures was missing, the resale of those copies was plausibly tortious under states laws related to image rights. Compare to *Elisa Allison*, et al *v Vintage Sports Plaques*, et al [1998] 136 F.3d 1443; *Herbert S. Zim v Western Publishing Co* [1978] 573 F.2d 1318; *Christie Brinkley v John Casablancas*, et al [1981] 438 N.Y.S.2d 1004; *Genesis Publications, Inc, et al v Anne C. Goss* [1983] 437 So.2d 169, cert. denied, 449 So.2d 264 (1984).
- 36 On the judgment, see F Verkade ‘First-Sale’ or Exhaustion Doctrine in the Netherlands’ in PB Hugenholtz, A Quaedvlieg and D Visser (eds) *A Century of Dutch Copyright Law: Auteurswet 1912–2012* (deLex Amsterdam 2012) 298; C Seville *EU Intellectual Property Law and Policy* (2nd edn Edward Elgar Cheltenham 2016) 72, note 312.

The defendant claimed that the right of distribution was exhausted when the original posters were put on to the market and so it was entitled to resell them, regardless of the format of the new copies.³⁷

The crux of the dispute was whether exhaustion ‘applies in a situation where a reproduction of a protected work, after having been marketed in the European Union with the copyright holder’s consent, has undergone an alteration of its medium, such as the transfer of that reproduction from a paper poster onto a canvas, and is placed on the market again in its new form.’³⁸

The CJEU rejected both parties’ arguments and considered that the plaintiff’s claim on the adaptation of the works would be devoid of merit. The transfer of paintings to canvas clearly lacked the necessary creation of a new original work of expression.³⁹ The defendant’s arguments did not convince the Court either because, regardless of the fact that *Art & Allposters* purchased the paper copies lawfully, it still did not gain authorization to reproduce the copies.⁴⁰ Based on the text of the InfoSoc Directive, the international copyright norms and the pre-existing CJEU jurisprudence, the judges rightly concluded that ‘the EU legislature, by using the terms “tangible article” and “that object,” wished to give authors control over the initial marketing in the European Union of each tangible object incorporating their intellectual creation.’⁴¹ The CJEU considered the transfer to canvas, that is, the alteration of the medium, a new reproduction, which fell outside of the owner’s rights deriving from the lawful initial purchase.⁴²

4. Analysis—a need for a sustainability-oriented exhaustion doctrine

In the current state of the Planet, it is clear that the need for a circular economy supersedes the old policy arguments of IP law that support linear models of production

37 *Art & Allposters*, C-419/13 (n 18) paras 14–21.

38 *ibid* para 23.

39 *ibid* paras 24–28.

40 *ibid* paras 29–40.

41 *ibid* para 37.

42 *ibid* para 45. On the judgment, see E Rosati, ‘Online copyright exhaustion in a post-allposters world’ (2015) 10 *Journal of Intellectual Property Law & Practice* 9 at 675–681; M Savič, ‘The CJEU Allposters Case: Beginning of the End of Digital Exhaustion?’ (2015) 37 *European Intellectual Property Review* 6 at 389–394; J Griffiths, ‘Exhaustion and the Alteration of Copyright Works in EU Copyright Law – (C-419/13) *Art & Allposters International BV v Stichting Pictoright*’ (2016) 17 *ERA Forum* 1 at 172–174; S Karapapa ‘Exhaustion of Rights on Digital Content under EU Copyright: Positive and No Perspectives’ in T Aplin (ed) *Research Handbook on Intellectual Property and Digital Technologies* (Edward Elgar Cheltenham 2020) 494–496.

based on reuse and repair, like upcycling, is one form of green transition in the fashion sector. IP rights should not stand in the way of such transitions in the form of a rightholder-centric, very narrow interpretation of the exhaustion doctrine.

5. Conclusions

Since the CJEU judgment *Cofemel*⁵⁴ confirmed the standard of copyright protection being the same for all work categories, rightholders of industrial designs and works of applied art can more confidently rely on copyright. Although the neutral standard of originality promotes equality between creators from different fields,⁵⁵ it might also open a door for overreaching brand protection attempts of (powerful) design companies. If not enough attention is paid to the fair balance between the interests of rightholders and the interests of the society, copyright can be used to hinder the types of reuse that would foster sustainable development, such as upcycling. Far-reaching protection might even set obstacles for creativity itself: dialogue, inspiration and reformulation are inherent in intellectual creation and copyright is not meant to hinder them.⁵⁶ Limitations to exclusive rights therefore have an important role of preventing absolute monopolies.⁵⁷

One important way to avoid overprotection is the correct (re)interpretation of the doctrine of exhaustion. In the context of upcycling, an interpretation that is favourable to reuse and recycling of works is particularly important in order to foster sustainable development. Transformative redistributions clearly fit into the scope of the reinterpreted (or rather properly interpreted) exhaustion doctrine. As upcycling is conceptually based on the original forms (or pieces) of copyright-protected expressions, their reuse can be covered by the distribution right. Indeed, when it comes to works of applied art, this is particularly important, as these works are often mass produced and rely on linear consumption models.

This interpretation of exhaustion is supported by sound policy arguments—both external and internal to copyright law. The underlying internal direct or primary justifications of exhaustion are broad enough to encompass upcycling. Even more, the EU's growing pressure towards a circular economy and the evolving legal basis for that, eg its most recent Textile Strategy, show the way how this old-fashioned copyright doctrine might be reconceptualized to support sustainability in general.

54 Judgment in *Cofemel—Sociedade de Vestuário SA v G-Star Raw*, C-683/17, ECLI:EU:C:2019:721.

55 H Härkönen *Fashion and Copyright: Protection as a Tool to Foster Sustainable Development* (Doctoral Dissertation, University of Lapland, Acta Electronica Universitatis Lapponiensis 311, 2021) 64–65.

56 Opinion in *Cofemel—Sociedade de Vestuário SA v G-Star Raw*, C-683/17, ECLI:EU:C:2019:363, para 55.

57 Mezei, *Copyright Exhaustion* (n 1) 7–8.