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## **UPCYCLING: INTELLECTUAL PROPERTY RIGHTS AND LEGAL IMPLICATIONS OF TRANSFORMING WASTE INTO SUSTAINABLE FASHION PRODUCTS IN NIGERIA**

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### **ABSTRACT:**

It has been established that the fashion industry is high on the world's pollution list. For instance, the United Nations Environment Programme (UNEP) noted that making a pair of jeans trousers, from the production of the cotton to its delivery, requires 3,781 litres of water. This amounts to the emission of about 33.4 kilograms of carbon equivalent. The nature of the business, evidenced by the use of synthetic materials, hazardous colours, energy intensive production methods, has impacted the environment negatively. The need to fulfil Goal 12 of the Sustainable Development Goals and the call to embrace the circular economy has led to switching to using sustainable materials and products. This drive for sustainability in the fashion industry has, however, raised challenges in upholding and enforcing Intellectual Property Rights (IPR).

This paper examines the implications of Intellectual Property Rights (IPR) on the creative use of waste materials in creating sustainable fashion products, through upcycling. It argues that to get the full benefit of sustainability in upcycling, IP challenges, presented, must be resolved. These challenges occur in the areas of Trademarks, Industrial Designs and Copyright. Nigeria's IPR laws do not adequately address the unique nature of upcycling. It has failed to strike the needed balance between creativity and the possibility of infringement of existing IPRs.

The paper concludes that upcycling offers tremendous opportunities for environmental preservation through sustainability, thereby positively impacting the economy and society, consequently. The role of IP should therefore be towards promoting sustainability. It goes on to recommend that, to maintain/encourage sustainability, it is essential to strike a balance in solving this dilemma within the Nigerian IP laws.

**Word Count:** 269 words

**Keywords:** Intellectual Property, Intellectual Property Rights, Upcycling, Sustainability, Fashion Industry, Nigeria.

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The World Bank. 2019. How Much Do Our Wardrobes Cost to the Environment? [<https://www.worldbank.org/en/news/feature/2019/09/23/costo-moda-medio-ambiente](https://www.worldbank.org/en/news/feature/2019/09/23/costo-moda-medio-ambiente)

## 1.0. INTRODUCTION

It has been established that the clothing industry is high on the world's pollution list. For instance, the United Nations Environment Programme (UNEP) noted that making a pair of jeans trousers, from production of the cotton to its delivery, requires 3,781 litres of water.

This amounts to the emission of about 33.4 kilograms of carbon equivalent. In line with achieving the UN Sustainable Development Goals, particularly Goal 12"which calls for ensuring sustainable consumption and production patterns, there is an increased call on the fashion industry to embrace a new textile economy.This call has been championed by foundations such as the Ellen MacArthur Foundation and the UN Alliance for Sustainable Fashion.

The nature of the business, evidenced by the use of synthetic materials, hazardous colours, energy intensive production methods has negatively impacted the environment. The need to fulfil Goal 12 of the Sustainable Development Goal, and the call to embrace circular economy has led to upcycling, downcycling and recycling, thereby switching to using sustainable materials and products. This drive for sustainability in the fashion industry has however raised challenges in upholding and enforcing Intellectual Property Rights (IPR). This is due to the fact that, the logo of the previous creator/producer may be included in the upcycled product.

This paper focuses on upcycling. Upcycling is carried out in various creative industries. However, the **IPR** challenges in upcycling is more obvious in the fashion industry. This is because the new product will most likely be of the same kind/genre as those produced by the creator of the old product, thereby leading to confusing as to the source of the product.

It examines the implication of Intellectual Property Rights (IPR) on the creative use of waste materials in creating sustainable clothing products, through upcycling. In doing this, the paper will identify and analyse key Intellectual Property (IP) challenges in upcycling; examine the implications and complexities associated with the use of pre-existing designs, Trade Marks and Copyright materials in transforming waste to sustainable products, assess

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*Ibid.* see also "It's time For a Circular Economy". A publication of the Ellen MacArthur Foundation.

<https://ellenmacarthurfoundation.org/>

UN SDG Resources. Sustainable Development Goals:

<https://www.un.org/sustainabledevelopment/sustainable-consumption-production/#:text=Goal%2012%20Ensure%20sustainable%20consumption%20and%20production%20patterns&text=Goal%2012%20is%20about%20ensuring%20populations%20are%20continuing%20to%20grow>

This goal recognises that sustainable consumption and production patterns is pertinent for sustaining livelihoods. A UN explanation of Goal 12, acknowledges that our planet is running out of resources and if our current lifestyle is maintained, it will require an equivalent of 3 planets, to meet the natural resources needs, by 2050. One of the requirements is the transitioning to a circular economy, which demands designing products for longevity, repairability, and recyclability. In the same vein, it encourages reusing, refurbishing and recycling to minimise resource depletion and waste.

<https://www.unep.org/>

Goal 12 - Ensuring Sustainable Consumption and Production Patterns. <https://sdgs.un.org/goals/goal12>

the effectiveness of the existing IP laws, and make recommendations for addressing and mitigating these IP challenges, whilst promoting innovations in sustainable practices and creativity.

#### DEFINITION OF TERMS

**Circular economy** is a model of production and consumption. It involves sharing, leasing, reusing, repairing, refurbishing and recycling existing materials and products as long as possible, thereby extending their life cycle and reducing waste.

**Downcycling** refers to the process where a material is converted into something of less value. In this situation, the nature of the material itself prevents it from being as durable and valuable as it used to be, once processed. An example is the process of making newspaper from higher grade writing paper.

**Recycling** is the process where waste is turned into reusable materials. It involves the process of breaking down a used product into smaller bits and creating something new from it.

**Upcycling** refers to transforming a discarded material into something of greater value by refurbishing or repurposing it. The process does not involve breaking it down into its raw materials.

There are two modes to upcycling. The first situation is where the original product is taken apart and something new is created, using the main parts of the original, which usually bore the logos of the original creator. For instance, items recreated from buttons or pieces of a designer bag or clothes, bearing the logo of the original creator. The other upcycling

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10 Circular economy: definition, importance and benefits. News. A publication of the European Parliament. 24/5/23. <https://www.europarl.europa.eu/news/en/headlines/economy/20151201STO05603/circular-economy-definition-importance-and-benefits#:~:text=The%20circular%20economy%20is%20a,reducing%20waste%20to%20a%20minimum>

11 What Is Recycling, Upcycling, Downcycling and Closed Loop. <https://www.zeroco.com.au/blogs/news/chasing-the-arrows>; see also Kelsea A. Schumacher and Amanda L. Forster, Textiles in a circular economy: An assessment of the current landscape, challenges and opportunities in the United States, Vol 3, FRONTIERS, 30th November, 2022, <https://www.frontiersin.org/articles/10.3389/frsus.2022.1038323/full>

12 What Is Recycling, Upcycling, DowncyclingAnd Closed Loop. <https://ecostore.com/nz/blog/upcycling-recycling-downcycling-whats-the-difference/>

13 "What Does Upcycling Mean and Why is it So Important? What Is the Difference Between Recycling and Upcycling?" 2020. <https://www.unisanuk.com/what-does-upcycling-mean-and-why-is-it-so-important/>

14 GauntKK. 2022. "The UpcycleConundrum". <https://www.bestlawyers.com/article/repurposed-products-copyright-infringement/4546>

technique, is the transformation of original products into something new, by adding to items like accessories to make them unique.

### **3.0. SUSTAINABILITY IN THE CLOTHING INDUSTRY IN NIGERIA**

Sustainable fashion design refers to the art of creating environmentally friendly items of clothing and accessories, from materials with a smaller carbon footprint. It minimises waste, reduces energy and water consumption, while promoting fair labour practices, with the aim of making social and environmental impact. It is the means through which the clothing industry is contributing to a greener and ethical future.

The elements of sustainable fashion include environmental responsibility, socially and ethically conscious elements. These elements should be taken into consideration, from creation to production, distribution and consumption. With regards to sustainable fashion, the emphasis is on the use of eco-friendly materials and processes. It is characterised by a shift from fast fashion, which, though affordable, is harmful to the environment, to slow and sustainable fashion. The benefits of sustainable fashion range from saving money and time, to being a smart business move, which exhibits the commitment to having a safer environment.

Nigeria is faced with challenges of waste management and environmental degradation. The clothing industry is a major contributor to the world's pollution through waste generated from the fast fashion trend and disposable clothing. Worldwide, there is a growing awareness of the dangers of excessive waste generation and inefficient waste management, resulting in the development and growth of sustainable fashion. Nigeria is not left out of this increased awareness and the move for change. This has contributed to the industry embracing sustainable fashion.

The Nigerian clothing industry is gaining recognition and growing fast. According to the Nigerian Bureau of Statistics, the textile, apparel and footwear industry contributed 0.24% to Nigeria's GDP, in the first quarter of 2021, employing over 7 million people. The report further stated that, the industry contributed about 10% to Nigeria's manufacturing GDP.

<sup>14</sup> Tuase-Fosudo W. 2023. **Exploring the future of sustainable fashion with Nigerian fashion brand owners** A publication of Marie Claire Nigeria. Retrieved from <https://marieclaire.ng/exploring-the-future-of-sustainable-fashion-with-nigerian-fashion-brand-owners/> on 6/8/25

<sup>15</sup> *Ibid*. Tuase-Fosudo. 2023

<sup>16</sup> Khaliq Z. Leveraging Opportunities In Fashion Industry For Quick Profits. LEADERSHIP. <<https://leadership.ng/leveraging-opportunities-in-fashion-industry-for-quick-profits/#:-text=The%20fashion%20industry%20is%20a.million%20people%20in%20the%20country>>.

Stakeholders in the Nigerian clothing industry, are becoming popular and competing internationally with contemporaries.

In Nigeria, the fashion industry is fast catching up and embracing sustainable fashion and, environmentally responsible production process. A number of fashion brands are involved in the upcycling initiative. These fashion brands, in their own ways, are upholding ethical practices for their production process. Initiatives such as the Waste to Wealth has trained over 300 women to turn plastic carrier bags into crocheted products such mats, bags and other colourful accessories, which sell for anything between \$3-\$47 depending on the size. Another example is Olayemi Oluwabamigbe, who creates clothes and accessories from recycled plastic bags.

Be that as it may, the shift towards sustainability is saddled with challenges. Challenges faced by the Nigerian sustainable fashion industry include high cost of production, limited access to sustainable materials, limited public awareness, the lack of or inadequate infrastructure and need for capacity building.

### **3.1. CHALLENGES FACED IN IMPLEMENTING SUSTAINABLE FASHION DESIGN PRACTICES**

Nigeria's clothing industry faces various challenges, ranging from limited access to sustainable technologies and materials. Consumers have little or no knowledge about sustainability and sustainable practices. This negatively impacts the demand for sustainable fashion products. As with other areas of the economy, this industry enjoys limited support from the government, as there is a dearth of favourable policies to encourage sustainable

<sup>17</sup> Fashion brands such as FFA(Factory), Zinkata, Lohije, to name a few, are known sustainable fashion brands.

<sup>18</sup> Okoh L. 2018. Nigeria's Sustainable Fashion Industry. A publication of Culture Trip. 4/9/2018. <<https://theculturetrip.com/africa/nigeria/articles/nigerias-sustainable-fashion-industry/>>.

<sup>19</sup> *Ibid.* Okoh. 2018.

<sup>20</sup> Onyekelu S. 2024. RISE OF SUSTAINABLE FASHION: ECO-FRIENDLY PRACTICES IN NIGERIA'S FASHION INDUSTRY. Business Day. 17/7/24. <<https://businessday.ng/life-arts/article/rise-of-sustainable-fashion-eco-friendly-practices-in-nigerias-fashion-industry/>>

practices. Added to this is cost implication of producing sustainable fashion goods, which is due to their eco-friendly cultivation and processing methods.

In addition, access to sustainable materials is limited. In spite of these challenges, however, brands offering upcycled products are emerging. This points to the fact that, with improved awareness and increased support and collaboration, sustainability will thrive in the clothing industry.

The government, in its part, has put in place the Environmental Impact Assessment (EIA) Act (EIAA). By virtue of Section 2, companies engaging in projects that significantly affect the environment must undergo an environmental impact assessment. In addition to the Act, is the National Environmental (Textile, Wearing Apparel, Leather and Footwear Industry) Regulations of 2009. The Regulations are administered by the National Environmental Standards and Regulations Enforcement Agency. The Regulations concern issues such relating to the impact of the textile industry operations, such as pollution control systems, waste minimisation, chemical usage, effluent standards, air and noise pollutions. Be that as it may, there are no legislations, specifically regulating the fashion industry, in Nigeria.

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<sup>21</sup> THISDAY Style. 2024. Sustainability in Nigerian Fashion: Action or Lip Service. THISDAY STYLE, 1/ 1 2/24. <<https://www.thisdaystyle.ng/sustainability-in-nigerian-fashion-action-or-lip-service/#:text=Beyond%20the%20Brands,solution%20in%20the%20long%20term>>

<sup>22</sup> Emma C. 2024. Rise of Sustainable Fashion: Trends, Challenges and Opportunities. A Publication of Global Sentinel. <<https://globalsentinelng.com/rise-of-sustainable-fashion-trends-challenges-and-opportunities/>> See also Sustainability Directory. 2025. Why Is Sustainable Fashion So Expensive To Produce? <<https://fashion.sustainability-directory.com/question/why-is-sustainable-fashion-so-expensive-to-produce/>>

<sup>23</sup> Idoko N. 2023. Sustainable Fashion Design in Nigeria: A Growing Trend. Retrieved from <<https://professions.ng/sustainable-fashion-design/#:text=One%20example%20is%20the%20Ethical,impact%20of%20the%20fashion%20industry>>

<sup>24</sup> CapE12, LFN2004

<sup>25</sup> See Section 2 EIAA

<sup>26</sup> S.I. no.34/2009.

<sup>27</sup> Reg. 4 National Environmental (Textile, Wearing Apparel, Leather And Footwear Industry) Regulations of 2009, S.I. no. 34/2009

<sup>28</sup> Reg. 7 National Environmental (Textile, Wearing Apparel, Leather And Footwear Industry) Regulations of 2009, S.I. no. 34/2009

<sup>29</sup> Reg. 9 National Environmental (Textile, Wearing Apparel, Leather And Footwear Industry) Regulations of 2009, S.I. no. 34/2009

<sup>30</sup> Regs 15-17 National Environmental (Textile, Wearing Apparel, Leather And Footwear Industry) Regulations of 2009, S.I. no. 34/2009

<sup>31</sup> Reg. 19-22 National Environmental (Textile, Wearing Apparel, Leather And Footwear Industry) Regulations of 2009, S.I. no. 34/2009

<sup>32</sup> Reg 23-26 22 National Environmental (Textile, Wearing Apparel, Leather And Footwear Industry) Regulations of 2009, S.I. no. 34/2009

Nigeria's clothing industry has, to a considerable extent, embraced the circular fashion philosophy that advocates the continuous usage of clothing. This is evidenced by the growth of sustainable fashion, which has benefitted Nigeria in numerous ways. It has created employment opportunities for local artisans and craftsmen, as a result of materials used. The use of local raw materials in an added advantage to the economy. To this is the added impact on the environment by reducing the reliance on synthetic fabrics and chemical dyes, thereby reducing consumption, landfill waste and pollution.

#### **4.0. THE BENEFITS AND CHALLENGES OF UPCYCLING**

Earth Day is celebrated, annually on 22<sup>nd</sup> April, during which time, awareness about the need to be environmentally friendly is raised. At this time, countries are encouraged to set up initiatives geared towards improving the environment. In Africa, it is estimated that, unless action is taken, by 2025, mismanaged plastic waste, for instance will be about 10.5 million tonnes.

As noted earlier, the clothing industry, is high on the list of the world's sources of pollution. It has been noted that about 90% of discarded waste are reusable and recyclable. Out of these, discarded textiles account for 87%. Furthermore, the industry is an energy- intensive one. It uses large plants which consume large amount of energy, resulting in substantial greenhouse gas (GHG) emissions. There is evidence to show that it is a large water consumer, as well as being a main producer of wastewater. In addition, it produces toxic chemicals from processes such as printing, dyeing and finishing, which if not disposed properly, will result in serious environmental damage. In view of this, there has been a growing awareness of the consequence of waste and carbon emission to the planet.

The resulting call for and trend towards preserving the environment through sustainability has increased the practice of upcycling, downcycling and recycling. Upcycling, is characterised by valuable resources conservation and reduction in degrading the environment. Upcycling, therefore, has significant effect on the environment.

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<sup>33</sup> *Loe.cit.* Idoko N. 2023.

<sup>34</sup> "Africa's Creativity in Upcycling and Recycling." TalkuTalku Magazine. 28<sup>th</sup> April, 2022  
<https://magazine.talkutalku.com/african-creativity-in-upcycling-and-recycling-wastes/>

<sup>35</sup> Moazzem S, Wang L, Daver F, Crossin E. 2021. Environmental Impact of Discarded Apparel Landfilling and Recycling. *Resources, Conservation and Recycling*. Vol. 166. 105338. ISSN 0921-3449.  
<https://doi.org/10.1016/j.resconrec.2020.105338>.  
<https://www.sciencedirect.com/science/article/pii/S0921344920306534>

<sup>36</sup> See footnote 1 and 2 above.

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<sup>21</sup> THISDAY Style. 2024. Sustainability in Nigerian Fashion: Action or Lip Service. THISDAY STYLE, 1 /12/24. <<https://www.thisdaystyle.ng/sustainability-in-nigerian-fashion-action-or-lip-service/#:-text=Beyond%20the%20Brands.solution%20in%20the%20long%20term>>

<sup>22</sup> Emma C. 2024. Rise of Sustainable Fashion: Trends, Challenges and Opportunities. A Publication of Global Sentinel. <<https://globalsentinelng.com/rise-of-sustainable-fashion-trends-challenges-and-opportunities>> See also Sustainability Directory. 2025. Why Is Sustainable Fashion So Expensive To Produce? <<https://fashion.sustainability-directory.com/question/why-is-sustainable-fashion-so-expensive-to-produce>>

<sup>23</sup> Idoko N. 2023. Sustainable Fashion Design in Nigeria: A Growing Trend. Retrieved from <<https://professions.ng/sustainable-fashion-design/#:-text=One%20example%20is%20the%20Ethical-impact%20of%20the%20fashion%20industry>>

<sup>24</sup> Cap E12, LFN 2004

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<sup>33</sup> *Loe.cit.* Idoko N. 2023.

<sup>34</sup> "Africa's Creativity in Upcycling and Recycling." TalkuTalku Magazine. 28<sup>th</sup> April, 2022  
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<sup>35</sup> See footnote 1 and 2 above.

Furthermore, reducing consumption reduces waste. As noted earlier, upcycling is creating usable products from waste or unwanted products. Existing products are adapted to create a more valuable new product. Upcycling, is an effective and easy way of reducing consumption. In Nigeria, as in other nations of the world, waste management has now been invaded by creativity, through processes such as, upcycling, recycling and downcycling, gaining grounds for sustainable products. Brands such as Sabi Mode, MxDonna are examples of Nigerian businesses leading sustainable, eco-friendly and ethical creative process, in the country's clothing industry.

Other advantages of upcycling are that it gives room for artists to express their personal thoughts and creativity, and expands and sustains local economies, by providing work for local artisans and small businesses. It offers affordable alternative clothing items, especially when pre-loved (thrifted) items are upscaled by the person who intends to wear them. Lastly, upcycling promotes creativity and craftsmanship. It provokes innovation within the clothing industry.

Be that as it may, upcycling is saddled with legal implications, in the form of IPR violations. Intellectual Property (IP) are creations of the mind. These include inventions, literary and artistic works, designs, symbols, names and images, which are used in commerce. In its part, IPR are those rights granted over creations of the mind. They give creators of IP exclusive rights over their creations for a specific term. IPR raise ownership, brand identity and infringement. With regards to Upcycling, IPR issues manifest in two ways, namely, IPR in the new creation, and IPR in the old product, which may be infringed in the course of creating the new.

## **5.0 LEGAL IMPLICATIONS OF UPSCALING IN THE CLOTHING INDUSTRY.**

That the Nigerian clothing industry is experiencing expansion in creating sustainable items of clothing, by upcycling, downcycling and recycling, is not in doubt. As noted earlier, these

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<sup>37</sup> "UPCYCLING". <https://healtheplanet.com/100-ways-to-heal-the-planet/upcycling> Naijapackage. 2023. "Eco-Friendly and Ethical Fashion Brands in Nigeria". 7th April, 2023. <https://naijapackage.com/eco-friendly-and-ethical-fashion-brands-in-nigeria/>

<sup>38</sup> WIPO. "What is Intellectual Property?". A publication of World Intellectual Property Office. [https://www.wipo.int/about-ip/en/#:text=Intellectual%20property%20\(IP\)%20refers%20to.and%20images%20used%20in%20commerce](https://www.wipo.int/about-ip/en/#:text=Intellectual%20property%20(IP)%20refers%20to.and%20images%20used%20in%20commerce)

<sup>39</sup> WTO. "What are Intellectual Property Rights?". [https://www.wto.org/english/tratop\\_e/trips\\_e/intell\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intell_e.htm)

<sup>40</sup> New Nigerian Fashion Brands embrace sustainable practices (15/3/23) <https://www.environewsngigeria.com/new-nigerian-fashion-brands-embrace-sustainable-practices>; see also

<sup>41</sup> Nigeria's Sustainable Fashion Industry (2018) <https://theculturetrip.com/africa/nigeria/articles/nigerias-sustainable-fashion-industry>

processes have legal implications on IPRs. The IPRs that are affected by these processes are Trademarks, Industrial Designs and Copyright. A trademark is a mark which distinguishes the goods or services of an enterprise from those of another. An industrial design, in its part, consists of three-dimensional features, such as the shape of an article, or two-dimensional features, such as patterns, lines or colour. Copyright refers to rights belonging to creators over their literary and artistic works, such as books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings.

In the Trademarks Act, a trademark is a mark used or proposed to be used concerning goods to indicate a connection in the course of trade between the goods and the person having the right either as a proprietor or as a registered user to use the mark, whether with or without any indication of the identity of that person. Babafemi notes that a trademark is a distinctive mark authenticating product(s) of its registered owner. It may include a symbol, name, word or device, which is either registered or established by use. A registered trademark grants exclusive rights on the owner/user, to the exclusion of others. This gives the brand owners an upper legal hand in relation to trademark infringement.

Industrial Design protection is extended to designs that are unique. Where these are created when upcycling, they may be eligible for protection. The designer must be careful in using items that retain what qualifies as industrial design, in the original clothing item, that was done by the original creator, as this may amount to an infringement.

In relation to upcycling, in order to ascertain whether an upcycled item is a new creative work or an infringement, copyright comes into play. By virtue of Section 2, artistic works are eligible for copyright protection, if they are original, and in a fixed form. The creator,

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<https://theculturetrip.com/africa/nigeria/articles/nigerias-sustainable-fashion-industry> and Nigerian Teen Activists Create Upcycled Fashion Show for Sustainability (2021) <https://www.artshehelp.com/nigerian-teen-activists-create-upcycled-fashion-show-for-sustainability/>

<sup>42</sup> Section 67 Trademarks Act, Cap T13 LFN 2004; see also WIPO. "Trademarks: What is Trademarks". <https://www.wipo.int/trademarks/en/#:-text=What%20is%20a%20trademark%3F,protected%20by%20intellectual%20property%20rights>

<sup>43</sup> Section 12 Patents and Designs Act 1970 (Cap P2 LFN 2004); see also WIPO. "Industrial Design: What is Industrial Design" <https://www.wipo.int/designs/en/>

<sup>44</sup> WIPO. "Copyright: What is Copyright". <https://www.wipo.int/copyright/en/>

<sup>45</sup> Cap T13 LFN 2004

<sup>46</sup> Trademark Act, s.67.

<sup>47</sup> Babafemi J. 2007. *Intellectual Property: The Law and Practice of Copyright, Trade Marks, Patent and Industrial Design in Nigeria* (Justinian Books, Ibadan) at 176.

<sup>48</sup> Trademarks Act, s.5 (1).

<sup>49</sup> Section 2(1)(c) Copyright Act, 2022

must, however, not have intended it to be used as an industrial design. By this definition, designs incorporated into accessories and items of clothing subsists in copyright. In addition, the progression of styles and trends is fast. Copying designs is prevalent and made easier by the use of digital technology. It is a breeding ground for counterfeiters. There is therefore high risk of IPR infringement, where designs are copied and fakes are sold at considerably cheaper prices. Enforcing IPR and preventing violation is very challenging, more so the global supply chain for counterfeits is difficult to monitor, given the existence of online stores.

## **6.0 EFFECTS OF UPCYCLING ON EXISTING BRANDS**

As noted earlier, upcycled goods sometimes bear the logos of the original creator, giving a wrong impression of its source. Where the logo is protected by **IPR**, an infringement may occur. Consequently, in spite of the sustainable and eco-friendly solution that it offers, it could have legal implications, resulting from infringement of IPR.

Including logos of the original creator of the item in the upcycled version, raise the issue of an infringement of the trademarks. With regards to upcycling, trademarks are the most relevant. This is because they increase the value of the upcycled product, especially new ones. The main essence of trademark is protecting the products or services of the brand owner against the use of the mark or something similar, by a third party, in the course of trade and in a way like to deceive or cause confusion.

A trademark is infringed when it is used without the authorisation and consent of the proprietor of the mark, and illegally, causing confusion to the public. To establish infringement, the onus is on the trademark owner to prove that the infringing party, the producer of the upcycled good, used theirs or a similar trademark, in commerce, without their consent, thereby causing confusion to the public.

Where the trademark is, however, not registered, the proprietor of the trademark does not have the right to exclusive use of it and can only bring an action for passing off. It is however not in all cases that the use of a registered trademark amounts to an infringement. Where the principle of exhaustion, also known as the principle of first sale, applies, it extinguishes the right of the proprietor of the registered trademark. This principle provides that, the sale of a

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<sup>52</sup> Section 2(6) Copyright Act, 2022

<sup>53</sup> Section 5(2) Trademarks Act

<sup>54</sup> *ibid*

product protected by trademark, by its proprietary owner, exhausts the right to control or regulate what the buyer does with it. It is a defence to an allegation of trademarks infringement, as it extinguishes the right of the proprietary owner. This defence will not subsist where there exists material differences between the purchased good and the upcycled one. Upcycled products fit into this category, as they are usually, materially different from the original. This was demonstrated in **Chanel Inc. v. Shiver & Duke LLC**, where Chanel brought an action against Shiver & Duke for trademark infringement, unfair competition and trademark dilution. The defendant produced upcycled jewellery, which contained pieces from luxury brands. One of their products contained repurposed authentic Chanel buttons, which were not bought from Chanel or obtained by the defendant with the prior knowledge or consent of Chanel. The buttons were not verified by the Plaintiff as genuine. Added to this, is the fact that they were used, originally on item of clothing, not jewellery. The upcycled jewellery resembled jewellery designed by the Plaintiff. The plaintiff argued that the upcycled jewellery was likely to cause confusion to the public, and that the usage of the buttons in making jewellery was materially different from their original use. Shiver & Duke, could therefore not rely on the defence of trademark exhaustion. The case was settled out of court, without prejudice, on undisclosed terms and without cost to either party.

The fact that this case, and some others, were settled out of court, has offered no guidance as to the thinking of the courts in such a situation. One thing is, however, clear with regards to upcycling and **IPR**, the crucial issues are the state of the upcycled product, that is, the extent of its material difference and using appropriate terms in disclaiming the existence of potential affiliation with the original brand.

Another interesting case on upcycled products and alleged trademarks infringement is the case of *Hamilton International Ltd. v. Vortic LLC*. In that case, the U.S. District Court for the Southern District of New York held that the Defendant's upcycled goods did not infringe

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<sup>55</sup> Gawley S. Green is the New Black: The Legal Implications of Upcycling in A Fashion Forward Era <<https://carson-mcdowell.com/news-insights/insights/green-is-the-new-black-the-legal-implications-of-upcycling-in-a-fashion-forward-era>>.

<sup>56</sup> Upcycled Goods: How Fashion and Apparel Brands Can Promote Sustainability While Protecting Brand Value, Perkins Coie (July 6, 2021), <<https://www.perkinscoie.com/en/news-insights/upcycled-goods-how-fashion-and-apparel-brands-can-promote-sustainability-while-protecting-brand-value.html>>

<sup>57</sup> (1:21-cv-01277-MKV) District Court, S.D. New York. See also *Louis Vuitton Malletier S.A.S. v. Sandra Ling Designs, Inc, et.al.* 4:21-CV-352 (S.D.Tex. Aug. 24, 2021)

<sup>58</sup> For instance, *Louis Vuitton Malletier S.A.S. v. Sandra Ling Designs, inc, et.al.* 4:21-CV-352 (S.D. Tex. Aug. 24, 2021)

<sup>59</sup> No. 20-3369 (2d Cir. 2021)

the Plaintiffs trademark right in their antique Hamilton pocket watches. The Court noted that the Defendant had disclosed on their website that their upcycled products were made using the Plaintiffs pocket watch parts.

As noted earlier, issues that can arise from upcycling, especially when logos of the trademark proprietor appear on the upcycled goods, include post-sale confusion. This occurs, firstly, where a product bearing the registered trademark of the original producer of an item, which appeared on an upcycled product, is bought under the belief that it is the product of the original producer, but fails to live up to that standard. The buyer may believe that the standard associated with that brand is lost or diminished. Secondly, when upcycled goods flood the market, bearing the logo of luxury brands, the exclusive image of the luxury brand is eroded or diluted, thereby reducing its appeal to high end consumers. Thirdly, upcycled goods tend to divert sales from the brand owner, because they provide cheaper alternatives, which are very similar to the original luxury goods.

## **7.0 WAY FORWARD**

To overcome the challenges facing the sustainable fashion industry, it is essential that mechanisms be put in place to enhance **IPR** enforcement. This could be done, for instance, by increasing the penalties for infringement, which will be a deterrent for intending offenders. By so doing, counterfeiting and other forms of infringements will be curbed.

In addition, a specific law, addressing issues relating to the sustainable fashion industry, should be promulgated. The legislation, will regulate matters such as, waste management, ethical labour, and eco-friendly materials, specifying appropriate and adequate penalties for violations of any of its provisions. introducing penalties for unsustainable practices and incentives for compliance.

Creating awareness about IPR, among the up-and-coming sustainable fashion designers and the public at large, will go a long way in not only improving creativity but in reducing infringement. When needed, the designers should not shy away from seeking legal assistance in relation to IPR registration and enforcement.

<sup>60</sup> Onyekelu S. 2024. RISE OF SUSTAINABLE FASHION: ECO-FRIENDLY PRACTICES IN NIGERIA'S

<sup>61</sup> FASHION INDUSTRY. Business Day. 17/7/24. <<https://businessday.ng/life-arts/article/rise-of-sustainable-fashion-eco-friendly-practices-in-nigerias-fashion-industry/>>

<sup>62</sup> Vintly AB. 2025. The Role of Consumer Education in Driving Sustainable Supply Chains. A publication by Vintly AB. <<https://www.vintly.com/blog/the-role-of-consumer-education-in-driving-sustainable-supply-chains#:~:text=Consumer%20education%20on%20sustainability%20is.companies%20that%20prioritize%20ethical%20practices>>

<sup>63</sup> *ibid*

Upcycled production must be done in a way that it does not cause consumer confusion, as well as distort brand identity

The impact of IPR on creating sustainable products cannot be ignored, as it can restrict available opportunities. Issues such as post-sale confusion, dilution and diversion of sales, still pose a threat to the development of the circular economy. It is therefore important that there are clear directions on how to navigate the IPR landscape. For instance, regarding the first sale doctrine, three (3) tests have been applied, namely, the possibility of confusion test, the materially different test and the necessary and integral test. In situations of upcycling, the possibility of confusion test and the materially different test appear to be more relevant. Applying them to upcycling and trademark infringement cases will give clarity and uniformity in avoiding infringement.

There is a need to raise awareness and educate designers, consumers and industry stakeholders about the legal and ethical issues relating to upcycling, in promoting responsible practices. They could collaborate to develop best practice guidelines for upcycling fashion, share knowledge and establish industry-wide standards. Navigating **IPR** challenges can be made easier when there are laid down ethical guidelines for upcycling.

The relationship between upcycling fashion and intellectual property is characterised by opportunities and challenges. By exploring potential solutions, fostering education, and encouraging collaboration, the fashion industry can support the growth and positive impact of upcycling fashion brands while respecting intellectual property rights.

There is a need to consider the opportunities offered by upcycling to society, the economy, and the environment. The increased consciousness of environmental preservation through sustainability, the role of **IP** laws should shift towards promoting sustainability by supporting efforts at decreasing the negative environmental impact of overproduction and increased waste. Consequently, **IPR** should be geared towards promoting public interest by promoting sustainability and reducing waste, at the same time, upholding the exclusive rights of IPR owners.

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<sup>63</sup> Increase demand for sustainability in the fashion industry and the impact of IPR on it, has led to some luxury brands starting their own upcycling business, e.g. Louis Vuitton and Stella McCartney.