

UPCYCLING AS A LEGAL LIMITATION ON TRADEMARK RIGHTS: RETHINKING TRADEMARK LAW FOR ENVIRONMENTAL SUSTAINABILITY

Natthanan CHAIWONG¹

¹ Faculty of Law, Chulalongkorn University Bangkok, Thailand;
6784005334@student.chula.ac.th

ABSTRACT

The fashion industry is recognized as one of the world's most polluting industries and generates a significant amount of waste each year. In response to growing environmental concerns, upcycling has emerged as a sustainable practice that transforms unused or discarded materials into products with added value while preserving the original qualities of the materials. However, where original trademarks remain visible on upcycled products, the practice may create legal uncertainty under trademark law.

This article examines the legal status of upcycling under Thai trademark law. It analyzes the rights of trademark owners under the Thai Trademark Act B.E. 2534 (1991), particularly the exclusive right under Section 44 and passing off protection under Section 46 paragraph two. The article further examines the limitations on trademark rights, namely the exhaustion of rights principle and fair use under Section 47, and evaluates whether these doctrines provide sufficient protection for upcycling activities.

To provide comparative perspectives, the article also examines the approaches adopted under European Union (EU) and United States trademark law (US). The analysis demonstrates that both the EU and the US recognize limitations on trademark rights through exhaustion doctrines and fair use principles.

This article argues that Thai trademark law currently lacks a clear legal framework governing upcycling. The absence of statutory recognition of the exhaustion of rights principle, together with the uncertainty surrounding the application of the Section 47 fair use provision, leaves upcyclers exposed to potential trademark liability. Accordingly, legal reform is necessary to provide a safe harbor for upcycling practices.

Keywords: upcycle, upcycling, sustainability, waste, environment, trademark law, exhaustion of rights, fair use, comparative study

CITATION INFORMATION: Chaiwong, N. (2026). Upcycling as a Legal Limitation on Trademark Rights: Rethinking Trademark Law for Environmental Sustainability. *Procedia of Multidisciplinary Research*, 4(6), 11.

INTRODUCTION

Upcycling

What is Upcycling?

Upcycling is one of the sustainable approaches used to address the environmental problems caused by waste. The term “upcycling” combines the ideas of “upgrading” and “recycling.” In the context of fashion, upcycling refers to the transformation of waste, unused, or secondhand materials into new fashion products with added value while preserving the original qualities of those materials as a primary source of added value. The added value may take several forms, such as artistic value and environmental value.

Different Forms of Upcycling

Minor Modification

Minor modification refers to limited alterations while preserving the original structure of the product. For example, attaching decorative elements, or embroidering patterns onto branded bags. In these situations, the product generally remains the same type of goods after modification.

Major Modification

Major modification involves substantial transformation of the original product into a different form. Examples include transforming jeans into bags or converting bags into keychains. In such cases, the upcycled goods may become entirely different products from the original goods. According to Thai trademark law, confusion may arise where the use of a trademark causes the public to be confused as to the ownership or origin of the goods, thereby affecting the ability of the trademark to distinguish the proprietor’s goods from those of others. The assessment is based on the perspective of a person of ordinary prudence. Therefore, regardless of whether the upcycled goods involve minor or major modifications, the upcycling process may still create a likelihood of confusion. Consumers may mistakenly believe that the upcycled products bearing another person’s trademark are new products, limited editions, or products resulting from a collaboration between the trademark owner and another brand. Consequently, in order to accommodate upcycling, an appropriate limitation on trademark rights under Thai law should be introduced.

Trademark Rights under Thai Trademark Law

Exclusive Rights of the Trademark Owner

Under Thai trademark law, a trademark owner may acquire rights through trademark registration. The most important protection is the exclusive right under Section 44 of the Thai Trademark Act B.E. 2534 (1991), hereinafter referred to as the “Thai Trademark Act.” Section 44 provides that a registered trademark owner has the exclusive right to use the registered trademark, namely the use of trademark “as a trademark” by affixing the trademark to the goods, for the goods for which the trademark is registered. The owner may also bring legal proceedings for trademark infringement under Section 46 paragraph one. The scope of protection extends not only to identical marks but also to confusingly similar marks likely to cause public confusion regarding the ownership or origin of goods. However, the protection under Section 44 covers registered goods and goods in the same class. Where goods fall outside these categories, the trademark owner may instead rely on a passing off claim under Section 46 paragraph two.

Passing Off under Section 46 Paragraph Two

Section 46 paragraph two protects trademark owners against passing off actions. Passing off occurs where a person sells goods in a manner that causes consumers to believe that the goods belong to another person. Importantly, this provision may apply to both registered and unregistered trademark owners. Moreover, Section 46 paragraph two can be applied when the registered trademark is used with the goods in a different class from the registered goods. In such circumstances, where the goods fall outside the scope of Section 44, the registered

trademark owner must rely on the right in the same manner as an unregistered trademark owner through a passing off claim under Section 46 paragraph two. In the context of upcycling, passing off becomes relevant where upcycled goods fall outside the same class protected under Section 44. In such situations, the registered trademark owner may rely on Section 46 paragraph two instead.

Upcycling and Trademark Infringement under Thai Law

The legal treatment of upcycling depends on the extent of modification and whether the upcycled goods remain within the scope of protection under Section 44. While owners of unregistered trademarks generally rely on passing off protection under Section 46 paragraph two, the position is more complex for registered trademark owners because the applicable legal protection depends on the nature of the modification.

Minor Modification

Where upcycling involves only minor modifications, the upcycled goods generally remain the same type of goods. Accordingly, the registered trademark owner may rely on Section 44 because the goods remain within the scope of the registered goods.

Major Modification

Major modification creates greater legal uncertainty because the transformed product may become different goods.

(1) Same Class

In some cases, the upcycled product may remain within the same class. For example, transforming an oversized sweatshirt into a crop top set still results in clothing products within Class 25. In these situations, the registered trademark owner may continue relying on Section 44.

(2) Different Class

In other situations, the upcycled goods may fall outside the scope of Section 44 because they become goods in a different class. For example, in the case where both original and upcycled goods are fashion items, converting jeans in Class 25 into a luxury tote bag in Class 18. Where this occurs, the registered trademark owner may instead rely on passing off protection under Section 46 paragraph two.

Limitations on Trademark Rights

Exhaustion of Rights under Thai Law

The exhaustion of rights principle operates as a limitation on the exclusive rights of the registered trademark owner under Section 44 of the Thai Trademark Act. The principle has been recognized by the Thai Supreme Court Judgment No. 2817/2543 (2000) and No. 297/2546 (2003).

Under this principle, once trademarked goods have been lawfully placed on the market by the trademark owner or with the owner's consent, the trademark owner generally cannot prevent the further resale of those goods. The right is exhausted after the first lawful sale.

Despite recognition of the exhaustion principle, significant legal uncertainty remains regarding its application to upcycling.

First, according to the Thai Supreme Court decisions, the judgments do not clearly address situations involving the physical transformation of goods. Instead, the Court referred to the concept of "quality difference" in the context of parallel importation, in those cases, the differences in quality originated from the trademark owner itself, or from parties acting with the authorization of the trademark owner, as part of the trademark owner's distribution strategy for different markets and consumer preferences in each country based on local tastes. By contrast, upcycling involves modifications introduced by independent third parties operating outside the trademark owner's control. Accordingly, the reasoning concerning quality differences cannot be directly extended to support upcycling activities. Second, Thai law lacks clear legal standards as the principle is only recognized in Thai Supreme Court decisions and

does not appear in any provision of the Thai Trademark Act. Third, the exhaustion principle primarily functions as a limitation on Section 44 rights, while its application to passing off claims under Section 46 paragraph two remains uncertain.

As a result, the current Thai legal framework does not provide clear protection for upcycling activities.

Fair Use under Thai Trademark Law

Section 47 of the Thai Trademark Act provides fair use limitations on exclusive rights under Section 44 of the Thai Trademark Act. The provision consists of two main limbs: fair use of a trademark as a personal name or business name; and fair use of descriptive terms to describe the character or quality of the goods. Moreover, both limbs require bona fide or good faith use.

Fair Use as a Name

The first limb protects the bona fide use of personal names, surnames, or business names. However, this provision appears largely irrelevant in the context of upcycling because upcycling disputes generally do not concern the use of names. Instead, the issue concerns the continued appearance of trademarks on modified products. Accordingly, the first limb of Section 47 does not provide meaningful protection for upcycling activities. As a result, the main focus shifts to the second limb of the Section.

Fair Use of Descriptive Terms

The second limb permits the bona fide use of descriptive terms describing the character or quality of goods. Based solely on the wording of Section 47, the provision refers to “descriptive terms” or “คำบรรยาย.” When considered from the Thai wording, the provision appears to focus on the use of words or textual descriptions. Also, Thai legal textbooks and judicial decisions provide limited explanation regarding the details of the principle. Consequently, Section 47 currently provides uncertainty for upcycling.

Comparative Analysis between EU and US regarding Trademark Limitations

Exhaustion of Rights under EU and US Law

Both the European Union and the United States recognize the principle that once trademarked goods have been lawfully placed on the market by or with the consent of the trademark owner, the trademark owner cannot control the further distribution of those specific goods. Consequently, the resale of genuine goods is generally permitted in both jurisdictions. However, both systems also recognize important limitations which may differ in the details.

Under EU law, Article 15(2) EUTMR and TMD provide that the trademark proprietor may oppose further commercialization where “legitimate reasons” exist, especially where the condition of the goods has been changed or impaired after they were placed on the market. Accordingly, the EU approach focuses heavily on the condition of the goods. By contrast, the United States applies the “material difference” doctrine as a limitation. The “material difference” refers to the difference that affects customers’ purchasing decisions. Under US law, even subtle differences may be sufficient if they are relevant to consumers’ purchasing decisions. Therefore, the US approach focuses more heavily on consumer perception.

Descriptive Fair Use under EU and US Law

Descriptive fair use allows third parties to use terms descriptively in relation to the goods. Under EU law, descriptive use is recognized under Article 14(1)(b) EUTMR and TMD. The provision allows the use of signs or indications describing the kind, quality, intended purpose, value, or characteristics of goods in accordance with honest practices. Similarly, US law recognizes descriptive fair use in Section 33(b)(4) of the Lanham Act where a trademark is used fairly and in good faith to describe the characteristics of goods. Accordingly, descriptive fair use in both jurisdictions primarily focuses on describing the user’s own goods.

Referential Fair Use under EU and US Law

Both the EU and the US also recognize referential forms of fair use. Under EU law, Article 14(1)(c) EUTMR and TMD recognize referential use, allowing third parties to use a trademark

in accordance with honest practices to identify or refer to goods or services as those of the trademark proprietor. Under US law, nominative fair use performs a similar role and is recognized in *New Kids on the Block v. News America Publishing, Inc.* case. It allows third parties to use another person's trademark where it is necessary to identify or refer to the trademark owner's goods or services. However, the use must not falsely imply sponsorship, affiliation, or endorsement. Accordingly, referential fair use in both jurisdictions focuses not on describing the user's own goods, but on referring to another person's goods.

Difference between Descriptive and Referential Fair Use

The key distinction between descriptive and referential fair use lies in the object being described. Descriptive fair use focuses on describing the characteristics, quality, or nature of the user's own goods. By contrast, referential fair use focuses on referring to another person's goods.

Accordingly, both types of fair use involve the use of a trademark for purposes other than indicating origin. However, descriptive use concerns the user's own goods, while referential use concerns another party's goods.

Application to Upcycling

When applied to upcycling, exhaustion of rights may potentially support upcycling activities if Thai law develops clearer statutory provisions governing physical alterations to goods. In this regard, the US material difference approach may provide a useful balance. Physical modifications should not automatically prevent resale, but trademark owners should still be protected where the changes are sufficiently material to create genuine consumer confusion.

In relation to fair use, referential fair use appears more suitable for upcycling than descriptive fair use. For example, in upcycling situations, the trademark appearing on the upcycled product does not function to describe the upcycled product itself. Instead, it functions to refer to the original branded goods used before transformation. To illustrate, where an upcycled bag contains an original trademark, the trademark functions to indicate that the product was upcycled from authentic goods originating from that particular brand.

Accordingly, the trademark serves a referential function by informing consumers of the source of the original materials incorporated into the upcycled product rather than describing the upcycler's own goods. Therefore, referential fair use appears conceptually more compatible with upcycling activities than descriptive fair use.

Conclusion and Recommendations

With respect to exhaustion of rights, this article argues that Thailand should expressly codify the exhaustion principle within the Thai Trademark Act.

Accordingly, Thailand should adopt a clearer statutory framework similar to the US "material difference" approach. Upcycled goods involving physical alterations should still be permitted unless the differences are sufficiently material to create genuine consumer confusion. However, determining the threshold of "material difference" in the context of upcycling remains particularly difficult. Unlike ordinary resale situations, upcycling in the fashion industry often involves artistic creativity and imagination. As a result, it is hard to determine how much physical alteration should be considered "too much" before the product is no longer protected by the exhaustion principle. Accordingly, the exhaustion principle may not be sufficient to function as a complete safeguard for upcycling practices.

With respect to fair use, the wording of Section 47 of the Thai Trademark Act primarily refers to the "description of goods." Based on the wording of the provision, it appears closer to descriptive fair use. However, Thai Supreme Court jurisprudence suggests that Thai law may already recognize referential use. This can be observed in the Supreme Court Judgment No. 547/2538 (1995), where the defendants used the term "FOR USE IN MITA" to refer to compatibility with the plaintiff's goods. In substance, the trademark was used to refer to another person's products. Accordingly, the MITA decision suggests that Thai law already contains elements of referential fair use. Therefore, Thailand should reform Section 47 to

expressly recognize referential fair use as a separate limitation on trademark rights. Such reform would provide legal certainty and create a safe harbor for legitimate upcycling activities.

Revised English Version of Section 47 of Thai Trademark Act

“Rights provided under this Act shall not interfere with any bona fide use by a person of his own personal name or surname or the name of his place of business or that of any of his predecessors in business, or the bona fide use of a trademark to:

- (a) describe the character or quality of his goods or services; or
- (b) refer to or indicate a connection with goods or services of the trademark owner”

Revised Thai Version of Section 47 of Thai Trademark Act

“สิทธิตามพระราชบัญญัตินี้ไม่เป็นการขัดขวางบุคคลใดในการใช้โดยสุจริตซึ่งชื่อตัวชื่อสกุลหรือชื่อสำนักงานการค้าของตนหรือของเจ้าของเดิมของกิจการของตน หรือการใช้โดยสุจริตซึ่งเครื่องหมายการค้าเพื่อ

- (ก) บรรยายลักษณะหรือคุณสมบัติของสินค้าหรือบริการของตน หรือ
- (ข) อ้างถึงหรือแสดงความเชื่อมโยงกับสินค้าหรือบริการของเจ้าของเครื่องหมายการค้า”

The proposed version of Section 47 is derived from Article 14(1)(c) of the EUTMR. The writer adopts the terms “refer” and “indicate a connection.” The term “refer” is retained because it captures the essence of referential fair use, namely the reference to genuine branded materials incorporated into the upcycled product.

Moreover, the phrase “indicate a connection” reflects the relationship between the upcycled product and the original goods. When translated into the Thai legal context as “แสดงความเชื่อมโยง,” the wording clearly conveys that the trademark is used to communicate the connection between the upcycled product and the genuine branded materials from which it was derived.

Moreover, the wording should be changed from “No registration under this Act” to “Rights provided under this Act” because trademark disputes in upcycling may arise under both Section 44 and Section 46 paragraph two. Also, Section 47 functions primarily as a limitation on the exclusive rights of registered trademark owners under Section 44. It would be difficult to justify limiting the rights of registered trademark owners, who receive greater protection, while leaving the rights available under Section 46 paragraph two unaffected. Therefore, the revised wording would provide clearer protection.

Furthermore, Thailand should adopt a more flexible approach by expanding the concept of “description” (คำบรรยาย) beyond purely textual expressions. To maintain consistency with the structure of descriptive fair use under Section 47(a), this thesis proposes replacing the term “descriptive terms” with the broader concept of “describe” (บรรยาย). This approach is consistent with Article 14(1)(c) EUTMR, which refers generally to the use of a trade mark. Since a trade mark may consist of words, designs, letters, numerals, colours, shapes, packaging, or sounds, the proposed wording would better accommodate non-textual forms of trademark use. Although this issue arises within the context of descriptive fair use under Section 47(a), the writer nevertheless proposes this amendment in order to avoid confusion and to maintain consistency within the provision.

Moreover, even though this issue may not appear to be directly related to upcycling practices, the writer further suggests that any amendment to Section 47 should also expressly include the term “services” in addition to “goods.” This is because trademark rights may apply to both goods and services under trademark law.

Furthermore, trademark rights should be balanced against the purchaser’s property rights and the public interest in receiving accurate information about the nature of the product, including information relating to upcycling, through the fair use doctrine. Excessive post-sale control by trademark owners may unduly restrict legitimate uses of lawfully acquired goods.

Supporting legitimate upcycling practices also generates economic and environmental benefits by encouraging innovation, small businesses, sustainable entrepreneurship, product reuse, and the extension of product lifespan. Moreover, allowing references to the original branded materials may assist consumers in understanding the origin of the upcycled product.

In light of the above analysis, legal reform is necessary to provide a safe harbor for upcycling practices.

REFERENCES

- Calboli, Irene. “Upcycling, the Ongoing Battle: A (Hopeful) United States Perspective.” *Verfassungsblog* (2025). <https://verfassungsblog.de/upcycling-the-ongoing-battle/>.
- Department of Intellectual Property (Thailand) [กรมทรัพย์สินทางปัญญา]. “Chapter 3 Trademark” [บทที่ 3 เครื่องหมายการค้า]. n.d.<https://www.ipthailand.go.th/images/2562/Suppress/lesson3.pdf>.
- Keats, Anthony M. “Trendy Product Upcycling: Permissible Recycling or Impermissible Commercial Hitchhiking?.” *Trademark Reporter* (2020). https://www.kiip.re.kr/webzine/2012/file/kiip_43_file3.pdf.
- Lepesant, Victoria. “Redressing Sustainable Fashion Practices: Upcycling as a Defense to Trademark Infringement.” *Texas A&M University School of Law Review* 10, no. 2 (2023). <https://doi.org/10.37419/LR.V10.I2.5>
- Mezei, Péter, and Heidi Härkönen. “A Primer to Intellectual Property Law and Upcycling.” *SSRN Working Paper* (2025). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5298352
- Schenerman, Jolie Brett. “One Consumer’s Trash Is Another’s Treasure: Upcycling’s Place in Trademark Law.” *Cardozo Arts & Entertainment Law Journal* 38, no. 3 (2020). <https://cardozoaelj.com/one-consumers-trash-is-anothers-treasure-upcyclings-place-in-trademark-law/>
- Wegener, Charlotte, and Marie Aakjær. “Upcycling – A New Perspective on Waste in Social Innovation.” *Journal of Social Entrepreneurship*. 2016. https://www.researchgate.net/publication/326453746_Upcycling_-_a_new_perspective_on_waste_in_social_innovation
- Bently, Lionel, Brad Sherman, Dev Gangjee, and Phillip Johnson. *Intellectual Property Law*. 6th ed. 2022.
- Department of Intellectual Property. “Chapter 3: Trademark [บทที่ 3: เครื่องหมายการค้า].” 2019. <https://www.ipthailand.go.th/images/2562/Suppress/lesson3.pdf>.
- Department of Intellectual Property. *Intellectual Properties for the Entrepreneur: Trademarks* [ทรัพย์สินทางปัญญาสำหรับผู้ประกอบการ เครื่องหมายการค้า]. Modified 2020. https://www.ipthailand.go.th/images/Promote/3_book_TM.pdf.
- Ginsburg, Jane C., Jessica Litman, and Mary L. Kevlin. *Trademark and Unfair Competition Law Cases and Material*. 4th ed. 2007.
- Hemaratchata, Chaiyot [ไชยยศ เหมะรัชตะ]. *The Nature of Intellectual Property Law* [ลักษณะของกฎหมายทรัพย์สินทางปัญญา]. 2025.
- Khaosaeng, Khanuengnit. *Intellectual Property in Thailand*. 2025. Kharadi, Meeta. “Upcycling in Fashion and Textile.” In *FashionPedia*. RFicare, 2023. https://www.researchgate.net/publication/371366137_UPCYCLING_IN_FASHION_AND_TEXTURE.
- Kuanoth, Jakkrit [จักรกฤษณ์ ควรวจน์]. *International Law on Copyright, Patents, and Trademarks* [กฎหมายระหว่างประเทศว่าด้วยลิขสิทธิ์ สิทธิบัตร และเครื่องหมายการค้า]. 2016.
- Phitthayaphon, Mana [มานะ พิทยาภรณ์]. *Explanation of the Trademark Act* [คำอธิบายพระราชบัญญัติเครื่องหมายการค้า]. 1982.
- Popa, Lavinia Maria, and Antonela Curteza. “Approaches to Recycling in the Fashion Industry (Upcycling).” In *The 18th Romanian Textiles and Leather Conference*, edited by Rodica Harpa, Cristina Piroi, Adrian Buhu, and Luminita Ciobanu. Sciendo, 2023.

- https://www.researchgate.net/publication/369078275_Approaches_to_Recycling_in_the_Fashion_Industry_Upcycling.
- Senftleben, Martin. “Fashion Upcycling and Trademark Infringement: A Circular Economy/Freedom of the Arts Approach.” In *Fashion and Intellectual Property*, edited by David Tan, Jeanne Fromer, and Dev Gangjee. Cambridge University Press, 2025. <https://www.cambridge.org/core/books/fashion-and-intellectual-property/fashion-upcycling-and-trademark-infringement/2C7F773602EAE54B796E901913C6F7B4>.
- Sripibool, Wisit [วิศิษฐ์ ศรีพิบูลย์]. *Explanation and Legal Provisions of Intellectual Property Law* [คำอธิบายพร้อมด้วยบทกฎหมายทรัพย์สินทางปัญญา]. 2003.
- Sukhothai Thammathirat Open University [มหาวิทยาลัยสุโขทัยธรรมมาธิราช]. *Teaching Materials for Intellectual Property Law: Units 1–8* [เอกสารสอนชุดวิชาทรัพย์สินทางปัญญา หน่วยที่ 1–8]. 2009.
- Sukhothai Thammathirat Open University [มหาวิทยาลัยสุโขทัยธรรมมาธิราช]. *Teaching Materials for Intellectual Property Law: Units 9–15* [เอกสารสอนชุดวิชาทรัพย์สินทางปัญญา หน่วยที่ 9–15]. 2009.
- Suphaphonsiri, Thatchai [รัชชัย สุกผลศิริ]. *Explanation of Intellectual Property Law* [คำอธิบายกฎหมายทรัพย์สินทางปัญญา]. 1993.
- Thaveechaiyagarn, Suthiphon [สุทธิพล ทวีชัยการ]. *Collected Lectures of the Thai Bar, Semester I, 78th Generation, Academic Year 2025, Book No. 8* [รวมคำบรรยายเนติบัณฑิต ภาคหนึ่ง สมัยที่ 78 ปีการศึกษา 2568 เล่มที่ 8]. 2025.
- Tingsamitr, Was [วัศ ดิงสมิตร]. *Explanation of Intellectual Property Law* [คำอธิบายทรัพย์สินทางปัญญา]. 2002.
- Johansson, Melina. “Reimagining EU Trademark Law in an Upcycling Era: A Circular Economy Approach to Trademark Protection.” Master’s thesis, University of Helsinki, 2024.
- Munsrijan, Nantarat. “Problems of the Use of Registered Trademark in the Case of Fair Use.” Master’s thesis, Chulalongkorn University, 2022.

Data Availability Statement: The raw data supporting the conclusions of this article will be made available by the authors, without undue reservation.

Conflicts of Interest: The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

Publisher’s Note: All claims expressed in this article are solely those of the authors and do not necessarily represent those of their affiliated organizations, or those of the publisher, the editors and the reviewers. Any product that may be evaluated in this article, or claim that may be made by its manufacturer, is not guaranteed or endorsed by the publisher.



Copyright: © 2026 by the authors. This is a fully open-access article distributed under the terms of the Attribution-NonCommercial-NoDerivatives 4.0 International (CC BY-NC-ND 4.0).