

Rethinking Trademark Rights in Circular Economy from Fashion Upcycling Perspective

Nurul Elliyana Abdul Jamal^{1†}, Zinatul Ashiqin Zainol¹, Safinaz Mohd. Hussein¹ and Rose Dahlina Rusli²

¹Faculty of Law, Universiti Kebangsaan Malaysia, 43600 Bangi, Selangor, Malaysia

²College of Creative Arts, Universiti Teknologi MARA, 40450 Shah Alam, Selangor, Malaysia

Received: 28th February 2025; revised: 24th November 2025

The fashion industry plays a significant role in the global economy but significantly harms the environment by overusing and polluting natural resources. Like many others, Malaysia's fashion sector operates on a linear economic model that generates substantial waste and contributes to environmental degradation. This study explores the intersection of sustainable fashion and trademark rights in implementing circular economy principles in fashion industry. The purpose of this research is to critically examine the legal tension between brand protection and sustainable practices, identifying the extent to which legal frameworks support or hinder circular initiatives. A qualitative legal research method was employed, involving doctrinal analysis of relevant laws, policies, and case studies. Findings highlight successful sustainable practices in fashion industry, such as textile recycling, second-hand markets, and take-back programs in Malaysia, which align with circular economy principles. It also reveals that while trademark law plays a crucial role in safeguarding brand identity, it can unintentionally obstruct upcycling of branded goods, which are key components of circular fashion. The study concludes that amendment to Trademark Act 2019 and legal reforms approaches are necessary to align trademark protection with the goals of sustainability, encouraging a more balanced legal environment that supports both brand integrity and environmental responsibility. By overcoming these obstacles, Malaysia can strengthen its leadership in sustainable fashion and create a model for integrating circular economy practices into other sectors.

Keywords: Upcycling, Circular Economy, Sustainable Fashion, Trademark

Circular economy is the opposite of linear economy. It is a closed-loop system that continuously utilize resources, focusing on minimizing waste and maximizing product value. Adopting this system can help address critical environmental challenges such as environmental degradation, resource depletion, and climate change while also enhancing economic stability. One industry that urgently needs to reform is the fashion industry, widely regarded as the second most polluting industry globally.¹ In Malaysia alone, 3.1 million tonnes of fashion waste are disposed of annually.² Alongside the country's efforts to implement circular economy, sustainable fashion practice is gaining momentum among local artisans, designers and business. One such practice is upcycling which is transforming discarded product into new, and higher value product. The practice reduces the demand for virgin resources and helps divert waste from landfills. However, fashion industry heavily relies on trademark to protect its products. Consequently, upcycling trademarked product poses a risk of infringement.

Legal cases in the United States and Europe illustrate how trademark laws can create barriers to fully adopting sustainable fashion. Hence, trademarks had indirectly hinder the full implementation of sustainable fashion practice. This paper will explore the legal challenges of integrating sustainable fashion practices in Malaysia's circular economy.

Circular Economy

A circular economy is defined as an industrial system that is restorative or regenerative by intention and design, with its primary objective being to maximize the value of products throughout their entire lifecycle by encompassing production, distribution, consumption, and disposal while minimizing waste.³ The system aims to retain the added value of products for as long as possible, eliminating waste by treating end-of-life products as repetitive reusable resources to create further value.⁴ While linear economy relies heavily on the availability of cheap and abundant raw resources, a circular economy operates on the principle of reusing products and integrating them into a closed-loop

[†]Corresponding author: Email: elliyana.work@gmail.com

system of production and consumption⁵ as shown in Fig. 1.

Based on Fig. 1, circular fashion system begins with raw material extraction, where natural or synthetic fibers are sourced. These materials are then processed into textiles before moving to the design and development stage, where sustainability is prioritized. Clothing is manufactured and distributed through retail operations before reaching consumers. Instead of discarding garments after use, consumers are encouraged to repair, redistribute, or resell them. Recycling plays a key role in transforming old or damaged clothes into new materials, reducing the need for virgin resources. Disposal is considered the last option, aiming to minimize environmental impact. By redesigning, remanufacturing, and repurposing textiles, the circular fashion system promotes a more responsible and eco-friendly industry.

Circular economy system aligns with the United Nations Sustainability Development Goals (UN SDG), specifically Goals 12, which is to ensure sustainable consumption and production patterns.⁷ It embodies SDG 12 by promoting minimal resource usage in production and responsible disposal practices. It prioritizes the 10-R strategy, offering a promising alternative to the outdated linear economic system.⁸ A successful transition to a circular economy requires collaboration among governments, businesses, NGOs, and consumers.⁹ As environmental distress affects everyone, it has inspired developed nations to adopt similar measures, reflecting a global shift toward circularity.¹⁰

Circular economy has been widely discussed over the years. Japan is considered one of the pioneer

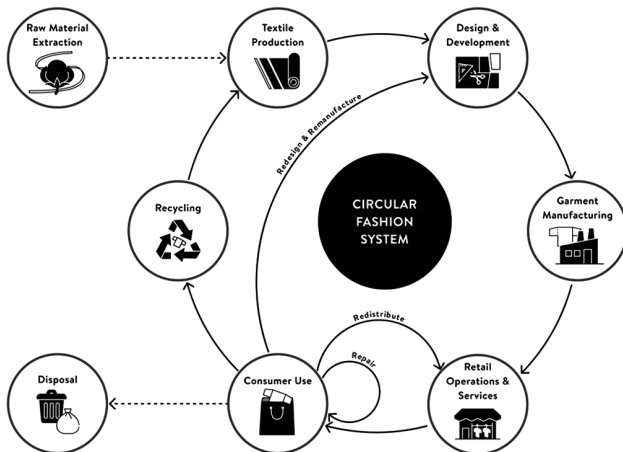


Fig. 1 — Circular fashion system
Source: Redress Design Award Website⁶

countries in implementing circular economy policies as early as 2000 by introducing a legal framework known as ‘Law for Establishing a Recycling-Oriented Society’, which prioritizes a waste hierarchy.¹¹ Then, in 2001, Japan implemented ‘Law for the Promotion of Effective Utilization of Resources’, requiring businesses to integrate recycling considerations into the design and manufacturing stages.¹² In United States, it started with the establishment of US Environment Protection Agency (EPA) in 2009, which is the responsible body for circular economy goals. A few circular initiatives that have been taken by EPA are ‘National Recycling Strategy: Part One of a Series on Building a Circular Economy for All’ in November 2021, ‘National Strategy for Reducing Food Loss and Waste and Recycling Organics’ in June 2024, and ‘National Strategy to Prevent Plastic Pollution’ in November 2024. The initiative emphasize on slowing the climate change and identifying key actions to reduce the impact of natural resources extraction and processing.¹³ In Europe, it started with the adoption of Circular Economy Action Plan 2015, then followed by updated plan in March 2020 as part of the European Green Deal. The plan introduces new rules in order to achieve carbon neutrality by 2050 and addressing concerns on packaging and packaging waste, biodegradable and compostable plastics, and eco-design for sustainable goods.¹⁴

Following the global momentum, Malaysia also shows its commitment to transitioning towards a circular economy. On 27 September 2021, Ismail Sabri Yaakob, Prime Minister then, introduced 12th Malaysia Plan 2021–2025 (RMK-12), emphasizing on reducing waste, improving resource efficiency, and encouraging industries to adopt sustainable production and green technologies.¹⁵ Complementing the plan and New Industrial Master Plan 2030 (NMIP 2030), National Circular Economy Policy 2020–2030 is provided as framework to guide the transition. Specifically targeting waste management, on 6 August 2024, the Housing and Local Government Ministry (KPKT) introduced Circular Economy for Solid Waste Blueprint 2025–2035, which focuses on improving solid waste management, increasing recycling rates, and reducing reliance on landfills.¹⁶ This blueprint expands on the traditional 3R principles by incorporating the 10-R strategies introduced by United Nations and includes measures such as an Extended Producer Responsibility (EPR) scheme and zero-waste-to-landfill certification for manufacturers, emphasizing governance, legislation,

and market creation in solid waste management. Minister Nga Kor Ming stressed the need to shift to a circular economy, urging immediate action against the ‘Triple Planetary Crisis’ and aligning Malaysia with global sustainability efforts.¹⁷ Malaysia’s commitment is reinforced by its participation in the UN SDG and the Paris Agreement, supporting Malaysia’s goal of net-zero emissions by 2050.¹⁸

Implementing circular economy key elements into fashion industry involves adopting practices that centre on sustainability throughout the product lifecycle. These key elements are as outlined in Table 1. The transition from a linear economy to a circular economy can only be done by embracing these key elements and prioritizing sustainable practices.

Fashion Industry Environmental Problems

The fashion industry is one of the most significant contributing industry to the global economy. The scale is so big that it can be considered the seventh-largest economy if ranked alongside individual countries gross domestic product (GDP).²¹ In 2019, the fashion industry global revenue was 1.5 trillion USD. Then, the numbers plummeted to 1.3 trillion

USD as COVID-19 pandemic hit and lockdowns were enforced in most places worldwide. After lockdowns ended, consumers returned to stores and the revenue rebounded to 1.5 trillion USD and steadily increased. There is also a surge of increased revenue in 2023 to 1.73 trillion USD caused by the revenge spending phenomenon, as consumers feel deprived of shopping during the pandemic.²²

The high revenue reflects the massive scale of the fashion industry, which consequently harms the environment.²³ In 2019, the United Nations considered fashion as the second most polluting industry globally¹ as it excessively uses and pollutes the most critical natural resources such as air, water, and land.

The environmental impacts as shown in Table 2 are not created overnight.²⁷ The economy system has an essential effect on how the industry is shaped today. Linear economy was introduced and has been in use for a long time because of its simplicity and low cost. It extracts natural resources to produce goods and then discards them after use. The system gives little consideration to the excessive usage of resources for production, the consequences of the disposal, and the environmental impact.²⁸ Therefore, there is growing

Table 1 — Key elements of circular economy in fashion industry

Goal	10-R Strategy	Key elements	Description
Smart Product Use and Manufacture	R0: Refuse R1: Rethink R2: Reduce	Resource Efficiency	This principle focuses on minimizing waste, energy use, water consumption and reducing the industry overall environmental impact.
Extend Lifespan of Product	R3: Reuse R4: Repair R5: Refurbish R6: Remanufacture R7: Repurpose	Design for Longevity and Durability Product Life Extension	This principle focuses on producing long-lasting garments that withstand wear and tear, promoting extended use and reducing waste. This principle focuses on maximizing the lifespan of garments by keeping them in circulation for as long as possible.
Useful Application of Materials	R8: Recycle R9: Recover	Use of Sustainable Materials End-of-life Recycling	This principle focuses on ensuring all product components can be safely returned to the environment to reduce environmental degradation. This principles focuses on ensuring materials are reprocessed into new products and diverting waste from landfills.

Sources: Ellen MacArthur Foundation (n.d)⁹, Ellen MacArthur Foundation (2019)¹⁹, The Sustainable Fashion Forum (2024)²⁰

Table 2 — Natural resources and the usage and pollution by fashion industry

Natural resources	The usage and pollution by fashion industry
Air	<ul style="list-style-type: none"> Produced 270 kilograms of CO2 emissions per person, totalling 121 million tonnes of greenhouse effect.²⁴
Water	<ul style="list-style-type: none"> Use 2,700 litres of fresh water to produce a single cotton t-shirt.²⁴ Use an average of 9000 litres of water per person to produce clothing and shoes.²⁴ The dyeing and finishing process is responsible for 20% of global clean water pollution.²⁴
Land	<ul style="list-style-type: none"> 700,000 harmful microplastic fibres are in the oceans and pollute marine ecosystems.¹ 64.5% of textile waste is discarded in landfills (World Bank Group, 2019). 75 million tons of clothing packaging waste is discarded annually in the United States.²⁵ Europeans discard on average 11 kilograms of textile per person annually, with 87% of the waste being burned or disposed of in landfills.²⁶

concern about whether this system remains viable after seeing how it is unsustainable to continue practicing. The effects of the fashion industry on the environment desperately call for change.²⁹

The fashion industry in Malaysia is not much different compared to its global landscape. According to the Ministry of International Trade and Industry (MITI), the textiles, apparel, and footwear industry contributed RM6.0 billion to the country’s GDP in 2020 compared to only RM4.2 billion back in 2006.³⁰ In 2018, the total waste disposed of by concession companies in the seven states that adopted Solid Waste and Public Cleansing Management Act 2007 amounted to 3.1 million tonnes per year, and 6.3% of it consisted of textile waste.²

Selangor Youth Community (SAY), Life Line Clothing Malaysia (LLCM), and SWCorp, in collaboration with Kloth Cares launched the ‘Fabric Recycling Movement’ in 2018 to encourage the public to dispose of unwanted textiles in textile recycling bins. This campaign collected 608,000 kg of textiles across the Klang Valley, Melaka, and Negeri Sembilan between August 2018 to May 2020 as shown in Fig. 2.² Figure 2 illustrates the composition of textile waste in Malaysia, categorizes into several groups, and highlights the percentage and weight for each type.

Figure 2 shows that clothing contributes the largest share of textile waste, making up 60% (364,800 kg) of

total textile waste. 70% (255,360 kg) of this is classified as unusable while 30% (109,440 kg) is deemed usable. Gender-specific analysis reveals that women's clothing comprises 58% (212,800 kg) of the clothing waste, while men's clothing accounts for 42% (152,000 kg). Household textiles contribute 10% (60,800 kg) of the total textile waste. This category includes items like towels, bedsheets, and curtains, which are commonly discarded after wear and tear. Fabric scraps make up another 10% (60,800 kg). These are often leftover pieces from clothing production or alterations. While these scraps are typically small, they present significant potential for upcycling into new products, reducing the need for virgin textiles.

Bags contribute 7% (42,560 kg) to the total textile waste. This category is further divided into luggage bags (60%, 25,536 kg), backpacks (20%, 8,512 kg), and handbags (20%, 8,512 kg). Bags are often made from durable materials, making them suitable for repair, reuse, or recycling. Proper waste management strategies for this category could extend the lifecycle of these items and reduce waste accumulation. Accessories, such as scarves, hats, and belts, account for 5% (30,400 kg). Specifically, scarves and shawls make up 30% (9,120 kg), and belts comprise 10% (3,040 kg), and other accessories waste could accumulate to 60% (18,240kg). Accessories are often

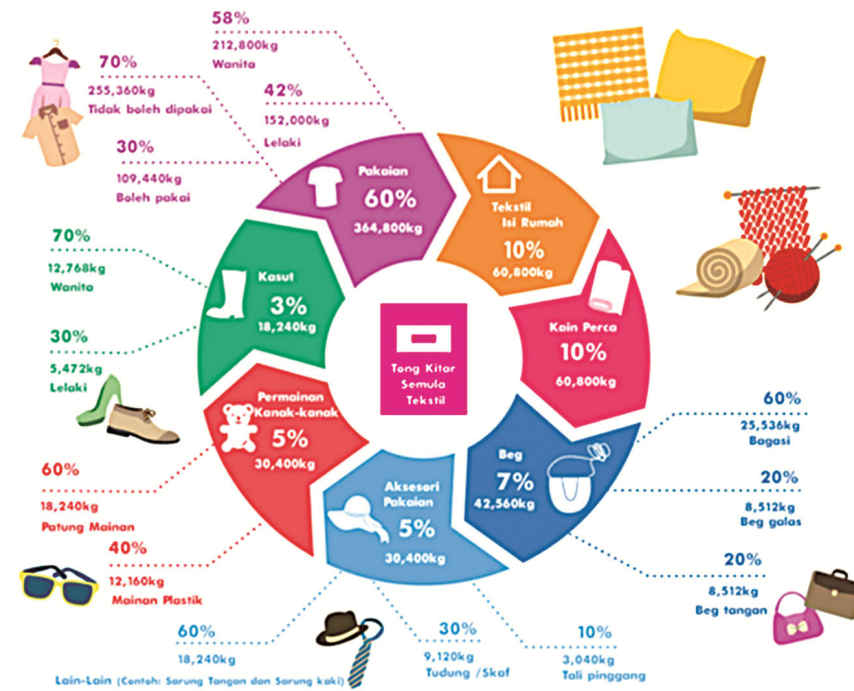


Fig. 2 — Malaysian textile waste composition

made of mixed materials, which pose challenges for recycling but also opportunities for creative reuse through upcycling. Kids toys account for 5% (30,400 kg) of the total textile waste. This category includes items such as dolls and plastic toys. Dolls represent the majority, making up 60% (18,240 kg) of this waste, while plastic toys contribute 40% (12,160 kg). These items are often discarded due to wear, breakage, or being outgrown, but they offer significant potential for recycling or repurposing, especially for creative upcycling projects.

Shoes make up 3% (18,240 kg) of textile waste. Gender-specific analysis reveals that women's shoes comprises 70% (12,768 kg) of the shoe waste, while men's shoes account for 30% (5,472 kg).

The data underscores the need for proper waste management, recycling, and upcycling initiatives in Malaysia to reduce the environmental impact of textile waste and promote sustainability within the circular economy framework. Other than official campaign, circular fashion practices can also be implemented through diverse initiatives that promote sustainability throughout the product lifecycle.

Sustainable Fashion Initiatives

Sustainable fashion initiatives in Malaysia are gaining momentum as brands, designers, and consumers shift towards eco-friendly practices. With increasing awareness on environmental and ethical concerns, many local fashion businesses are embracing sustainable materials and circular fashion models. This movement not only helps to reduce waste and carbon footprint but also promotes responsible consumption and a greener future for the Malaysian fashion industry.

Second-hand and Vintage Markets

Second-hand and vintage markets encourage the reuse of clothing by selling pre-owned items. These

markets reduce waste and offer unique and affordable fashion options. Platforms like thrift stores and online marketplaces have made second-hand shopping more accessible and mainstream (Fig. 3).³¹

Clothing Rental Service

Clothing rental services allow consumers to rent clothes instead of purchasing them. This service is particularly popular for high-end fashion and special occasions. In this type of service, companies offer to lease, rent, or permit subscription-based access to their products instead of selling them outright. This service helps in reducing the demand for new clothing, extending the life cycle of garments, and minimizing waste and resource consumption.

In Malaysia, clothing rental services are gaining popularity as a sustainable and affordable alternative to fast fashion. We Rent Fashion and Lylamod are notable platforms that offer a wide variety of outfits, including designer wear and occasion-specific clothing, for rent. Instagram-based rental services such as flib.my have also emerged, catering to users looking for easy and convenient access to rented attire for events, weddings, or formal occasions. By leveraging social media platforms, these services connect users with stylish, high-quality fashion options while promoting circular practices like reuse and sharing.

Resale Platform

Resale platforms enable individuals to sell their used clothing directly to other consumers. Resale platforms in Malaysia, such as Carousell, Refash and Second-hand.my, play a significant role in promoting and extending the life cycle of clothing through resale and reuse. Carousell is a widely used marketplace where individuals can quickly buy and sell pre-loved fashion items. Refash, recognized as Malaysia and Singapore largest second-hand fashion destination, focuses on



Fig. 3 — Second hand and vintage market in Kota Damansara, Kuala Lumpur, every Sunday from 7 am-11 am

Source: Car Boot Sales Kota Damansara Facebook³²

curating and reselling high-quality second-hand clothing, making sustainable fashion accessible and stylish. Similarly, Secondhand.my provides a platform for consumers to trade used items, including clothing. Together, these platforms contribute to the circular economy by giving garments a second life while reducing overconsumption and environmental impact.

Clothing Swaps and Peer-to-Peer Sharing

Clothing swaps and peer-to-peer sharing involve exchanging clothes with friends, family, or community members. These initiatives promote resource sharing and reduce the need for new purchases. Community events and online platforms facilitate these exchanges, fostering a culture of reuse.

Initiatives by Company

Companies in the fashion industry are adopting various initiatives to minimize environmental impact. Programs such as take-back programs, closed-loop systems, and sustainable-focused enterprises play a crucial role in promoting resource efficiency and waste reduction.

Take-back Program

Take-back programs encourage consumers to return used clothing to retailers for recycling, repurposing, or proper disposal. This promotes responsible disposal and provides an opportunity to reintroduce materials into the production cycle. In Malaysia, H&M and Uniqlo have implemented take-back programs as part of their commitment to sustainable fashion industry. H&M Garment Collecting Program and Uniqlo Recycling Program encourage customers to drop off unwanted clothes at designated store collection bins, regardless of brand or condition. The collected items are sorted to minimize textile waste and give garments a second life. Wearable items are donated to people in need through global and local initiatives, while non-wearable items are recycled into new products, such as insulation materials or textiles. These programs actively contribute to closing the loop in the fashion industry, supporting a more resource-efficient future.

Closed-loop System

This system focuses on designing products that can be easily disassembled and recycled, with materials being reused within a closed loop. It involves developing systems for collecting and recycling materials, ensuring that resources are used efficiently and minimizing waste. Adidas introduced Futurecraft. Loop sneaker with the tagline 'running shoe that is made to be remade' has created a closed-loop system

as the shoes are fully recyclable after the product lifecycle ends.³³

Sustainable-focused Enterprise

A sustainable-focused enterprise is a business that aims to minimize waste, reduce environmental impact, and promote the use of renewable resources. In Malaysia, Kloth Circularity and Life Line Clothing Malaysia is a social enterprise focusing on sustainability and environmental conservation. They promote sustainability through providing designated bins and sorting facilities, to collect unwanted textiles, clothing, and footwear. They also collaborate with other organizations to raise awareness of reducing textile waste and encourage circular economy practices. These efforts help to divert textile waste from landfills, promoting a sustainable and resource-efficient fashion ecosystem. Upcycle4Better also promotes sustainability by upcycling initiatives. The company focuses on creative reuse by turning discarded fabrics into bags, accessories, and home décor. This initiative helps to extend the life of materials and reduce textile waste.

Upcycling

Upcycling is an approach to repurpose discarded product into new and higher-value product. While upcycling has existed for many years, it has recently seen a significant boom. Upcycling can take two forms. First, it can transform original products into something new by adding details like fringes or jewels to a bag. Second, it simply reuses the remaining good parts of products to be disposed of to create new items. In both instances, the practice reduces the need for new materials and increases the lifecycle of existing products or parts.³⁴ Although the methods may differ as shown in Table 3, the main goal remains to ensure the responsible and sustainable use of materials in fashion.

Upcycling is permissible as long as the upcycled product does not feature a registered trademark. However, if a trademark remains on the product after modification, it may risk infringement.

Trademark in Fashion Industry

Trademark refers to any sign capable of being represented graphically that can distinguish goods or services of one undertaking from those of another.³⁵ Trademark helps producers to reap the financial rewards associated with a desirable product and provides identity, visibility, and consumer recognition.³⁶ Well-known trademarks such as Cartier for jewellery, Louis Vuitton for handbags, and Nike

Table 3 — Act of upcycling in fashion

Act of upcycling in fashion	Description
Patchwork	Combine pieces from old cloth to craft a patchwork skirt, jacket, or tote bag, adding a trendy, personalized touch.
T-Shirt Tote Bags	Convert worn-out t-shirts into reusable tote bags by removing the sleeves and stitching the bottom hem, creating an eco-friendly alternative to plastic bags.
Embellished Jeans	Enhance plain denim with embroidery, patches, or fabric paint to create a customized, stylish look.
Scarf Headbands	Transform vintage scarves into fashionable headbands or hair accessories, adding colour to any outfit.
Button Jewellery	Collect buttons from discarded clothing to craft unique necklaces, bracelets, or earrings, showcasing creativity and reducing waste.
Fabric Dyeing	Use natural dyes to refresh faded or stained garments, giving them a new, vibrant appearance.
No-Sew Alterations	Employ fabric glue or iron-on adhesives to adjust hemlines, add embellishments, or modify clothing without sewing, making upcycling accessible to beginners.

for sportswear serve not only as identifiers but also as indicators of reputation and quality. A trademark can include various signs such as letter, word, name, signature, numeral, device, brand, heading, label, ticket, shape of goods or their packaging, colour, sound, scent, hologram, positioning, sequence of motion or any combination and thereof, offering broad protection under trademark law. However, it must be graphically representable and distinctive.³⁷ For example, both the name ‘Adidas’ and its iconic ‘three-parallel stripes’ symbol are protected trademarks of the global sport apparel company.

Once registered, trademark rights grant exclusive control to registered proprietors over the commercial use of their marks as provided in Section 48 Trademarks Act 2019.³⁸ However, this exclusivity may conflict with circular economy practices such as upcycling, particularly in fashion industry. Upcycling may violate Section 48 Trademarks Act 2019 as registered proprietor’s trademark products is often modified and resold as new items. This act is contrary towards the provision as the registered proprietors are the one who have the exclusive rights to use the trademark and to prevent others from using it in the course of trade without permission.³⁹

Thus, by upcycling trademarked goods, the upcycler are facing the risk of committing trademark infringement. In accordance with Section 54 (1) Trademarks Act 2019, infringement occurs when a person uses a sign identical to a registered trademark, for goods identical to those protected by the trademark, in the course of trade, and without the proprietor’s consent. Furthermore, Section 54 (2) (a) extends this to situations where a sign is identical with the trademark and used in relation to similar goods, leading to a likelihood of confusion to the public. In

the upcycling context, this means that even if the upcycled product is not identical to the original, retaining the trademark on a similar fashion item may mislead consumers about the origin or endorsement of the product.⁴⁰

There is no reported case yet in Malaysia concerning the infringement in upcycled fashion products, unlike in the United States and Europe. In *Louis Vuitton Malletier S.A.S. v Sandra Ling Designs Inc. et al.* (2021)⁴¹, the plaintiff sued the defendant for alleged trademark infringement for the sale of apparel, handbags, and accessories made from purportedly authentic pre-owned Louis Vuitton goods. However, the court did not get an opportunity to rule on whether the defendant’s actions constituted counterfeiting because the defendants filed an offer of judgment and the plaintiff accepted that offer. Figure 4 is the examples of the allegedly infringing upcycled products at issue in this case.

Another case concerning infringement of trademarks in upcycled fashion products is the case of *Chanel Inc. v Shiver & Duke LLC* (2022).⁴² The defendant allegedly infringed plaintiff’s trademark when they used authentic Chanel buttons bearing the CC monogram and put such buttons on chains, earrings, and bracelets. The packaging did not state that the jewellery was not authorized or associated with Chanel, but it did add ‘SD’ (for Shiver & Duke) markings on the backs of the Chanel-inspired jewellery and their tags. Plaintiff argued that their trademark was prominently displayed on defendant’s jewellery and brought images that identified plaintiff as the source of defendant products. However, again, the parties settled before there was a final judgment made. Figure 5 is the examples of the allegedly infringing upcycled products at issue in this case.



Fig. 4 — Use of Louis Vuitton Trademark in Sandra Ling Product
 Source: *Louis Vuitton Malletier S.A.S. v Sandra Ling Designs Inc. et al.* (2021)

Examples of Chanel's Genuine Costume Jewelry	Examples of Defendants' Button Costume Jewelry
	
	

Fig. 5 — Use of Chanel Trademark in Shiver & Duke Product
 Source: *Chanel Inc. v Shiver & Duke LLC* (2022)

Europe also has dealt with cases concerning trademark infringement in upcycled fashion products. In 2020, the issue of upcycling arose in the case of *Rich-Ycled Scandinavia IVS (Rich-Ycled) v Louis Vuitton Malletier SAS (Louis Vuitton)* (2020).⁴³ Rich-Ycled is a company that specializes in upcycling fashion materials into shoes and t-shirts. They marketed and sold shoes made from Louis Vuitton canvas and t-shirts. At the preliminary level, Rich-Ycled submitted that they used canvas originating from old Louis Vuitton products to produce the shoes. However, an examination of the disputed shoes revealed that the Louis Vuitton products used by Rich-Ycled were not original. Since the products were not original, the Maritime and Commercial High Court of Denmark did not decide on the question of upcycling, including whether or not Rich-Ycled was entitled to upcycle original Louis Vuitton products. Therefore, the issue of legality for upcycled goods remained unresolved.

Besides infringement, the reuse of materials bearing well-known trademarks raises other legal concerns namely trademark dilution. Trademark dilution occurs when the unauthorized use of a well-known trademark weakens its distinctiveness or harms its reputation, even if there is no consumer confusion.⁴⁴ Upcycled goods that visibly retain original trademark may fall within this legal issue, especially when the trademark is used prominently and without the registered proprietor consent.⁴⁵ There is two type of dilution that could happen which is dilution by blurring and dilution by tarnishment. Dilution by blurring happens when the distinctiveness of a famous mark is lessened through association with unrelated products. For example, modifying a luxury brand’s handbag into a casual tote may blur the brand’s identity, particularly if it no longer reflects the exclusivity or quality traditionally associated with the mark.⁴⁶ Dilution by tarnishment, on the other hand, involves harm to the brand’s image, which may arise if the upcycled item is of poor quality or conveys controversial messages.⁴⁷ Both forms of dilution can occur in upcycled fashion when the modified product undermines the brand’s control over its identity. While some may argue that upcycling promotes sustainability, such practices do not automatically shield creators from liability. The law prioritizes the preservation of the integrity of well-known trademarks, regardless of the upcycler’s intent. Therefore, unless the trademark use qualifies under exceptions, modifying and reselling upcycled goods with well-known trademark may indeed constitute trademark infringement or dilution.⁴⁸

However, there are two main exceptions that could be used to justify upcycling. Firstly, the first-sale doctrine. First-sale doctrine refers to a doctrine that

allows the purchaser of a trademarked good to resell that specific good without the trademark owner's permission. This doctrine ensures that the trademark registered proprietor cannot control the resale or further distribution of the product after it is sold while ensuring the buyer can freely buy and sell goods without fear of infringing on trademark rights.⁴⁹ Trade Marks Act 2019 does not explicitly use 'first-sale doctrine' terms, but their principles are inferred through common trademark law practices. In the United States, 'first sale doctrine' is not codified in statutes but is well-established through judicial precedents⁵⁰ and Europe applies 'first sale doctrine' in trademark law through Article 15 of Regulation (EU) 2017/1001 of the European Union Trade Mark (EUTM) where it stated that EU trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the European Economic Area under that trade mark by the proprietor or with his consent.

However, if the product is upcycled and then commercialized, the 'first sale doctrine' may not apply similarly, as the product is being modified.⁴⁸ In such circumstances, the trademark owner could claim that the modified product infringes on their trademark rights.⁵¹ The United States Supreme Court also clarified that subsequent resales or redistributions of the product are permissible, provided the product is not materially altered or misrepresented in a way that could harm the reputation associated with the trademark.⁵² The same standing applies in Europe through Article 15 (2) EUTM where it mentions the first-sale doctrine shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market.

Even so, in the context of fashion, the first sale doctrine should reasonably encompass upcycling practices, where used garments are transformed into new designs. There are two main reasons why the first sale doctrine should apply to upcycling. First, upcycling involves creative reuse and redesign rather than counterfeiting. Although the original product may be modified, such transformations are typically obvious enough that consumers recognize these are not new goods from the original manufacturer. When trademarks are not used deceptively or to suggest endorsement, the risk of consumer confusion remains low. Courts could adopt a more flexible interpretation of the first sale doctrine by weighing factors such as the intent behind

the modification, the visibility of the transformation, and the broader public interest rather than solely assessing material alteration.⁵³ Second, recognizing upcycling under the first sale doctrine encourages sustainability and innovation. With the fashion industry facing urgent environmental challenges, legal systems should support, not hinder, practices that reduce waste and promote reuse. This could help to create balanced legal approach because while permitting upcycling that serves the public good, it poses no harm to brand reputation.⁵⁴ In addition, since the original owner has already profited from the first sale, continued control over the product's subsequent transformation challenges the very basis of the first sale doctrine.⁴⁹

Second exception that could justify upcycling is nominative fair use principle in trademark law. Nominative fair use allows the use of a trademark to refer to the trademarked product itself, particularly when no practical alternative exists.⁵⁵ This exception typically applies when the upcycler must identify the source of the original material to describe its origin accurately, such as stating that a bag is made from a repurposed 'Louis Vuitton' scarf. The doctrine requires that the use does not suggest endorsement by the trademark owner, the trademarked product is not more than necessary for identification, and there is no likelihood of consumer confusion. This approach protects both the trademark owner's interest and the public's right to factual information about the product.⁵⁶ In the context of upcycling, nominative fair use justifies limited use of trademarks when the original brand is relevant to the transformed item's identity or value. For example, stating that a necklace is made from authentic 'Chanel' buttons may be lawful if done truthfully and without misleading consumers. This enables transparency, which benefits consumers seeking sustainability and authenticity, while maintaining the trademark owner's protection from reputational harm or unauthorized affiliation.

Based on the discussion, it can be seen that trademark law presents a significant legal challenge to upcycle fashion when modified goods retain visible and well-known trademarks. While such practices may risk trademark infringement and dilution, exceptions like the first-sale doctrine and nominative fair use offer potential legal justifications under certain conditions. A balanced approach that protects brand integrity while enabling sustainable innovation is essential to align trademark law with the goals of a circular economy in the fashion industry.

Conclusion

Transitioning to a circular economy and integrating upcycling in the fashion industry are vital steps toward achieving sustainability in Malaysia. Therefore, rethinking the trademark rights is essential to support the integration of fashion upcycling within a circular economy framework.

Currently, Section 48 and Section 54 Trademarks Act 2019 emphasizes the rights of trademark owners and leaves little flexibility for sustainability practices such as upcycling. These provisions currently focus on the exclusive rights of trademark owners and treat most unauthorised reuse of trademarks in trade as infringement. Therefore, an amendment specifically for Section 48 and Section 54 Trademarks Act 2019 may be necessary to support circular economy goals and give some rooms for reuse of trademarks where the intention is not to confuse the public but to promote reuse and reduce waste. Besides amendment specifically for Section 48 and Section 54 Trademarks Act 2019, Malaysia should also consider amending Trademarks Act 2019 generally to introduce specific exceptions or defences for sustainable practices such as fashion upcycling. A ‘sustainability exception’ could permit limited use of registered trademarks in upcycled goods, provided the use is non-deceptive, made in good faith, and does not harm the brand’s reputation. It can also be done by establishing the existed exception as first-sale doctrine and fair use to be applicable in upcycling cases.

Moving forward, research and policy should focus on aligning trademark protection with environmental priorities to enable innovation without compromising brand integrity. It should explore strategies to overcome the legal and regulatory obstacles that the industry faces in upcycling. This includes developing comprehensive legal frameworks that balance sustainability with trademark protection.

References

- UN News: Global Perspective Human Stories: UN launches drive to highlight environmental cost of staying fashionable, (2019), <https://news.un.org/en/story/2019/03/1035161>, (accessed on 12 February 2025).
- SWCorp, Recycle Thru Refashion, (2020), <https://www.swcorp.gov.my/recycle-thru-refashion-2020/> (accessed on 27 December 2024).
- Ellen MacArthur Foundation, Towards the circular economy Vol.1: An Economic and Business Rationale for An Accelerated Transition, (2013), <https://www.ellenmacarthurfoundation.org/towards-the-circular-economy-vol-1-an-economic-and-business-rationale-for-an> (accessed on 27 December 2024).
- European Commission, Towards a circular economy: A zero waste programme for Europe, (2014). <http://ec.europa.eu/environment/circular-economy/pdf/circular-economy-communication.pdf>, (27 December 2024).
- Calboli I, Pushing a square pin into a round hole? Intellectual property challenges to a sustainable and circular economy, and what to do about It, *International Review of Intellectual Property and Competition Law*, 55 (2) (2024) 237.
- Redress Design Award, Circularity in Fashion: *Sustainability v Circularity*. (n.d), <https://www.redressdesignaward.com/academy/resources/guide/circularity-in-fashion> , (accessed on 1 January 2025).
- United Nations, The 17 Goals, (n.d), <https://sdgs.un.org/goals> , (accessed on 27 December 2024).
- Buchel S, Hebinck A, Lavanga M & Loorbach D, Disrupting the status quo: A sustainability transitions analysis of the fashion system, *Sustainability: Science, Practice and Policy*, 18 (1) (2022) 231.
- Ellen MacArthur Foundation, What is circular economy?, (n.d) <https://www.ellenmacarthurfoundation.org/topics/circular-economy-introduction/overview>, (27 December 2024).
- Daga H & Choudhary L, Circular economy: (Not So) merry go round for innovation and world intellectual property regime, *Journal of Intellectual Property Rights*, 29 (2024) 325.
- The basic law for establishing the recycling-based Society (Law No. 110 of 2000) of Japan.
- Act on the Promotion of Effective Utilization of Resources (Act No. 48 of 1991) of Japan.
- United States Environment Protection Agency (US EPA), What is a circular economy? (n.d), <https://www.epa.gov/circulareconomy/what-circular-economy>, (accessed on 14 January 2025).
- European commission, Packaging Waste, (n.d), https://environment.ec.europa.eu/topics/waste-and-recycling/packaging-waste_en#review, (accessed on 15 December 2024).
- Awani News, RMK-12: Pemulihan Ekonomi Malaysia Lebih Kukuh dalam Keluarga Malaysia. (2021), <https://www.astroawani.com/berita-bisnes/rmk12-pemulihan-ekonomi-malaysia-lebih-kukuh-dalam-keluarga-malaysia-318336>, (accessed on 1 January 2025).
- New Straits Times, Circular economy for sustainability, (2024), <https://www.nst.com.my/news/nation/2024/08/1089305/circular-economy-sustainability#> (accessed on 10 August 2024).
- New Straits Times, Ministry Launches Circular Economy in Solid Waste Management Blueprint, (2024a), <https://www.nst.com.my/news/nation/2024/08/1087446/ministry-launches-circular-economy-solid-waste-management-blueprint>, (accessed on 10 August 2024).
- TRADE Malaysia, Malaysia waste management circular economy blueprint, (2024), <https://www.trade.gov/market-intelligence/malaysia-waste-management-circular-economy-blueprint?>, (accessed on 27 December 2024).
- Ellen MacArthur Foundation. Fashion and the Circular Economy – Deep Dive, (2019), <https://www.ellenmacarthurfoundation.org/fashion-and-the-circular-economy-deep-dive?>, (accessed on 27 December 2024).
- The sustainable fashion forum, What is circular fashion? (2024), <https://www.thesustainablefashionforum.com/pages/what-is-circular-fashion?>, (accessed on 27 December 2024).
- McKinsey & Company, The New Dynamic of Financial Globalization, (2017), <https://www.mckinsey.com/~media/>

- mckinsey/industries/financial%20services/our%20insights/the%20new%20dynamics%20of%20financial%20globalization/financial%20globalization_full%20report_august_29_2017%20(1).pdf, (accessed on 27 December 2024).
- 22 Forbes Magazine, In a Post-Covid world customers will be revenge shopping, (2021), <https://www.forbes.com/sites/blakemorgan/2021/03/22/customers-are-ready-to-back-with-covid-revenge-shopping/>, (14 December 2024). ; Karlsson M T & Ramasar V, Selling women the green dream: the paradox of feminism and sustainability in fashion marketing, *Journal of Political Ecology*, 27 (1) (2020) 335.
- 23 Pinkse J, Demirel P & Marino A, Unlocking innovation for net zero: Constraints, enablers, and firm-level transition strategies, *Industry and Innovation*, 31 (1) (2024) 16.
- 24 European union of energy, climate change & environment, (2020), https://environment.ec.europa.eu/strategy/circular-economy-action-plan_en?, (accessed on 27 December 2024).
- 25 World Bank, How much do our wardrobes cost to the environment?, (2019), <https://www.worldbank.org/en/news/feature/2019/09/23/costo-moda-medio-ambiente#:~:text=Around%2020%20of%20wastewater%20worldwide,flights%20and%20maritime%20shipping%20combined,> (accessed on 27 December 2024).
- 26 European Parliament, The impact of textile production and waste on the environment, (2020), <https://www.europarl.europa.eu/topics/en/article/20201208STO93327/the-impact-of-textile-production-and-waste-on-the-environment-infographics#:~:text=On%20average%20Europeans%20use%20nearly,87%25%20incinerated%20or%20landfilled.> (accessed on 12 February 2025).
- 27 United Nations Environment Programme (UNEP), Fashion's tiny hidden secret, (2024), <https://www.unep.org/news-and-stories/story/fashions-tiny-hidden-secret>, (accessed on 27 December 2024).
- 28 Geissdoerfer M, Pieroni M P, Pigosso D C & Soufani K, Circular business models: A review, *Journal Of Cleaner Production*, 277 (2020) 123741; Ellen MacArthur Foundation, Circularity Gap Report Textiles, (2024), <https://www.circularity-gap.world/textiles>, (accessed on 27 December 2024).
- 29 Moreira L, Galvão A R, Braga V, Braga A & Teixeira J, Sustainability as a gateway to textile international markets: The Portuguese case, *Sustainability*, 15 (5) (2023) 4669.
- 30 New Industrial Master Plan 2030 - Textile, Apparel And Footwear Industry of Malaysia
- 31 Baxi S, Circular fashion: Beyond sustainability – The future of fashion industry (2024), <https://www.linkedin.com/pulse/circular-fashion-beyond-sustainability-future-industry-sahil-baxi-zebwf/>, (accessed on 27 December 2024).
- 32 Car Boot Sales Kota Damansara Facebook, <https://www.facebook.com/CBSKotaDamansara/>, (accessed on 12 February 2025).
- 33 Zhang X, Le Normand A, Yan S, Wood J & Henninger C E, What is modular fashion: Towards a common definition, *Resources, Conservation and Recycling*, 204 (2024) 107495.
- 34 Calboli I, Upcycling, sustainability, and IP: What it means for the world of fashion. *WIPO Magazine*, (2023), https://www.wipo.int/wipo_magazine_digital/en/2023/article_0022.html, (accessed on 20 January 2024).
- 35 Section 3 Trademarks Act 2019.
- 36 Bently L, Sherman B, Gangjee D & Johnson P, Intellectual Property Law, United Kingdom: Oxford, University Press, (2018) 662.
- 37 Section 2 Trademarks Act 2019.
- 38 Section 48 Trademarks Act 2019.
- 39 Mossoff A, Trademark as a property right, *Kentucky Law Journal*, 107 (1) (2018) 5.
- 40 Lepesant V, Redressing sustainable fashion practices: Upcycling as a defense to trademark infringement, *Texas A&M Law Review*, 10 (335) (2022) 342.
- 41 *Louis Vuitton Malletier S.A.S. v Sandra Ling Designs, Inc.*, Civil Action 4:21-CV-352 (S.D. Tex. Aug. 24, 2021)
- 42 *Chanel Inc. v Shiver & Duke LLC*, 1:21-cv-01277 (MKV) (S.D.N.Y. Aug. 30, 2022)
- 43 *Rich-Ycled Scandinavia IVS (Rich-Ycled) v Louis Vuitton Malletier SAS (Louis Vuitton)* (BS-43965/2018-SHR of 6 January 2020)
- 44 Martino T, Trademark dilution, *Oxford University Press*, USA. (1996) 57.
- 45 Keats A M, Trendy product upcycling: permissible recycling or impermissible commercial hitchhiking?, *Trademark Reporter*, 110 (712) (2020) 6.
- 46 Simon Fhima I, Dilution by blurring: a conceptual roadmap, *Intellectual Property Quarterly*, 44 (2010) 40.
- 47 Bedi S & Reibstein D, Measuring trademark dilution by tarnishment, *Indiana Law Journal*, 95 (683) (2020).
- 48 Senftleben M, Developing defences for fashion upcycling in EU trademark law, *GRUR International*, 73 (2) (2024) 99.
- 49 Barnes D W, Free-Riders and Trademark Law's First Sale Rule, *Santa Clara Computer & High Technology Law Journal*, 27 (457) (2011) 461.
- 50 *Prestonettes, Inc. v Coty* 264 U.S. 359 (1924)
- 51 Calboli I, Market integration and (the limits of) the first sale rule in North American and European Trademark Law, *Santa Clara Law Review*, 51 (1241) (2011).
- 52 *Prestonettes, Inc. v Coty* 264 U.S. 359 (1924).
- 53 Senftleben M, Fashion upcycling as protected free speech in trademark law, *University of Miami International and Comparative Law Review*, (31) 349-387 (2024a) 386.
- 54 Bepalova N, Balancing intellectual property rights and sustainability-legal criteria for sustainable reuse, repair and refurbishment of IP-protected goods, and how to assess them, (2024) 35.
- 55 Schenerman J B, One consumer's trash is another's treasure: Upcycling's place in trademark law, *Cardozo Arts & Entertainment Law Journal*, 38 (745) (2020) 753.
- 56 Bain A, "DANK" customs, bootlegs, and reworked pieces: For an expressive use defence of secondary trademark works, *The Journal of World Intellectual Property*, 23 (3-4) (2020) 375.