

Ms Yvette Goss
Right to Repair
Productivity Commission
4 National Circuit
Barton ACT 2600
Australia

7 February 2021

Re: *Submission on the Right to Repair in response to the Productivity Commission's Issues Paper December 2020*

Thank you for the opportunity to make a submission to the *Issues Paper* on the Right to Repair.

We note that the Commission has been asked to assess the costs and benefits of a right to repair in Australia and the impact that regulatory or policy changes could have on market offerings for repair services and replacement products. We note further that in undertaking the inquiry, the Commission should consider:

1. *The legislative arrangements that govern repairs of goods and services, and whether regulatory barriers exist that prevent consumers from sourcing competitive repairs;*
2. *The barriers and enablers to competition in repair markets, including analysing any manufacturer-imposed barriers, and the costs and benefits associated with broader application of regulated approaches to right of repair and facilitating legal access to embedded software in consumer and other goods;*
3. *The impact of digital rights management on third-party repairers and consumers, and how intellectual property rights or commercially-sensitive knowledge would interact with a right to repair;*
4. *The effectiveness of current arrangements for preventing premature or planned product obsolescence and the proliferation of e-waste, and further means of reducing e-waste through improved access to repairs and increased competition in repair markets; and*
5. *The impact on market offerings, should firms have their control over repair removed.*

We appreciate the broad and complex multi-disciplinary issues raised in the Terms of Reference for this 12 month Inquiry and note that our submission will only touch on some of the issues raised, given the time constraints. We look forward to the opportunity to provide further submissions when the Productivity Commission releases its draft Report in June 2021.

We are Intellectual Property Law academics at Griffith University with a strong interest in the International Right to Repair movement. We are researching the intersection between Intellectual Property law, consumer and competition law and the international Right to Repair movement. We were also guest editors of the special edition of the 2020 *Australian Intellectual Property Journal*: entitled: *'Unlocking the Interface between IP and the Right to Repair'*¹, which includes a series of journal articles that provide an in-depth analysis of Australian IP laws, as both barriers and enablers, of the Right to Repair. It includes contributions on the US and EU regulatory responses to the Right to Repair.

Please feel free to contact us for further discussion.

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¹ <http://sites.thomsonreuters.com.au/journals/2020/12/29/australian-intellectual-property-journal-update-vol-31-pt-2/>

INFORMATION REQUEST 1

What would a 'right to repair' entail in an Australian context? How should it be defined?

An Australian 'Right to Repair' needs to consist of a series of unique legal, regulatory and policy responses to the broad range of issues identified in the Commission's Issues paper.

While there are a myriad of different definitions of what the expression 'Right to Repair' means in different contexts and different countries, put simply, at the heart of the Right to Repair movement is recognition of the fact that legal, regulatory and policy reform is needed to rebalance the relationship between global and national manufacturers of digital (or smart) goods and machinery and the customers who buy those goods to ensure that those consumers have reasonable access to the repair information and services, spare parts and tools that are necessary to keep those goods in good working order for reasonable product life spans. It also recognises that the inability to repair that consumers are currently experiencing is increasingly and globally important as countries transition to Circular Economies. However, what is important to note that in an Australian context, a right to repair will need to be incorporated into a range of regulatory responses at local, state and federal levels. A Right to Repair cannot be thought of in isolation. There are many different responses that will need to be developed across a range of regulatory regimes: competition and consumer law, intellectual property laws, environmental laws, taxation and insurance laws. The comprehensive submission by iFixit (Kyle Wiens) sets out a range of features that should be encompassed in Right to Repair regulatory responses. We support these arguments and believe that the experiences and knowledge shared in this submission highlight the similarity of challenges that US and Australian consumers face.

Along with a Right to Repair, consideration must be paid to the need for regulatory responses to the increasingly use of the unfair terms in consumer contracts that are accompanying software enabled products, devices and machinery. There needs to be recognition and action taken by regulators to address the power imbalance between consumers and manufacturers, as was been shown by the 23 recommendations made by the ACCC, in its 2019 Digital Platform's Inquiry Report² to ensure that Australian consumers are treated fairly and that their privacy is respected.

When thinking about consumer's inability to repair their own goods that is often imposed by end use licence agreements (EULAs), it is fundamentally important for regulators recognise the general inequity of the Australian Consumer Law's approach of placing the onus (and significant costs) onto individual consumers to prove the existence of unfair terms and to instigate legal actions to pursue a remedy. Instead, regulators should examine policy response that place positive obligations on manufacturers to make their commercial dealings with their customers more transparent and equitable. This shift in onus would make positive inroads to ensuring consumers are adequately informed when making choices about product choice.

With increasing concern over Australia's environmental future, it is not only consumers who have a role to play in reducing their consumption by reuse, repair and recycling their goods but

² <https://www.accc.gov.au/about-us/tools-resources/social-media/transcripts/accc-digital-platforms-inquiry>

also manufacturers who have an important role to play by accepting more responsibility for ensuring the longevity of their products and how their products will be disposed of responsibly at their end of life. Broader community education about encouraging reuse and repair of existing products and reinforcing the roles and responsibilities that both manufacturers and consumers have in contributing to Australia's environmental future should also be undertaken.

INFORMATION REQUEST 2

- a) What types of products and repair markets should the Commission focus on?*
- b) Are there common characteristics that these products share (such as embedded technology and software or a high/low degree of product durability), and which characteristics would allow policy issues to be considered more broadly?*
- c) If there are particular products that the Commission should focus on, what are the unique issues in those product repair markets that support such a focus?*

Given the breadth of the categories of consumer goods and machinery that are software enabled, we suggest that the Commission should not attempt to narrow the category of goods when examining barriers to repair. There are so many categories of products that now have proprietorial software embedded within them that to focus on one or two categories of goods would deny the breadth of the problem that confronts Australian consumers. It is not only consumer goods such as refrigerators, washing machines, lighting, tools, phones, computers, kitchen appliances such as toasters, coffee machines, almost every modern wearable devices made for the person such as Fitbits, smart watches and iPhones. It is not only personal and household appliances and devices that contain embedded software that can be locked and controlled by the OEMs. This problem extends far broader into industries such as medicine (with the Covid 19 crisis highlighting the life threatening situations caused by the inability to repair medical devices such as ventilators)³, agriculture and mining.

Given Treasury has already released draft legislation introducing a *Mandatory Scheme for Sharing of Motor Vehicle Service and Repair Information*,⁴ we believe it is unnecessary for the Productivity Commission to concern itself specifically with the sharing of car repair and service information of Motor Vehicles. However, as there are a number of exclusions from this legislation, attention should be paid to the exclusions from the Scheme such as automatic vehicles, telemetry in vehicles and agricultural machinery.

Specifically excluding automatic vehicles and telemetry from this Scheme will limit the effectiveness of this scheme. Telemetry is used in many motor vehicles now and to exclude

³ <https://usp.org/news/usp/new-senate-right-repair-bill-reduce-barriers-fixing-medical-equipment-including-ventilators>. Specific legislation, *The Critical Medical Infrastructure Right-to-Repair Act of 2020*, was introduced to allow 'trained repair technicians to more easily access information and tools required to complete maintenance and repair of critical medical infrastructure in preparation for and as part of a response to the current COVID-19 crisis.' <https://www.wyden.senate.gov/news/press-releases/wyden-and-clarke-introduce-bill-to-eliminate-barriers-to-fixing-critical-medical-equipment-during-the-pandemic->

⁴ Available at <https://treasury.gov.au/consultation/c2020-128289>

this from the scope of the Scheme is a lost opportunity. Motor vehicle diagnostics and information that is sent directly to the manufacturer (and that no longer remains on board the motor vehicle) will be excluded from the sharing arrangements and thus tip the balance of access to information that enables repair too much in favour of the manufacturer and places the consumer and the independent repair industry at a severe disadvantage.

Concerns over data security and privacy are often one of the arguments that manufacturers and their agents use to oppose the idea of a consumer's right to repair. To argue that consumer data security is one of the reasons to restrict repairs overlooks the fact that consumers, who are able to control and access the content in their own products, would be able to delete or move the data on their phones, tablets or computers, thus ensuring that data remains private and is not available to others.

The inability of farmers to repair their tractors has attracted much attention and it is pleasing to see that the concerns over the lack of access to reasonable repair services for agricultural machinery are already the subject of examination by the ACCC in the *Agricultural Machinery: Aftersales Markets Inquiry*.⁵ Farmers have long complained about the excessive costs charged by local dealerships for repair that they, or their local mechanics, could simply do themselves, if they were able to access the necessary information and software that is needed.⁶ It costs \$1000s for farmers and local mechanics in rural and remote Australia to access the computer software needed to diagnose problems with agricultural machinery thus preventing farmers from fixing their tractors when needed or local mechanics from providing mechanical services to their farming communities. Agricultural dealerships have a monopoly on repair information forcing farmers to pay higher costs for repair and restricting the choice of repairers.

Importantly, as part of its examination into the issues which may be harmful to competition and to purchasers of agricultural machinery, the ACCC is also examining issues concerning *data ownership and management* within the agricultural industry, rightfully identifying that these issues raise significant privacy and competition concerns for farmers. Many of the technology providers' data ownership provisions in the EULAs and data licences that accompany the new digital agricultural machinery prevent farmers from accessing their data, thus restricting their ability to change from one technology provider to another. Inability to access their farm data has potentially serious competition issues.

The full consequences of the lack of ownership, control and access to machine (and agricultural) data that farmers are experiencing are yet to be fully explored and understood by regulators. However, it is not only farmers that are experiencing a loss of control of their data but also the consumers who adopt and engage with software-enabled goods. Many 'smart' wearable consumer goods, such as smart watches and iPhones, generate large amounts of data that is shared with manufacturers but not with the consumers who own those goods and many consumers are often seemingly unaware of this fact.

We suggest that the issues arising from the lack of ownership, control and access to data that consumers experience when using a broad range of digital goods is an issue that the Productivity Commission should also concern itself when examining the broader issues

⁵ Available at <https://www.accc.gov.au/focus-areas/agriculture/agricultural-machinery-after-sales-markets>

⁶ <https://news.griffith.edu.au/2018/11/23/do-australian-farmers-need-a-right-to-repair/>

relating to the inability of consumers to access repair and service information for the goods that they own.

We note that the national Consumer Data Right (CDR)⁷ has been introduced into the banking sector, and will soon, be expanded into other industries. This right gives consumers greater access to and control over their data and seeks to address many of the concerns facing consumers over management and use of their personal data. It aims to improve consumers' ability to compare and switch between products and services, and should encourage competition between service providers. While this holds much promise for consumers, it is not yet clear whether or how this right will impact more generally on consumers who purchase software enabled goods that generate data about their usage.

INFORMATION REQUEST 3

- a) Do the consumer guarantees under the ACL provide adequate access to repair remedies for defective goods? If not, what changes could be made to improve access to repair remedies? Are there barriers to repairing products purchased using new forms of payment technologies, such as 'buy now pay later'?*
- b) Is the guarantee of available repair facilities and spare parts effective in providing access to repair services and parts? Or is the opt-out clause being widely used, making the guarantee ineffective?*
- c) Should consumer guarantees seek to balance the broader societal costs of remedy choices (such as the environmental impacts of replacements) with consumer rights, and if so how? For example, should repairs be favoured as a remedy?*
- d) Are consumers sufficiently aware of the remedies that are available to them, including the option to repair faulty products, under the ACL's consumer guarantees?
If not, would more information and education be a cost-effective measure to assist consumers understand and enforce guarantees? What would be the best way to deliver this information? What other measures would be more effective?*

It is important to note at the outset that the consumer protection laws in the ACL emphasise the importance of the repair that the *supplier of goods* conducts. However, the consumer guarantees, supplier warranties and consumer remedies emphasise the right of repair that the *original manufacturer or an authorised service provider* conducts.

In terms of assessing the effectiveness of the consumer guarantees in relation to repair, it is difficult to assess as there appears to be little evidence of the number of incidences or actions brought under the ACL's consumer guarantees with respect to repairs. It is therefore difficult to comment on how well these provisions are working in practice.

One particular improvement to the overall operation of the consumer protection provisions would be to amend the definition of 'consumer' for the purposes of the ACL. The definition of 'consumer' under the ACL currently captures any person who acquires goods or services for an amount not exceeding \$40,000 (or where the goods were acquired for personal, domestic or household use). The new threshold of \$100 000 coming into effect on 1 July 2021 will still leave many large pieces of machinery outside the scope of the consumer protection provisions.

⁷ <https://www.accc.gov.au/focus-areas/consumer-data-right-cdr-0>

For example, farmers who purchase large pieces of agricultural equipment, such as tractors or combine harvesters, whose costs far exceed the \$100,000 threshold will never have the protections of the consumer guarantee provisions nor the ACL's unfair terms provisions.⁸ This exposes farmers as they are unable to access remedies under the consumer guarantees or under the unfair terms provisions for those terms in their software contracts that restrict their ability to repair or access repair information and services. The fact that farmers are not considered 'consumers' for the purposes of the ACL provisions more generally has been raised with the ACCC in general consultations about the introduction of the Consumer Data Right into new industries such as agriculture.

Another point to highlight is that the consumer guarantees do not apply to goods or services costing more than \$40 000 (soon to be \$100,000) that are normally used for business purposes (for example, installing industrial air conditioning to an office or a factory premises). On the other hand, business vehicles and trailers are also covered, *irrespective of cost* under consumer guarantees, provided they are used *mainly to transport goods*. The Act clearly states that rights to a repair do not apply to items worth more than \$40 000 (soon to be \$100,000) purely for business use, such as machinery or farming equipment.

The reparability of products by the original manufacturer or an authorised dealer has been of limited value to consumers for a number of reasons.⁹ Recently, prohibitive costs,¹⁰ manufacturers' unfair monopoly over the parts repair market,¹¹ and time and effort have discouraged consumers from pursuing Right to Repair as a consumer remedy.¹²

In 2018, a landmark decision of the *Australian Competition and Consumer Commission v Apple Pty Ltd*¹³ ('the Apple case') confirmed that manufacturers who tell consumers that their warranty would not be honoured if they took their goods to a third-party repairer was a breach

⁸ Leanne Wiseman, Changes to Contract Laws could give small farming businesses more control over farmers <https://theconversation.com/changes-to-contract-laws-could-give-small-farming-businesses-more-control-of-data-and-innovation-69275>

⁹ Pascal Durand, 'Draft Report on a Longer Lifetime for Products: Benefits for Consumers and Companies (2016/2272(INI))' (2016/2272(INI), European Parliament-Committee on the Internal Market and Consumer Protection, 22 December 2016) 12, 9. The identified reasons include 'lack of access to spare parts, and their excessive cost, the cost of labour with respect to low-cost, imported products, the lack of appropriate information on how to carry out repairs and maintenance, the price and procedure involved, the increasing complexity of software and electronics, barriers to entry for independent repairers and self-repairers, the low reparability of products and their components, the insufficiency of replacement services for goods while they are being repaired'

¹⁰ Radio New Zealand, 'Right to Repair in NZ', *Radio New Zealand*, 16 January 2019 <<https://www.radionz.co.nz/national/programmes/summer-days/audio/2018678566/right-to-repair-in-nz>>.

¹¹ Christina Purcell, 'The Impact of "Right to Repair" Legislation on Innovation and Intellectual Property in the Automotive Industry' 38, 21; Henrik Riisgaard, Mette Mosgaard and Kristina Overgaard Zacho, 'Local Circles in a Circular Economy – the Case of Smartphone Repair in Denmark' (2016) 5(1) *European Journal of Sustainable Development* 109.

¹² Mostafa Sabbaghi et al, 'The Current Status of the Consumer Electronics Repair Industry in the U.S.: A Survey-Based Study' (2017) 116 *Resources, Conservation and Recycling* 137.

¹³ (No 4) [2018] FCA 617.

of the Australian Consumer Guarantees in the ACL sent a strong message to the community that manufacturers should not be controlling the aftermarket to the exclusion of others. While this case was a landmark case from a consumer's point of view, despite this, anecdotally, some consumers are still under the impression that in some cases, third party repair could invalidate their warranty.

Consumers' awareness of their legal rights under the ACL's Consumer Guarantees.

It is often difficult for consumers to find out about their full warranty rights or repair options with respect to the goods that they own, particularly their 'smart' goods, as there is often little or no contractual paperwork that accompany these goods, with the products' terms of service often being hosted on manufacturers' websites.

There is little doubt that consumers are generally unaware of their legal rights under the ACL consumer guarantees. In December 2020, we conducted an online survey of Australian Consumers' understanding of the ACL repair provisions and the right to repair movement.¹⁴

This survey examined a range of issues but for the purposes of this submission, we will focus on those responses concerning consumer understandings of their rights under the ACL. From the results of this survey, it was revealed that in terms of awareness and understanding of the ACL, that most consumers (82%) were aware that laws exist to protect their basic consumer rights under the ACL when purchasing electrical or electronic goods. However, by way of contrast, 56% were not aware of their ability to have their electronic goods repaired under the ACL. It was also found that a high percentage of consumers had minor to no understanding of their consumer rights. Additionally, 45% of participants had only an average understanding of their consumer rights under the ACL, while a high percentage of 38% had minor to no understanding of their consumer rights.¹⁵

We understand that there is already a lot of information about the ACL's consumer protections available through consumer organisations or Government, so it is not necessarily the case that more information about the ACL is needed. However, what is needed is a broader education and engagement campaign within the community (perhaps via media and social media) of the need for better understanding of the rights that consumers have under the ACL. However, anecdotally, consumers feel overwhelmed at the thought of the costs associated with having to seek legal advice or take action over a dispute with a large companies.

Public repair events and organisations, such as *Repair Cafes and Associations and individual repairers (such as Mend it Australia)*, serve a vital role in the community to increase awareness of the importance of repair to reducing E-waste and in turn, environmental sustainability. Local, State and Federal Government support for such organisations would increase the numbers, strength, patronage and availability of these services. A co-ordinated approach to these organisations could be supported through appropriate various levels of Government funding, which in turn, would reap benefits of reduction of 'smart' and physical goods ending up in landfill.

¹⁴ Leanne Wiseman, Kanchana Kariyawasam, Pamela Saleme, Australian Consumers' Right to Repair Survey Dec 2020, Quantitative Analysis Report, Griffith University, Feb 2021

¹⁵ Ibid.

There are a number of challenges faced by these voluntary repair organisations: including complexities and uncertainties around the lack of a national approach to regulating the repair of electrical or digital equipment; challenges in accessing and the costs associated with appropriate insurance coverage for their activities. We understand a number of Repair Cafes and associations have also made submissions to the Commission about the repair work they do and the challenges that they face and it is important for the Commission to understand the great work they are doing and the results they are achieving within their local communities.

INFORMATION REQUEST 5

- a) To what extent do current IP laws already facilitate repairs by consumers or independent third parties (e.g. the spare parts defence under the Design Act)?*
 - b) Are there any aspects of IP laws where consumers' rights with respect to repairs are uncertain?*
 - c) Do current IP protections (e.g. intellectual property rights, technological protection measures, end-user licencing agreements) pose a significant barrier to repair in Australia? If yes, please comment on any or all of the following:*
 - the specific IP protections that prevent consumers from sourcing competitive repairs and/or inhibit competition in repair markets*
 - the types of products or repair markets these barriers mainly affect*
 - the prevalence of these barriers*
 - the impacts of these barriers on third party repairers and consumers (e.g. financial cost, poorer quality repairs)*
- (continued next page)*
- options for reducing these barriers and their associated benefits, costs and risks (including potential impact on market offerings).*
- d) In what ways might government facilitate legal access to embedded software in consumer and other goods for the purpose of repairs? What are the pros and cons of these approaches?*

At the heart of the legal and regulatory barriers to repair is the IP law regime. Manufacturers of digitally enabled goods use the IP in the computer software to 'lock' up the goods, and service and repair information, which, in effect 'tethers'¹⁶ consumers to the manufacturers for repair and service. Manufacturers rely upon the copyright scheme of technological protection measures (TPMs) developed in the 1990s to protect music and other copyright content online, to prohibit access to the underlying software programs that are now embedded in everyday smart appliances, cars and machinery. It is not only copyright and TPMs over the embedded software that are being used to prevent access and repair but also contributing to the problem are the copyright end use licence agreements (EULAs) that restrict access to the technology and the repair information in service manuals. Patents, trademarks, designs, and confidentiality in the hardware, software, spare parts and repair manuals are also being used to control the aftermarket of spare parts, repairs and servicing. Intellectual Property law is one of the key

¹⁶ Hoofnagle, C., Kesari, A., Perzanowski, A., 'The Tethered Economy', (2019) 87 *The George Washington Law Review* 783

ways used by manufacturers to restrict access to not only repair and service information but also diagnostic programs and spare parts.

As Kyle Wiens from iFixit highlights: ‘Repairing modern appliances and machinery requires ‘access to diagnostic codes, circuit layouts and replacement parts that manufacturers zealously protect. And refurbishing can require access to proprietary tools that manufacturers have been historically reticent to share.’¹⁷

However at the outset, it is important to note that many smart goods and machinery that require repairing do not directly interfere with the intellectual property of the manufacturers. Despite this, manufacturers continue to cite protection of the ‘Intellectual Property’ as one of the key reasons for their opposition to the Right to Repair. Repair does not necessarily involve the duplication of copyright works, nor the making of a patented article nor the reproduction of a registered design. Basic information about how a product works and how that product functions is not necessarily the subject matter of intellectual property law.

Intellectual Property Laws should not be operating to prevent a smart consumer product or good from working or from being repaired. Amendments to Intellectual Property laws should be considered that prevents the with-holding or non-disclosure of crucial repair and service information that would ensure that the products remain in use for longer and that they do not end up in landfill. For example, under the *Mandatory Scheme for Sharing of Motor Vehicle Service and Repair Information*,¹⁸ repair and service information protected by copyright are the subject of the mandatory sharing scheme. This approach could be adopted for broader categories of goods, other than motor vehicles.

With respect to way in which Intellectual Property Laws facilitate (or inhibit) repair, it is necessary to examine the Patents Act, the Designs Act, the Trade Marks Act, and the Copyright Act. Each of these different forms of Intellectual Property both facilitate and inhibit repair in a different way.¹⁹

However, the complexities and practical application of each of the IP regimes when it comes to thinking about a right to repair, requires further research. Australia is party to a number of international treaties and bilateral trade agreements that cover the full range of intellectual property laws and accordingly, a full and detailed understanding of Australia’s international and national IP laws is necessary to understand how a right to repair could interact with Australia’s intellectual property laws.

¹⁷ Kyle Wiens, ‘Intellectual Property is putting the Circular Economy in Jeopardy,’ The Guardian, 3 June 2014, <https://www.theguardian.com/sustainable-business/intellectual-property-circular-economy-bmw-apple>. See also Kyle Wiens, Design for Repair, available at <https://www.theguardian.com/sustainable-business/design-repair-empowering-consumers-fix-future>

¹⁸ Available at <https://treasury.gov.au/consultation/c2020-128289>

¹⁹ See Christopher Heath and Anselm Kamperman Sanders (eds), ‘Spare parts, repairs, and intellectual property rights : IIEEM international intellectual property programmes, Conference Proceedings, Kluwer, 2009. See also Leanne Wiseman and Kanchana Kariyawasam (eds), ‘Unlocking the Interface between IP and the Right to Repair’ Special Edition, (2020) 31:2 *Australian Intellectual Property Journal* Special Edition.

Put simply, with respect to **Patent Law**, the recent High Court decision in *Calidad Pty Ltd & Ors v. Seiko Epson Corporation & Anor*²⁰ ‘has provided a very important clarification of the rights of users of products to enable them to be repaired and reused patented products. By accepting the doctrine of exhaustion in Australia, for the first time in 112 years, the High Court has given consumers the opportunity to increasingly recycle and reuse, rather than to discard, products when they have the potential for further use.’²¹ Thus Australian Patent Law now recognises and facilitates the right to repair patented goods.

With respect to **Designs Law**, while there is an existing repair defence, we have highlighted the inadequacies and the limitation of this repair defence in ‘Revisiting the Repair Defence in the Designs Act (2003) in Light of the Right to Repair Movement and the Circular Economy’.²² We suggest that there is need to further review not only the Designs Act’s repair defence, as despite what some may think, this defence does not give consumers a general to repair ‘smart’ goods that are protected by design protection.²³ Designs Law, rather than focussing solely on the visual appearance of the product or article, could be used to incentivise repairability. There are many ways for this to happen, yet of course, the full implication for design owners and design users would need further research to examine the full impact upon both the rightsholders and the consumers. One example might be for a fee discount to be offered to applicants seeking design registration for their products where those designs are eco-friendly or where the design encourages or facilitates repair. Suggestions such as these require further investigation and research however, Designs Law, like other IP regimes, should be reviewed more broadly to take into account the broader social and environmental goals, inspired by Australia’s commitment to the UN Sustainable Development Goals.

Copyright

While Copyright law is a right to prevent the unlawful copying of copyright works, copyright is one of the key forms of intellectual property being relied upon by manufacturers to restrict access to repair and service information for software enabled devices and machinery. The combination of copyright in the instruction manuals, along with End Use Licence agreements, technological protection measures (TPMs) and digital rights managements being used in software-enabled goods, consumers are finding themselves locked out the products they own but also from accessing basic product information in many instances.

Under Australian Copyright law, there is no recognised defence of repair. The fair dealing defences are purpose specific and repair could never be argued to be a fair dealing of a copyright work in Australia. None of Australia’s current permitted fair dealing purposes (criticism and review, research and study, reporting the news, judicial proceedings, parody and satire, disability rights) would cover repairs. To allow consumers or third party repairers to access to repair information, one option would be to add a further defence of fair dealing in

²⁰ https://www.hcourt.gov.au/cases/case_s329-2019

²¹ <https://www.gtlaw.com.au/news/gilbert-tobin-client-calidad-succeeds-landmark-high-court-patent-appeal>

²² Leanne Wiseman and Kanchana Kariyawasam, ‘Revisiting the Repair Defence in the Designs Act (2003) in Light of the Right to Repair Movement and the Circular Economy’ in Leanne Wiseman and Kanchana Kariyawasam (eds), ‘Unlocking the Interface between IP and the Right to Repair’ Special Edition, (2020) 31:2 *Australian Intellectual Property Journal* 36

²³ Ibid.

respect of the right of repair. It should be noted clearly that mere reading of the repair or service manual does not involve a breach of copyright.

The Productivity Commission has already recommended the adoption of a US style Fair Use in Australia, which could arguably allow for repair as a potential defence to an action for copyright infringement.

Technological Protection Measures

Manufacturers' use of technological protection measures (TPMs) or digital locks over software enabled goods are also one of the key barriers to repairability. As Graeme Austin notes: 'Right to Repair advocates claim that legal prohibitions against circumventing TPMs that control access to copyright-protected works impose barriers to repairing these goods.'²⁴ Recognition of this problem has led to exceptions to anticircumvention prohibition regimes.²⁵ Austin argues that these initiatives overlook a key question: whether, in the context of copyright-protected computer programs, the concept of a [copyright] "work" includes the function performed by those programs. He argues that 'disaggregating "function" from the "work" requires a closer look at basic copyright principles and his analysis suggests that, far from being the enemy of the right to repair, basic copyright principles can be enlisted in its cause.'²⁶ We support and agree with this hypothesis that copyright and TPMs protect copyright works in computer enabled goods from copying and are not, and should not be, about protecting the actual functioning of a good or product.

End Use Licence agreements

End Use Licence agreements originated with the sale of shrink wrapped media such as floppy disks, CD and DVDs. These ensured that the copyright content of that product was protected from copying. However, they are now being used for all software enabled goods. These contracts are non-negotiable and generally appear on the websites of the manufacturers and often in language that highly skilled lawyers are trained to read, not everyday consumers.

To use the use of EULAs in agriculture as an example, it has been argued by some agricultural manufactures and their agents that farmers are in fact businesses and thus should not be given the protections of consumer law. However, this fails to recognise the huge bargaining imbalances between farmers and their farming enterprises and the huge multinational corporations who are the agricultural technology providers, such as John Deere. It appears to be suggested that farmers willingly accept the terms of service when turning on their tractors and machinery. However, there is little or no evidence to support those claims. Having worked closely with farmers on a range of challenges associated with the introduction of digital

²⁴ Graeme Austin, 'Anti-circumvention provisions and the function of the Work' in Leanne Wiseman and Kanchana Kariyawasam (eds), 'Unlocking the Interface between IP and the Right to Repair' Special Edition, (2020) 31:2 *Australian Intellectual Property Journal* 92

²⁵ In 2018, the US Copyright Office recognised a right of repair as an exception to their scheme of technological protection measures. This exception will be up for review in 2022 as this is part of the three yearly review conducted by the Library of Congress to update and review exceptions to s 1201 of the US Copyright Act.

²⁶ Graeme Austin, n 24.

technologies on farm, including concerns over data ownership, control and access, we strongly disagree.²⁷

Research conducted in 2015-2016 as part of a Federally funded research project on the barriers to the adoption of digital agriculture in the Australian agricultural industries, *Accelerating Precision Agriculture to Decision Agriculture (P2D)*,²⁸ revealed not only a lack of trust in the way in which their data was being collected, stored and managed by agricultural technology providers but also the fact that more generally *farmers were generally unaware of the terms of the software licences that accompanied the new digital equipment that was being adopted on their farms.*

The Producer Survey²⁹ that was conducted as part of the P2D project revealed that *47% of primary producers surveyed say they have no understanding and an additional 27% said they have little understanding of the terms and conditions of licence agreements before signing up to a new software or service, particularly where the service is provided online.*"

We concluded that: "the fact that so many producers are unaware of the terms that govern the ownership and use of, and access to, their data indicates that there appears to be very little discussion about issues relating to data ownership or access prior to entering a contract for agricultural technology or services. As producers do not understand the implications of what they are signing, they are often unaware of how much control the service provider is asserting over their data or the extent to which their data is being shared and traded. This has significant consequence for the agricultural industry as a whole, as it forms the basis for the lack of trust that producers have towards some of the new digital services and products on offer."³⁰

To allay the mistrust that farmers have with the agricultural technology providers' terms of service for their agricultural machinery, the USA, NZ, EU and now Australia have developed Codes of Conduct that encourage best practice in data management and contracting principles for agricultural technology providers when dealing with farmers.³¹

²⁷ We both are members of the Australian Centre for Intellectual Property in Agriculture (www.acipa.edu.au) and since 2015, have worked with Australian farmers on a range of challenges arising from the adoption of digital agricultural technologies. A submission has been made on some of these issues to the ACCC's *Agricultural Machinery: Aftersales Markets Inquiry in 2020*.

²⁸ <https://www.crdc.com.au/precision-to-decision>

²⁹ Zhang, A., Baker, I., Jakku, E. and Llewellyn, R. (2017). 'Accelerating precision agriculture to decision agriculture: The needs and drivers for the present and future of digital agriculture in Australia. A cross industries producer survey for the Rural R&D for Profit 'Precision to Decision' (P2D) project. CSIRO and Cotton Research and Development Corporation, Australia. Available at <https://www.crdc.com.au/sites/default/files/P2D%20producer%20survey%20-%20CSIRO%20Final%20Report.pdf>

³⁰ Wiseman, L and Sanderson J, 'The Legal Dimensions of Digital Agriculture in Australia: An Examination of the Current and Future State of Data Rules Dealing with Ownership, Access, Privacy and Trust, Accelerating Precision Agriculture to Decision Agriculture, CRDC and Griffith University and USC Australia, 2017. Available at <https://www.crdc.com.au/sites/default/files/P2D%20Legal%20Dimensions%20-%20Griffith%20USC%20Final%20Report.pdf>

³¹ For further explanation of these Data Codes of Conduct, see Jay Sanderson, Leanne Wiseman, Sam Poncini, 'What's behind the ag-data logo? An examination of voluntary agricultural data codes of practice' (2018) *International Journal of Rural Law and Practice*, available at

This research, including identifying the restrictions imposed on farmers' ability to repair their machinery, has created interest and been adopted by national and international agricultural policy makers who are developing policy responses for the impact of digitalisation on farmers and agricultural industries.³²

This very issue of mistrust of technology providers and of their terms of use is not restricted to farmers nor is it restricted to data. It was recognised that within agriculture the sophisticated agricultural machinery comes with equally sophisticated and complex software contracts that not only restrict farmers' rights to repair their tractors but also forces them to use only authorised repairers.³³ Recommendations were made to Government and Agricultural Industry stakeholders that with respect to technology agreements, policies should be developed to ensure that there was more transparency by agricultural technology providers that the terms of the licences that bound farmers should be clearly explained and made available to farmers.³⁴

This issues that confront farmers who adopt new technologies on farm are no different to the issues facing consumers who are buying everyday software enabled goods. When buying goods with software embedded within it, consumers are assumed to have read through 'voluminous, nonnegotiable documents, written to benefit corporations in exchange for access to their services.'³⁵ There is general mistrust by consumers of the effect of the expansive terms of service that they are generally obliged to sign up to.

As the New York Times opined: 'Technology companies will assert that none of their policies are mandatory – if customers don't want to accept them, they can close their account to decline to sign up in the first place. But many companies have made their services so essential that opting out is not a feasible option, and customers are often presented with new terms at the moment they most need to use a service. Consider how difficult it would be to avoid signing

<https://epress.lib.uts.edu.au/journals/index.php/ijrlp/article/view/6043>. The Australian Farm Data Code is available here: <https://nff.org.au/programs/australian-farm-data-code/>.

³² Australian Council of Learned Technologies (ACOLA), *The Future of Agricultural Technologies*, 2020, available at <https://acola.org/hs6-future-agricultural-technologies/>; OECD, *Issues around data governance in the digital transformation of agriculture, The farmers' perspective*, 2020, available at https://www.oecd-ilibrary.org/agriculture-and-food/issues-around-data-governance-in-the-digital-transformation-of-agriculture_53ecf2ab-en

³³ This is one example the restriction on accessing repair in a John Deere's technology agreement https://www.deere.com.au/assets/pdfs/region-4/parts-and-service/warranty/warranty-statements/AU_wty_statement.pdf. Similarly, there are restrictions placed on available repairs on wearable devices: see *Garmin Watch Repair and Warranty Availability of Repair Facilities & Parts, Including Out of Warranty Service*. Garmin products, including its wearable products, include complex integrated components. *Repair of integrated component parts, such as cracked screens or broken integrated bands, may not be possible outside of Garmin factory conditions.* Therefore, facilities or spare parts may not be available for the repair of such components. <https://www.garmin.com/en-AU/legal/consumer-warranty-repairs/>

³⁴ Wiseman, L and Sanderson J, note 30.

³⁵ Editorial Board, 'What happens when you click 'Agree?', 2021 <https://www.nytimes.com/2021/01/23/opinion/sunday/online-terms-of-service.html>

up for a single Google product, let alone retrieve saved emails or photos, if the account has to be closed quickly.³⁶

“We have become so beaten down by this that we just accept it,” he said. “The idea that anyone should be expected to read these terms of service is preposterous — they are written to discourage people from reading them.”³⁷

Rules that require corporations to provide greater transparency around their terms of service are required. The onus should be placed on manufacturers and corporations providing digital services that are linked to physical goods to provide simple explanations in plain English (or relevant languages) about key terms in their software licences, around a range of topics including the data collection and management, repairability, avenues for dispute resolution. Where products are particularly aimed at teenagers or young adults, the terms of service need to be written in such a way that is appropriate for the age of the purchaser of those goods. For example, a digital product or service that is aimed at 15 year old should be written in a way that a 15 year old can understand.

Examining some of the restrictive non-negotiated terms that contained within and the way in which these EULAs bind purchasers of software-enabled goods, often when the products are merely switched on, raises the issue of whether these terms could potentially fall within the scope of the ‘unfair terms’ provisions of the Australian Consumer Law.³⁸

Trade Marks

While manufacturers have used their trade marks to protect their spare parts and thus prevent use in unauthorised repair, Trade Marks can also be used in ways that could facilitate repair. Again, further research needs to be conducted to examine the way in which Trade Marks are being used to encourage and incentives repair. For example, trade marks could be used to inform consumers in a positive way of those businesses who can conduct quality repairs or that stock repaired.³⁹ Sanderson and Henriksen’s in their article, “Certified Repairable: Using Trade Marks to Distinguish, Signal and Encourage Repair” provide an analysis and example of how Trade Marks could be used to encourage and facilitate repair services.⁴⁰

Trade Secrets

Manufacturers often argue that a right to repair would impinge upon their trade secrets as repair information requires disclosure of proprietary information. In some cases, even the contracts between the technology provider and consumer are argued to be confidential. However, unlike

³⁶ Ibid.

³⁷ Ibid.

³⁸ Leanne Wiseman, note 8.

³⁹ Revolve logo and label: <https://www.zerowastescotland.org.uk/content/revolve-certification>.

⁴⁰ Sanderson and Henriksen’s article, “Certified Repairable: Using Trade Marks to Distinguish, Signal and Encourage Repair” in Leanne Wiseman and Kanchana Kariyawasam (eds), ‘Unlocking the Interface between IP and the Right to Repair’ Special Edition, (2020) 31:2 *Australian Intellectual Property Journal* Special Edition.

the US, Australia protects trade secrets through the equitable action of breach of confidence and in many cases, basic product information would not be likely to be the subject of confidentiality. However, again as with all form of Intellectual Property regimes, further research and analysis is needed to full understand the tensions between consumer rights of repair and IP owners' rights and how those tensions could be resolved to ensure a balancing of rights between IP owners and consumers

INFORMATION REQUEST 8

- a) What policy reforms or suite of policies (if any) are necessary to facilitate a 'right to repair' in Australia?*
- b) Are there any other barriers to repair and/or policy responses that the Commission should consider?*
- c) What are the costs and the benefits of the various policy responses that have been proposed to facilitate repair (such as those outlined in table 1)?*
- d) Are there other international policy measures or proposals that the Commission should consider as part of this inquiry?*

There are a myriad of international policy approaches⁴¹ being adopted to respond to consumer's inability to repair, and the increasing problem of product obsolescence, the increasing Ewaste and the consequential environmental harm. The Commission has already identified the need for a range of policy responses to be investigated when examining how a Right to Repair may fit within Australia's legal and regulatory framework. Lessons can be learned from the US consumer rights approach as well as the EU environmental approach requiring manufacturers to take more responsibility for the products that they produce.

Interestingly, the EU is implementing a Right to Repair regime through the *EU EcoDesign Directive*, which comes into force in 2021 and requires manufacturers to create repairable goods and provide spare parts for up to 10 years. In addition, on 25 November 2020, Members of the European Parliament called for the EU Commission to "develop and introduce mandatory labelling, to provide clear, immediately visible and easy to understand information to consumers on the estimated lifetime and repairability of a product at the time of purchase".⁴² These are but two of a raft of EU regulatory responses that are useful to examine as possible regulatory responses.

The recent introduction of the *French Repairability Index*, while not without weaknesses, shows that by placing more responsibility on manufacturers to be honest about the quality and expected lifespan of their products, will in turn, enable consumers to make more informed choices. We have seen evidence of this with the introduction of the Energy rating labels which

⁴¹ See detailed discussion of: the US approach in Leah Chan Grinvald and Ofer Tur-Sinai, 'The Right to Repair: Perspectives from the United States'; and the EU approach in Taina Pihlajarinne, 'European Steps to the Right to Repair: Towards a Comprehensive Approach to a Sustainable Lifespan of Products and Materials?' in Leanne Wiseman and Kanchana Kariyawasam (eds), 'Unlocking the Interface between IP and the Right to Repair' Special Edition, (2020) 31:2 *Australian Intellectual Property Journal* Special Edition.

⁴² European Parliament, *Towards a More Sustainable Single Market for Business and Consumers, (2020/2021) (INI) Report*, <https://www.europarl.europa.eu/doceo/document/A-9-2020-0209_EN.html>.

provide consumers with information on the energy efficiency of a range of appliances. The more stars, the more energy efficient the product is compared to other models in its category. The Australian Government worked with industry and state and territory governments to introduce this system and also to extend the Energy Rating Label to include heating appliances, such as gas heaters and electric heaters.

Canada is also making inroads into a Right to Repair and given some similarities in our regulatory regimes, it would be useful for the Commission to examine their regulatory approaches.⁴³

As has been noted above, Australia has a strong regulatory response, within the Unfair Terms provisions of the ACL, to the inherent unfairness experienced by consumers and small business when contracting with corporations who use non-negotiated, pre-printed standard form contracts. The Commission should take into account the actual terms of use of some of the contracts that are accompanying computer enabled consumer goods, not only with respect to the ability of consumers to access reasonable repair information and services but also to take into consideration issues arising from the loss of control of the data that is generated by these devices. The introduction and expansion of Australia's Consumer Data Right should also be the subject of consideration as protecting consumers' rights, their data and their personal privacy are all intertwined when thinking about a potential Right to Repair for Australian consumers.

We commend the Commission in examining such a broad range of issues when considered what an Australian right to repair may look like. We particularly commend the examination of the broader environmental issues arising from product obsolescence and E-waste.

We reiterate the importance that the role of repair and reuse of digital and electronic goods can play in achieving a circular economy in Australia. As E-Waste Watch observe: "The circular economy, in its various definitions, is receiving increased attention in Australia due to its potential to address the negative impacts of waste. Yet without adopting strong regulatory measures for the production of optimally durable products, there is a real risk that a circular economy will perpetuate the myth that recycling alone will stop us from destroying our life support systems and health as we continue to increase our consumption of material goods."⁴⁴

⁴³ See articles on Repair at <https://www.thefifthstate.com.au/tag/right-to-repair/>

⁴⁴ E-Waste Watch, Reforming the Product Stewardship Act to enable a circular economy, <https://ewastewatch.com.au/2019/04/10/product-stewardship-act-circular-economy/>