Summary of "Intellectual Property Law and the Right To Repair" Article

Overview

When lobbying against right to repair legislation, manufacturers have most often argued on the basis of safety concerns and intellectual property rights. The movement pushing right-to repair has countered manufacturers with claims of environmental protection, maintaining a competitive market, and consumer autonomy[i]. While the repair movements arguments do have weight, they do not effectively counter manufacturers concerns of intellectual property. Manufactures have frequently used intellectual property rights and patented repair parts to price control parts and regulate the availability of these parts which forces consumers to go through the repair process in a way that is authorized by the manufacturer[ii]. This article argues that, in actuality, there is justification for right to repair legislation that is line with intellectual property rights and that right to repair is necessary to fully achieve the productive development of products and services.

Justifications

Intellectual property laws "are not absolute" and as a result are often designed to accommodate for external interests that would be affected if intellectual property laws were too restrictive[iii]. Values such as maintaining market competition are accounted for in the context of "balancing mechanisms" in intellectual property law and the specific need to "enable repairs" has been considered in various laws[iv]. While these justifications do have consideration within actual law, they are external to the nature of intellectual property. From an internal approach, the utilitarian view that the state should seek to advance the general well-being of society also dictates that the state should seek to promote the "commercialization" of products and services so that their impact on improving general well-being is fully achieved[v]. The Supreme Court determined in *Kewanee Oil v. Bicron Corp.* that patent laws seek to incentivize progress that positively benefits society[vi]. The authors argue that if intellectual property laws seek to advance this positive impact, right to repair laws would allow consumers and therefore society to more effectively benefit from the development of products and services. Further, a key aspect of exclusivity in patent law is that inventors must disclose certain information. While this disclosure must only relate to information necessary for the use of an invention, the authors argue that information on how to repair an invention is necessary for it to be truly useful to the consumer[vii]. From a framework of user innovation in which new technological development is often achieved, the authors state that right to repair is an "essential component"[viii]. Extending beyond utilitarian theory, the authors also argue that labor theory, personality theory, and social planning theory justify the right to repair under intellectual property ideals. This section is concluded with the point that right to repair laws would not "undercut the ability to of intellectual property systems to achieve their prescribed policy goals", however the balancing of these considerations is "context dependent"[ix].

Ramifications on Intellectual Property

In their discussion about the intellectual property ramifications of right to repair laws, the authors break the issue into four-tiered concentric circle model with the following categories in order: repair by individuals; diffusing information and repair shops; enabling competition in the replacement parts market; and mandating disclosures and supply[x].

At the individual level, the right to repair would not substantially reduce intellectual property incentives and consumers would have a degree to protection under patent and copyright laws. Under patent laws, consumers are permitted to repair patented products, but cannot reconstruct them[xi]. It is important to note there has been ambiguity between repair and reconstruction. There are complications when it comes to patented products with contracts that do not permit repair and these products would not be covered under right to repair unless addressed by specific legislation.

In addressing independent repair shops, the article discusses the limitation of trademark laws pose on the competition for independent repair services. With the court doctrine of "normative fair use" though, third party services may use trademarks to a limited degree in which they can accurately relay information to their customers[xii]. Small independent shops are still vulnerable to trademark laws though, and greater legal clarity is required.

When it comes to replacement parts, if there is not a competitive market for a product, consumers are dependent on the supply parts of the original manufacturer which can cause monopolistic pricing. Therefore, the authors argue that a right to repair would be most effective if original manufactures do not have full control over the replacement part market[xiii]. Complications arise though when specific parts of a product have utility or design patents as this means that when a part needs to be replaced, the replacement can only be supplied by the patent holder which could "circumvent the application of the exhaustion doctrine"[xiv]. There have been challenges to the notion that parts deserve patent protection, (ABPA in a litigation case against Ford), however these challenges have been struck down.

The fourth section which is mandating the disclosure of repair information and replacement parts is the area that proposed legislation has primarily attempted to address. The challenge is that while legislation seeks to mandate the supply of parts "available on fair reasonable terms", this would conflict with patent laws as the Supreme Court Case *Continental Paper Bag Co. v. Eastern Paper Bag Co.* determined that patent holders cannot be required to license its inventions[xv]. If legislation passes and applies these mandates to patented parts, it may be subject to constitutional challenges. While the disclosure of information is already mandated at the federal and state level to maintain consumer protection and market competition, this disclosure can be inhibited by trade secret laws[xvi]. There is federal protection for trade secret law, however it does not "displace" state law meaning that state definitions "coexist" with federal ones[xvii]. The authors suggest that carve-out language limiting repair and diagnostic information from being classified as trade secrets is necessary to receive information disclosure from manufacturers, but it must be in line with state law.

Criticisms

The authors address potential critiques to their argument specifically concerning the quality of repairs and counterfeiting risks associated with right to repair laws. A primary concern from manufacturers is that the quality of repairs will decline with right to repair. The authors counter this by identifying that in a competitive market, consumers would have the option to use repair services from the manufacturer if independent services were not of adequate quality[xviii]. The concern of economic loss for manufactures is addressed with the point that maintaining a competitive market should take priority, and manufacturers would still profit where sufficient incentive exists, even without control of the aftermarket[xix]. Finally, the authors believe that claims that counterfeiting would increase is a misconception and access to repair information would not cause a significant increase[xx].

[i] Leah Chan Grinvald and Ofer Tur-Sinai, "Intellectual Property Law and The Right To Repair", *Fordham Law Review* 88, no. 1 (2019): 73. Available at: https://ir.lawnet.fordham.edu/flr/vol88/iss1/3.
[ii] Grinvald and Tur-Sinai, "Intellectual Property Law", 75-76.
[iii] Grinvald and Tur-Sinai, "intellectual Property Law", 83.
[iv] Grinvald and Tur-Sinai, "Intellectual Property Law", 84.
[v] Grinvald and Tur-Sinai, "Intellectual Property Law", 86.
[vi] Grinvald and Tur-Sinai, "Intellectual Property Law", 87.
[vii] Grinvald and Tur-Sinai, "Intellectual Property Law", 92.
[viii] Grinvald and Tur-Sinai, "Intellectual Property Law", 89.
[ix] Grinvald and Tur-Sinai, "Intellectual Property Law", 97.
[x] Grinvald and Tur-Sinai, "Intellectual Property Law", 98.
[xi] Grinvald and Tur-Sinai, "Intellectual Property Law", 100-101.
[xii] Grinvald and Tur-Sinai, "Intellectual Property Law", 108.
[xiii] Grinvald and Tur-Sinai, "Intellectual Property Law", 111.
[xiv] Grinvald and Tur-Sinai, "Intellectual Property Law", 114.
[xv] Grinvald and Tur-Sinai, "Intellectual Property Law", 119-120.
[xvi] Grinvald and Tur-Sinai "Intellectual Property Law", 121-122.
[xvii] Grinvald and Tur-Sinai, "Intellectual Property Law", 122.
[xviii] Grinvald and Tur-Sinai, "Intellectual Property Law", 124.
[xix] Grinvald and Tur-Sinai, "Intellectual Property Law", 125.
[xx] Grinvald and Tur-Sinai, "Intellectual Property Law", 126.