

September 16, 2019

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex B)
Washington, DC 20580**Re: Federal Trade Commission's "Nixing the Fix" Workshop**

The National Association of Manufacturers ("NAM"), appreciates the opportunity to comment in response to the Federal Trade Commission's ("FTC" or "Commission") request for information following its "Nixing the Fix" Workshop.¹ The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. It is the largest U.S. manufacturing association, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12.75 million men and women, contributes \$2.33 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation.

The NAM applauds the Commission's efforts to seek information and empirical research to better understand why manufacturers may seek intellectual property ("IP") protections over certain product repairs. There are myriad good faith reasons why manufacturers choose to develop IP-protected repair techniques or parts, and these IP rights drive important benefits for consumers and manufacturers alike.

1. Background

As a general matter, the purchaser of a patented product is entitled to repair and replace worn or broken parts.² This long-settled right derives from the bedrock principle of U.S. property law that a person has the right to acquire, use, and dispose of property freely.³ At the same time, however, patent owners generally have the right to dispose of their patented property as they wish, including by choosing to sell their products and parts only to those they authorize.⁴ This important constitutional right is a defining feature of an IP owner's ability to exclude others from making, using, or selling their patented invention.⁵

¹ Fed. Trade Comm'n, *Nixing the Fix: A workshop on repair restrictions* (July 16, 2019), <https://www.ftc.gov/news-events/events-calendar/nixing-fix-workshop-repair-restrictions>.

² See, e.g., *Wilson v. Simpson*, 50 U.S. 109 (1850) (holding that an accused infringer who replaced cutting blades in a cutting machine it purchased from a patentee did not infringe the patentee's patent to a combination of the cutting machines and blades); *Chaffee v. Boston Belting Co.*, 63 U.S. 217 (1859).

³ *Cont'l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 429 (1908) (noting "it is the privilege of any owner of property to use or not use it, without question of motive.").

⁴ *Id.* ("As to the suggestion that competitors were excluded from the use of the new patent, we answer that such exclusion may be said to have been of the very essence of the right conferred by the patent...").

⁵ US. Const. art. I, § 8 ("to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries"); see also William

The recent “right to repair” movement has argued that these property rights should not be absolute, and that exercising patent rights allows patent holders to create monopolies. Under “right to repair” regulations and proposals, consumers and independent repair providers (“IRPs”) would have an unadulterated right to possess and use IP-protected diagnostic and repair information, software, tools, and parts created by original equipment manufacturers (“OEMs”). Supporters of this movement argue that state and/or federal legislation is necessary “to prevent a monopoly by compelling manufacturers to make parts, diagnostic software, and repair tools freely available to individuals and independent repair shops,” which they believe would lower the total cost of ownership for IP-protected products.⁶

The theory underlying this movement has two major flaws. First, as explained above, IP owners are generally entitled under law to maintain control of their property and use it as they see fit. Efforts to erode the value of IP protections involve important constitutional questions and implicate deeply rooted American legal concepts. Second, manufacturers’ ability to maintain a meaningful degree of quality control over the subsequent repair of their products is important to consumers. Companies are incentivized to innovate new repairs, make product design choices in the best interest of consumers, and protect consumers from ineffective or even dangerous repairs that might erode the value of the OEM’s brand when their inventions are IP-protected. To this end, and as detailed below, right to repair laws would create innumerable harms and unintended consequences for consumers and manufacturers alike, including by limiting consumer choice, impeding innovation, threatening consumers’ safety and wellbeing, opening the door to counterfeits, and—in the case of state-by-state regulation—immensely burdening interstate commerce.

2. “Right-to-Repair” Would Limit, Not Broaden, Consumer Choice

Proponents of “right-to-repair” mandates bill these efforts as ways to increase consumer choice, but these mandates do little to improve consumer outcomes and may even have the unintended consequence of limiting overall choice in the market. OEMs are currently free to provide IRPs and/or customers with the tools and information necessary to repair their products, and many OEMs have chosen to do so. Consumers who value the ability to independently repair products can select manufacturers who provide that option. This market-oriented system is consistent with Congress’s intent in passing the Magnuson-Moss Warranty Act (“MMWA”).⁷ Under the MMWA, consumers must have access to information that allows them to understand both their obligations and those of the seller with regard to future repairs so that consumers may make an informed choice about the products they purchase, but the Act stops short of attempting to dictate whether one seller’s terms were preferable to another’s terms.⁸

Perhaps more importantly, forcing manufacturers to forfeit the legal protection of their IP as a condition of market access would stifle innovation. Manufacturers invest time and resources in expensive and sometimes risky research and development efforts to invent new

Baxter, *Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis*, 76 YALE L.J., 267 (1966) [hereinafter Baxter, *Legal Restrictions*].

⁶ Daniel Cadia, *Fix Me: Copyright, Antitrust, and the Restriction on Independent Repairs*, 52 U.C. DAVIS L. REV. 1701, 1704 (2019).

⁷ See Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. Law 93-637, § 102(a), 88 Stat. 2183, 2185 (1975) (stating one purpose of the bill as being to “improve competition in the marketing of consumer products”).

⁸ See Kathleen F. Brickley, *The Magnuson-Moss Act—An Analysis of the Efficacy of Federal Warranty Regulation as a Consumer Protection Tool*, 18 SANTA CLARA L. REV. 73, 75 (1978).

products. Without the promise of legal protections, inventors are less incentivized to dedicate scarce resources toward creating new and innovative repairs and improvements for existing products.⁹ The same is true with regard to the development of new products as well. Stifling the ability of manufacturers to innovate and produce new designs and construction techniques will negatively impact consumers.¹⁰

3. “Right-to-Repair” Laws Threaten Consumer Safety

Beyond simply limiting innovation and choice, “right to repair” laws can also encourage behavior that leaves consumers exposed to increased physical or cyber security risks. Some laws, such as California’s AB 1163, generally force manufacturers to provide a “how to” repair manual for their products to anyone who requests one. IRPs and consumers who request these manuals may or may not have the technical skills necessary to conduct a safe repair even with readily available instructions.

A. Threat to Consumers’ Physical Safety

Many consumer products—particularly when electronic in nature—contain parts that may pose serious safety risks to the physical well-being of consumers when repaired by anyone but an authorized expert. Indeed, the United States Consumer Product Safety Commission regularly warns consumers not to attempt to repair their own products, as attempts to do so have resulted in injury and even death.¹¹ Further, for some consumer products that are typically repaired in a consumer’s home, manufacturers may lose the ability to take certain precautions to ensure that repair providers are authorized, properly certified, and do not pose a risk to the consumer.

B. Threat to Consumers Data and Cyber Security

As noted above, the “Internet of Things” has led to once “offline” products becoming connected online. According to some estimates, connected devices will be in nearly every home by 2020, with the total number of those devices expected to exceed 20 billion.¹² While this development has resulted in immense benefits for consumers, it has also created new access points for bad actors to attempt to steal personal data and IP through cyber-attacks. Manufacturers of connected devices understand these threats and have developed complex integrated security systems to protect against them. While authorized repair providers understand how to protect these systems, unauthorized repair providers or components can introduce new security risks by inadvertently disabling key hardware security features or preventing firmware or software from accepting or installing updates.

⁹ See Baxter, *Legal Restrictions* at 268.

¹⁰ See e.g. Comments of Microsoft, FTC-2019-0013-0012 at 4 (May 31, 2019), <https://www.regulations.gov/document?D=FTC-2019-0013-0012> (“Recent history has demonstrated that it is difficult to predict today which design elements will be the most important for consumers tomorrow. Stifling the ability of the device industry to innovate and produce new designs and construction techniques will negatively impact industry, consumers, and the market.”).

¹¹ See e.g. Consumer Product Safety Comm’n, *Repairing Aluminum Wiring 2* (2011), <https://www.cpsc.gov/s3fs-public/516.pdf>.

¹² Rob van der Meulen, *Gartner Says 8.4 Billion Connected “Things” Will Be in Use in 2017, Up 31 Percent From 2016*, Gartner, Inc. (Feb. 7, 2017), <https://www.gartner.com/en/newsroom/press-releases/2017-02-07-gartner-says-8-billion-connected-things-will-be-in-use-in-2017-up-31-percent-from-2016>.

4. State-By-State Regulation Would Significantly Burden Interstate Commerce

While manufacturers believe there is no compelling reason to force them to sacrifice their property rights as a condition of market access, it is also important that states do not create a patchwork of regulations governing repairs that would significantly burden interstate commerce. As of March 2019, 20 states had considered right to repair legislation despite the inherently federal nature of patent law.¹³ These state attempts to impose conditions on a federal right conflict with the framers' belief that a property right in inventions is critical to encourage inventors to create new products that benefit all of society. These attempts may also run afoul of the so-called "Dormant Commerce Clause" restriction on states' ability to institute laws that "impair the free flow of materials and products across state borders."¹⁴ The uniquely federal character of intellectual property rights highlights the need for the Commission to make clear that a state-by-state "right to repair" regulatory regime would hinder innovation and the free flow of commerce upon which manufacturers depend to meet the needs of consumers.

Ultimately, manufacturers are committed to providing safe products and ensuring a well-functioning and credible product safety regime—one that gives all stakeholders the necessary confidence that products meet all applicable safety standards and regulations. Uniform national patent laws are a critical part of this safety regime, and a key incentive for innovation.

We appreciate the opportunity to provide these comments, and we encourage you to contact us should you wish to discuss any part of this submission.

Sincerely,



Graham Owens
Director, Legal and Regulatory Policy
National Association of Manufacturers

¹³ US. Const. art. I, § 8 ("to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries).

¹⁴ *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1154-55 (9th Cir. 2012).