March 11, 2023

Dear Chair and Members of the Minnesota Senate Judiciary Committee,

We write to you as experts in intellectual property (IP) law to explain why manufacturers are incorrect when they claim that SF 1598 conflicts with their IP rights.

As early as 1901, courts have recognized a "right of repair or renewal" under U.S. copyright law. Doan v. American Book Co., 105 F. 772 (7th Cir. 1901). Since then, courts have repeatedly brushed back efforts to use copyright law to control the markets for repair parts and information. *See* ATC Distribution Grp., Inc. v. Whatever It Takes Transmissions & Parts, Inc., 402 F.3d 700, 703 (6th Cir. 2005) (holding part numbers and technical illustrations unoriginal); *see also* Southco, Inc. v. Kanebridge Corp., 258 F.3d 148 (3d Cir. 2001) (part numbers unprotectable); Toro Co. v. R & R Prod. Co., 787 F.2d 1208, 1213 (8th Cir. 1986) (part numbering system unoriginal).

It's not just the courts that have rejected these efforts. In amending § 117 of the Copyright Act, Congress explicitly embraced repair. *See* § 17 U.S.C § 117(c). And more recently, the Copyright Office has recognized that repairing a range of software-enabled devices, from smartphones to tractors, is non-infringing activity. *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 86 Fed. Reg. 206, 59627 (October 28, 2021).

Facilitating the repair of consumer devices is consistent with federal copyright law and policy. SF 1598 is in no way preempted by the Copyright Act, which merely prohibits states from enacting exclusive rights "equivalent" to those provided under federal law. 17 U.S.C. § 301(a). Nor does SF 1598 conflict with § 1201 of the Copyright Act. Some devices may not yet be subject to an exemption permitting the circumvention of technological protection measures for repair purposes. But SF 1598 does not require, authorize, or even contemplate circumvention. To the extent those activities are unlawful under federal law, they will remain so after the enactment of SF 1598.

If anything, the rules favoring repair under patent law are even clearer. Under the exhaustion doctrine, when a patentee sells a particular device to a consumer, it loses the right to control the use or subsequent transfer of that device. Exhaustion is why you can sell your used car without the manufacturer's permission. It's also why you can repair it free from any risk of patent liability. So long as you don't "reconstruct" the patented article—that is, rebuild it entirely—there is simply no infringement. *See* Aro Mfg. Co., Inc. v. Convertible Top Co., 365 U.S. 336 (1961). More recently, the Supreme Court made clear that manufacturers cannot leverage their patent rights to restrict the repair of the devices they sell. Impression Prods., Inc. v. Lexmark Int'l, Inc., 581 U.S. ___ (2017).

Nor does SF 1598 jeopardize manufacturers' trade secret rights insofar as it would enable access to information, replacement parts, or tools. First, SF 1598 specifically exempts trade secrets. Section 5(a) provides that "Nothing in this section requires an original equipment

manufacturer to divulge a trade secret to an owner or an independent service provider, except as necessary to provide documentation, parts, and tools on fair and reasonable terms." Second, repair information is frequently shared with authorized repair providers, who may or may not be under any legal obligation to maintain its secrecy. In other instances, the information may be generally known or readily ascertainable through other means, in which case it is not a protected trade secret under the law. To the extent there are truly valuable secrets at stake, the language in the bill is more than sufficient to preserve their legal protection.

Finally, there is no reason to believe that SF 1598 exposes manufacturers to any additional risks that their products will be counterfeited or otherwise reproduced. Determined counterfeiters already have access to devices, either on the open market or directly from device makers' own suppliers. The idea that a bill designed to empower consumers and increase competition in the repair market would contribute to the problem of counterfeiting in any material way is implausible.

The right to repair our devices is crucial, not only to our autonomy as individuals, but to our collective obligations to the planet. This bill would provide the citizens of Washington with tools to regain control over the devices they rely on every day and to stem the environmental harms of a throwaway consumer culture. As consumers as well as IP experts, we think that allowing people to repair the things they own makes common sense. It saves money by making the products we buy last longer. It eliminates waste in the form of discarded devices. And it reduces the need to extract raw materials from the earth.

Device makers now assert exclusive control over the supply of replacement parts, tools, software, and diagnostic information necessary for consumers to repair devices themselves or to rely on independent repair providers. As a result, independent repair shops are being driven out of business, which only reinforces the dominance of device makers and their authorized repair partners. Faced with monopoly pricing in the repair market, consumers are often persuaded to replace their devices rather than repair them. We think the people of Washington would benefit from the existence of more competition and the opportunity to do repairs themselves.

Thank you for your leadership on this critically important issue. We are happy to offer any additional information that you and your colleagues may find useful throughout the legislative process. Please reach out if we can be of any help.

Sincerely,

Ann Bartow
Professor of Law
University of New Hampshire Franklin Pierce School of Law

Julie Cohen
Mark Claster Mamolen Professor of Law and Technology
Georgetown University Law Center

Shubha Ghosh
Crandall Melvin Professor of Law

Syracuse University College of Law

Leah Chan Grinvald
Professor of Law & Associate Dean for Academic Affairs
Suffolk University Law School

Mark Lemley
William H. Neukom Professor of Law
Stanford Law School

Michael J. Madison
Professor of Law & John E. Murray Faculty Scholar
University of Pittsburgh School of Law

Aaron Perzanowski
Professor of Law & Oliver C. Schroeder Jr. Distinguished Research Scholar
Case Western Reserve University School of Law

Pamela Samuelson
Richard M. Sherman Distinguished Professor of Law
UC Berkeley School of Law

Joshua D. Sarnoff
Professor of Law
DePaul University College of Law

Jason M. Schultz
Professor of Clinical Law & Director of the Technology Law & Policy Clinic
New York University School of Law

Katherine J. Strandburg
Alfred Engelberg Professor of Law
New York University School of Law

Rebecca Tushnet
Frank Stanton Professor of First Amendment Law
Harvard Law School

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