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The Right to Repair: Perspectives from the United States – *Leah Chan Grinvald and Ofer Tur-Sinai*

Repair has entered the national conversation in the United States. Fuelled mainly by a strong consumer rights ideology of repair, the social movement has to-date mainly focused its efforts on State-level, consumer protection legislation in an attempt to codify a right to repair. The thought is that this will then bring to the bargaining table all of the various manufacturers that currently oppose such a right – and attempts to build upon the successful automobile right to repair campaign from 2011 to 2012. However, the focus on consumer rights can be somewhat myopic and overlooks in some sense how federal intellectual property laws can continue to interfere with a right to repair (even if mandated by some States). This article will provide an overview of the repair social movement in the United States and a look at how the focus in enacting a right to repair should encompass more than consumer rights, but also possible reforms to United States intellectual property laws. 98

European Steps to the Right to Repair: Towards a Comprehensive Approach to a Sustainable Lifespan of Products and Materials? – *Taina Pihlajarinne*

This article discusses the steps that the European Union legislator has taken to address barriers to repairs. It addresses the questions of what kinds of problems have been solved and what major problems remain to be tackled to promote the right to repair and the circular economy (CE) in Europe. The article argues that direct incorporation of CE concepts in intellectual property right (IPR) doctrines is necessary for genuine integration of CE goals within European Union law. The concept of a "sustainable lifespan" has the potential to act as a key concept promoting the fundamental aim of balancing IPRs and the CE: creating an incentive for innovative and creative work in society where products and materials are utilised within their sustainable lifespans. The notion of a sustainable lifespan should therefore play an independent role in IPR doctrines. 111

Anti-circumvention Prohibitions and the Function of the Work – *Graeme W Austin*

Many products contain embedded computer programs that are protected by technological protection measures (TPMs). Some right to repair advocates claim that legal prohibitions against circumventing TPMs that control access to copyright-protected works impose barriers to repairing these goods. Recognition of this problem has led to exceptions to anticircumvention prohibition regimes. Focusing on Australian and United States law, this article argues that these initiatives overlook a key question: whether, in the context of copyright-protected computer programs, the concept of a "work" includes the function performed by those programs. Disaggregating "function" from the "work" requires a

closer look at basic copyright principles. The analysis suggests that, far from being the enemy of the right to repair, basic copyright principles can be enlisted in its cause. 120

Revisiting the Repair Defence in the Designs Act (2003) in Light of the Right to Repair Movement and the Circular Economy – *Leanne Wiseman and Kanchana Kariyawasam*

Australia first introduced a form of a "right of repair" into its designs law in 2003 when the "spare parts" defence to designs infringement was introduced. This defence, which introduced the new concept of repairability into Australian designs law lay dormant and untested until 2019 Federal Court decision of *GM Global Technology Operations LLC v SSS Auto Parts Pty Ltd*. This article examines history and context behind the introduction of Australia's "spare parts" defence and contributes some thoughts as to the positive role that that the repair defence in designs law could play in facilitating a broader consumer right to repair in Australia. Through analysing *GM Global Technology Operations LLC v SSS Auto Parts Pty Ltd*, we highlight the detailed and complex nature of the spare parts defence, as well as its inadequacies. We argue it is timely to not only revisit the "repair defence" within designs law as it currently stands, but also to reflect more broadly, on how embedding a broader notion of repairability in Australian designs law would encourage a more "green" and sustainable designs scheme for Australia. This, in turn, would facilitate Australia's ongoing commitment to the United Nation's Sustainable Development Goals by allowing Australian consumers and designers to embrace and engage in a more environmentally sustainable, circular economy. 133

Rewriting Judicial History or Just Refilling Ink? Patents and the Right to Repair in Australia Post-Calidad: "Logic, Simplicity and Coherence with Legal Principle" Prevail over "Rights Which They Have Held for More Than a Century" – *Michael Williams and Vanessa Farago-Diener*

Where to draw the line between repair and remaking, and around the scope and character of both patentees' and consumer rights has been entertained recently by the Australian High Court in their consideration of Calidad. Until the Calidad litigation, there was little jurisprudence (and, with the exception of the conference on which this issue of this journal is based, few legal scholarly accounts), in Australia, as to what constitutes a repair of a patented product. Given the significance of the issues involved for the stakeholders mentioned, as well as in terms of competition law policy and principles, the decision is long overdue. At issue were a patentee's exclusive rights and the tensions therein with the capacity of consumers to repair a product they purchase (likely holding the assumption that such a use would not encroach upon a patent owner's legitimate interests), as well as the various secondary (or re-manufacturing/refurbishing) markets that have arisen both to supply a need (often in keeping with laudatory goals around recycling and repurposing for environmental reasons), and to profit from an opportunity in accordance with principles of demand, and, it follows, to keep costs of a product down. In establishing that Australia will follow the approach of the United States in particular with regard to what the majority refer to as the "comprehensible and consistent" doctrine of exhaustion of patents, over the previously dominant principle of implied licence (a shift that the minority decision-makers determine is "a question for the legislature, not the courts" and which they characterise as "stripping patentees of rights" long held), the High Court has provided much-needed certainty and clarity about a persistent conundrum within Australian patent law and its relationship to rights of repair. 147

Certified Repairable: Using Trade Marks to Distinguish, Signal and Encourage Repair – *Jay Sanderson and Teddy Henriksen*

In today's throwaway world, a right to repair is increasingly important for environmental sustainability. As important as a legal right to repair – be that via patent, copyright or design – is the provision of information about the repairability of goods and a willingness and desire to repair the goods that we purchase. In this article we examine the way in which trade marks (and the sections on "authorised use" and "control" in the *Trade Marks Act 1995* (Cth)) can be used to distinguish goods that are repairable and, in doing so, inform consumers that goods are repairable. Like the Health and Energy Star Ratings, Fairtrade and Forest Stewardship Council, a repairable trade mark can be distinctive and used to provide information, set standards and act as a simplifying heuristic to help consumers make a judgment and decision about which companies are repair friendly and which goods are repairable. In this way, the use of a repairable trade mark can play a crucial role in encouraging repair – creating a relational discourse in which intellectual property law, qua trade marks, help replace uncertainty and lack of knowledge with distinctiveness and an ability and desire to repair. 161