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July 22, 2023

Chairman Issa, Ranking Member Johnson, and Members of the Subcommittee:

Thank you again for the opportunity to testify during the July 18, 2023 hearing on the right to repair. I appreciate your careful consideration of this important issue.

I write to offer some additional thoughts with respect to a question posed by Representative Bentz during the hearing. He asked, in essence, whether a consumer who is fully aware at the time of purchase of the restrictions a manufacturer applies to a device has waived their right to repair that device in a manner that runs counter to those restrictions.

As I explained at the time, consumers are often unaware of repair restrictions until long after a device's purchase. Manufacturers typically do not disclose those restrictions in any clear or conspicuous manner, if at all. In other cases, manufacturers affirmatively misrepresent the availability of repair options through advertisements, press releases, and other public statements.

But putting those realities aside and assuming a consumer is fully aware that a manufacturer restricts repair through contract, company policy, or technological restrictions, the consumer's right to repair that device remains unchanged as a matter of intellectual property law. As the Supreme Court held in *Impression Products v. Lexmark*, 581 U.S. 360 (2017), a patentee's right to control the downstream use of a device is exhausted once a sale has occurred. There, Lexmark attempted to prevent refurbishment of its ink cartridges by imposing a "single-use only" policy, which was clearly communicated on the cartridge packaging. Nonetheless, the Court held that even if those restrictions were enforceable as a matter of contract law, Lexmark was powerless to assert its patent rights to prevent repair or refurbishment. *Id*. at 1531-1536.[1]

That holding is in keeping with the longstanding rule against servitudes on chattels. As a matter of property law, the seller of a device cannot impose restrictions on its use. Tesla cannot sell you a car on the condition that you only drive it on Thursdays, and Safeway cannot sell you tomatoes on the condition that you use them in a salad. Such demands may be enforceable as

[1] Courts have reached similar conclusions in the copyright context. *See* UMG Recordings, Inc. v. Augusto, 628 F.3d 1175, 1180 (9th Cir. 2011) (holding that record label's rights in promotional CDs were exhausted despite restrictive terms printed on the discs); *see also* Krause v. Titleserv, 402 F.3d 119 (2d Cir. 2005). The Ninth Circuit reached the opposite conclusion in Vernor v. Autodesk, Inc., 621 F.3d 1102 (9th Cir. 2010). But the reasoning in *Vernor* was severely undermined by the Court's subsequent holding in *Lexmark*.

contracts, but they cannot alter the underlying property interest of the owner. To hold otherwise would impose restrictions that "run with" personal property and bind future owners of the item who were not parties to the original agreement. Those sorts of restrictions are incompatible with clear property interests and would impose massive information costs on the market. As such, they have been rejected by both personal property and intellectual property law.

On a related note, I'm enclosing a copy of a new study by Kevin O'Reilly of U.S. PIRG, which details the many hurdles facing farmers even after John Deere's public commitment to allow independent repair. As the *Service Obstructor* report explains, the tools Deere has provided pursuant to its Memorandum of Understanding are insufficient to make good on the firm's promises to farmers.

If I can be of any further assistance to the Subcommittee, I would be more than happy to provide additional information.

Respectfully,

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