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**Before the House Committee on the Judiciary  
Subcommittee on Courts, Intellectual Property, and the Internet  
United States Congress, Washington, D.C.**

**“Is There a Right to Repair?”**

**July 18, 2023**

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

Thank you for the invitation to testify at this important and timely hearing on the intellectual property ramifications of the right to repair movement. I am currently Legal Fellow at the Hudson Institute’s Forum for Intellectual Property in Washington, D.C. The Forum for Intellectual Property supports data-driven research and promotes evidence-based policy discussions about the key role of intellectual property in growing innovation economies and flourishing societies. Prior to joining the Hudson Institute, I was Assistant Professor of Law at George Mason University’s Antonin Scalia Law School in Arlington, Virginia, where I taught copyright, patent, and trademark law. My testimony focuses primarily on the intersection of federal copyright law and the right to repair movement—though my thoughts apply equally to the other branches of intellectual property law. In short, I would caution against broad interventions that threaten to upend the legal rights and underlying policies that are directly responsible for the successes of the marketplace that we all enjoy today. This is especially true given the lack of evidence of a market failure that would warrant remedial action by Congress.

**Introduction**

The right to repair movement has gained significant momentum in recent years as supporters have ramped up their advocacy efforts. Numerous bills have been introduced in the states and in Congress, and a few of these state bills have even become law. Repair advocates want state and federal legislators to require manufacturers and other intellectual property (IP) owners to make available to consumers and independent repair shops the tools, parts, and know-how needed to diagnose and repair electronic devices and other products. The repair movement is premised on the idea that anything impeding repair opportunities is necessarily harmful to the public interest. But frequently left out of the discussion is the fact that these tools, parts, and know-how are often protected by IP rights. The tools include copyrighted computer programs and the means to disable technological protection measures that prevent unauthorized access to and copying of copyrighted works, the parts include innovations protected by utility and design patents as well as trademarks and trade dress, and the know-how includes information protected as trade secrets. The IP ramifications of the right to repair movement are substantial, and any legislative change should take into account the considerable economic and social benefits of IP protection.

The term “right to repair” itself is a misnomer, at least in the strict sense. A “right” is a legally enforceable claim against another to do, or forbear from doing, a given thing, and it implies the correlative duty in the other.<sup>1</sup> The notion that we can fix our things has long been recognized by the courts as one of the normal incidents of property ownership—though no duty of IP owners to help out has been recognized. The issue has arisen primarily in the patent law context. For example, the Supreme Court held in 1859 that “it is obvious” that a person can repair a patented machine “in the same manner as if dealing with property of any other kind.”<sup>2</sup> But patent law also recognizes a fundamental distinction between permissible repair, which extends the life of a useful article, and impermissible reconstruction, which amounts to making a copy of the invention.<sup>3</sup> The courts have reached the same conclusion in the copyright law context, where physical copies of copyrighted works can be repaired, but not reproduced.<sup>4</sup> Thus, while it is true that we have the ability to repair our things, IP owners are the only side of the equation with legally enforceable claims—*rights*—and the duty falls on others to not violate those rights when making repairs.

This sleight of hand about a purported repair “right” obscures the fact that it is the recent right to repair movement that would drastically change the status quo by eliminating the rights of IP owners. It is perhaps unsurprising that the most vocal repair advocates also tend to be the quietest about the critical role that reliable and effective IP protection plays in advancing the public good. Repair supporters claim that IP owners are engaging in abusive trade practices when they exercise their exclusive rights in a way that limits competition in the market for repair products and services. They attempt to bolster this position with the policy argument that IP owners are harming consumers and creating more electronic waste. These policy implications are certainly debatable. For instance, a recent economic study demonstrated how right to repair laws could “create a lose–lose–lose situation that compromises manufacturer profit, reduces consumer surplus, and exacerbates the environmental impact.”<sup>5</sup> But it is not debatable whether the fundamental premise of the repair movement is wrong. Our IP laws reward creators and innovators as an incentive for them to bring their creative innovations to the marketplace. The other side of this bargain is that consumers benefit from the introduction of these products and services that must then compete on the merits with other products and services. The real complaint of right to repair proponents is that the winners of this market-based competition are collecting their winnings.

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<sup>1</sup> See, e.g., *Right*, Black’s Law Dictionary (11th ed. 2019) (defining “right” as, *inter alia*, a “legally enforceable claim that another will do or will not do a given act” and “a recognized and protected interest the violation of which is a wrong”); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *Yale L.J.* 16, 31 (1913) (“It is certain that even those who use the word and the conception ‘right’ in the broadest possible way are accustomed to thinking of ‘duty’ as the invariable correlative.”) (cleaned up).

<sup>2</sup> *Chaffee v. Boston Belting Co.*, 63 U.S. 217, 223 (1859).

<sup>3</sup> See, e.g., *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 345–46 (1961) (“We hold that maintenance of the patented combination through replacement of a spent, unpatented element does not constitute reconstruction. Mere replacement of individual unpatented parts, one at a time, whether of the same part repeatedly or different parts successively, is no more than the lawful right of the owner to repair his property.”) (cleaned up); *Wilson v. Simpson*, 50 U.S. 109, 123 (1850) (“When the wearing or injury is partial, then repair is restoration, and not reconstruction.”).

<sup>4</sup> See, e.g., *Doan v. Am. Book Co.*, 105 F. 772, 777 (7th Cir. 1901) (“To render these books serviceable for use or sale, it became necessary to clean them, to trim the edges of the leaves, and to rebind them. We think that, so far as respects the copyright laws of the United States, no legal right of the appellee was invaded by so doing. A right of ownership in the book carries with it and includes the right to maintain the book as nearly as possible in its original condition, so far, at least, as the cover and binding of the book is concerned.”) (cleaned up).

<sup>5</sup> Chen Jin, Luyi Yang, & Cungen Zhu, *Right to Repair: Pricing, Welfare, and Environmental Implications*, 69 *Mgmt. Sci.* 1017, 1019 (2022).

## Copyright Law Rewards Authors to Promote the Public Good

The Copyright Clause of the U.S. Constitution grants Congress the power “to promote the progress of science . . . by securing for limited times to authors . . . the exclusive right to their respective writings.”<sup>6</sup> This is the foundation of our nationwide copyright system, and its importance is readily inferred from the fact that it was listed among the few constitutional grants of authority to Congress, such as the power to coin money, declare war, and regulate commerce. It is also significant that the First Congress, which included many drafters of the Constitution, such as James Madison, quickly enacted the Copyright Act of 1790, which granted to “authors the sole right and liberty of printing, reprinting, publishing and vending” their copyrighted works.<sup>7</sup> The Framers clearly understood that protecting the rights of authors goes hand in hand with protecting our individual liberties, like freedom of speech, which was later secured by the First Amendment in 1791. Indeed, the Framers appreciated that copyright protection is essential to a flourishing society, and they recognized the complementary goals of protecting both copyrighted expression and free speech. As the Supreme Court explained in 1985, “the Framers intended copyright itself to be the engine of free expression.”<sup>8</sup>

This fundamental connection between copyright protection and the public good might seem confusing at first blush. After all, the theory is that we increase our collective knowledge by giving authors the right to restrict the dissemination of their works. But the answer to this apparent paradox is simple: Federal copyright law embodies the principle that the best way to advance the public interest is by empowering authors to pursue their own private interests.<sup>9</sup> As James Madison famously put it in the Federalist Papers, the “public good fully coincides with the claims of individuals.”<sup>10</sup> Congress secures to authors exclusive rights—property rights—as a reward for their creative labors and as an incentive to profit in the marketplace from the dissemination of their works.<sup>11</sup> The Supreme Court has nicely summarized this insight of the Framers: “copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge.”<sup>12</sup> When authors have the legal and economic means to make a living from their creative works, their efforts spread knowledge and add to our collective success. They produce more, foster a growing economy, and ultimately contribute to a flourishing society. In other words, when authors get paid, everybody wins.

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<sup>6</sup> U.S. Const. art. I, § 8, cl. 8 (cleaned up).

<sup>7</sup> Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (cleaned up).

<sup>8</sup> Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985).

<sup>9</sup> See, e.g., Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003) (noting that “copyright law serves public ends by providing individuals with an incentive to pursue private ones”).

<sup>10</sup> The Federalist No. 43 (James Madison) (cleaned up).

<sup>11</sup> See, e.g., Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

<sup>12</sup> Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003) (cleaned up).

Copyright law has several built-in limitations that balance the rights of authors with the rights of the public. Since copyright secures exclusive rights in expression, that protection is limited to safeguard the free speech interests of others. Thus, when copyright protects an author’s work, that protection extends only to the original expression that the author created.<sup>13</sup> Copyright does not protect the facts and ideas that the author expressed in the work, and these instantly become free for everyone to use.<sup>14</sup> This important limitation promotes the progress of science—learning and knowledge—by allowing others to build on the uncopyrightable facts and ideas that the copyrighted work contains. Likewise, the fair use doctrine allows others to copy, use, and distribute otherwise protected expression under certain circumstances, such as for educational use or social commentary.<sup>15</sup> As the Supreme Court noted this term, fair use reflects a “balancing act between creativity and availability (including for use in new works).”<sup>16</sup> Finally, the Copyright Clause requires that copyright protection last only for “limited times,” which ensures that works enter the public domain once the copyright term expires.<sup>17</sup> In sum, copyright law is not a rigid system that robs the public interest by unjustly enriching authors; copyright instead guards the rights of authors while respecting the rights and liberties of others, and this balance advances the good of everyone.

### **Copyright Law Fosters the Thriving Digital Marketplace**

As the technology to make and distribute copies has advanced over the years, copyright law has been updated to ensure that the exclusive rights of authors remain protected. For example, in 1980, Congress amended the Copyright Act to clarify that computer programs are protectable works of authorship.<sup>18</sup> Recognizing that copyright law needed to be adapted to realize the full advantages of the internet, Congress enacted the Digital Millennium Copyright Act (DMCA) in 1998.<sup>19</sup> The DMCA promotes two mutually enforcing goals: fostering the growth of digital commerce for

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<sup>13</sup> See, e.g., *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) (“The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the *sine qua non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author.”).

<sup>14</sup> See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“Due to this distinction [between idea and expression], every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.”); 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

<sup>15</sup> See, e.g., *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (“The fair use doctrine is an equitable rule of reason which permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”) (cleaned up); 17 U.S.C. § 107 (providing that “the fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright”) (cleaned up).

<sup>16</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1273 (2023).

<sup>17</sup> U.S. Const. art. I, § 8, cl. 8; see also *Stewart v. Abend*, 495 U.S. 207, 228 (1990) (“The [Copyright] Act creates a balance between the artist’s right to control the work during the term of the copyright protection and the public’s need for access to creative works. The copyright term is limited so that the public will not be permanently deprived of the fruits of an artist’s labors.”) (cleaned up).

<sup>18</sup> See Pub. L. No. 96-517, 94 Stat. 3015, 3028 (1980) (amending the Copyright Act to clarify that a “computer program” is copyrightable subject matter); see also *Whelan Assocs., Inc. v. Jaslow Dental Lab’y, Inc.*, 797 F.2d 1222, 1234 (3d Cir. 1986) (“Computer programs are classified as literary works for the purposes of copyright.”) (cleaned up).

<sup>19</sup> See Pub. L. No. 105-304, 112 Stat. 2860, 2863-72 (1998).

consumers and creating opportunities for copyright owners to profit from their investments.<sup>20</sup> Given the ease of online piracy, the drafters of the DMCA understood that copyright owners would be reluctant to distribute their works in digital form.<sup>21</sup> The DMCA was enacted after years of studies, hearings, and active debates among stakeholders, and these extensive processes led representatives from more than 150 countries to adopt two international treaties requiring “adequate legal protection and effective legal remedies against the circumvention of effective technological measures.”<sup>22</sup> These treaties were crucial for the United States given the global nature of the internet and the importance of safeguarding the rights of American copyright owners abroad.

To prompt copyright owners to market their works in the digital realm, the DMCA secures technological protection measures (TPMs) that bolster the traditional exclusive rights by preventing infringement from happening in the first place.<sup>23</sup> TPMs come in two varieties: access controls that govern the means of accessing a copyrighted work, and copy controls that prevent the copying a work once it has been accessed. The DMCA imposes liability on someone who bypasses a TPM to access a copyrighted work without authorization.<sup>24</sup> As the legislative history puts it, bypassing an access control is “the electronic equivalent of breaking into a locked room in order to obtain a copy of a book.”<sup>25</sup> The DMCA also imposes liability for distributing the tools that others can use to bypass access controls or copy controls.<sup>26</sup> However, the DMCA does not create liability for merely bypassing a copy control when the user already has authorized access to the work that it protects. This preserves the free speech interests of users who might engage in fair use—a point driven home by the DMCA’s explicit provision that it has no effect on the fair use doctrine.<sup>27</sup> To

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<sup>20</sup> See, e.g., H.R. Rep. No. 105-551(II), at 23 (“A thriving electronic marketplace provides new and powerful ways for the creators of intellectual property to make their works available to legitimate consumers in the digital environment. And a plentiful supply of intellectual property—whether in the form of software, music, movies, literature, or other works—drives the demand for a more flexible and efficient electronic marketplace.”).

<sup>21</sup> See, e.g., S. Rep. No. 105-190, at 8 (1998) (“Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy.”).

<sup>22</sup> WIPO Copyright Treaty art. 11, Dec. 20, 1996, 36 I.L.M. 65 (1997); see also WIPO Performances and Phonograms Treaty art. 18, Dec. 20, 1996, 36 I.L.M. 76 (1997); H.R. Rep. No. 105-551(I), at 9 (1998) (“The conference produced two treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, which were adopted by consensus by over 150 countries.”) (cleaned up).

<sup>23</sup> See, e.g., *MDY Indus., LLC v. Blizzard Ent., Inc.*, 629 F.3d 928, 948 (9th Cir. 2010) (concluding that the DMCA “creates a new anticircumvention right distinct from copyright infringement” and “strengthens the traditional prohibition against copyright infringement”).

<sup>24</sup> See 17 U.S.C. § 1201(a)(1)(A) (“No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”).

<sup>25</sup> H.R. Rep. No. 105-551(I), at 17 (1998).

<sup>26</sup> See 17 U.S.C. § 1201(a)(2) (“No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title.”); *id.* at § 1201(b) (“No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title.”) (cleaned up).

<sup>27</sup> See 17 U.S.C. § 1201(c)(1) (“Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.”); see also H.R. Rep. No. 105-551(I), at 18 (1998) (“In a fact situation where the access is authorized, the traditional defenses to copyright infringement, including fair use, would be fully applicable. So, an individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which he or she has acquired lawfully.”).

encourage socially beneficial uses of copyrighted works protected by TPMs, Congress established certain permanent exemptions as well as an administrative procedure for creating temporary exemptions via a triennial rulemaking by the Librarian of Congress.<sup>28</sup>

Today’s thriving digital marketplace is confirmation that copyright law is working as intended. Indeed, it is an understatement to say that Congress was prescient in enacting the DMCA to secure the access controls and copy controls that provide copyright owners with the technological impetus to participate in the online economy. Policy advocates campaigning for right to repair legislation rarely acknowledge any of the benefits of TPMs in particular or copyright law in general. This omission is telling given that copyright law has served as the launching pad for the economic and cultural revolutions that benefit us all today. Consumers have unprecedented access to copyrighted content—movies, books, music, games, computer programs—as well as electronic devices and other products that keep getting smarter—phones, televisions, refrigerators, watches, automobiles—because Congress has secured both the traditional exclusive rights in copyrighted works and the TPMs that help to prevent infringement in the digital realm. Repair proponents downplay these clear successes of the copyright system while arguing that the exclusive rights of authors are harmful to the market for repairs. But these exclusive rights promote the public good by making it possible for the people who create these wonderful things to make a profit. Without copyright law, and other IP protections, our smart devices would be overpriced paperweights.

### **The Myth of the Right to Repair Movement**

Right to repair supporters have argued loudly that broad changes at the state and federal level are warranted because manufacturers and other IP owners are limiting repair opportunities for consumers. They claim that these practices unnecessarily increase the cost and time of repairs, create electronic waste, and remove economic opportunities for local businesses. Their message has even reached the White House. In July 2021, President Biden issued an executive order directing the Federal Trade Commission (FTC) to address “unfair anticompetitive restrictions” in the repair market, such as those “imposed by powerful manufacturers” on farmers.<sup>29</sup> Less than two weeks later, the FTC issued a policy statement that promised to “devote more enforcement resources” and “prioritize investigations into unlawful repair restrictions.”<sup>30</sup> The policy statement claimed that the FTC had “uncovered evidence that manufacturers may, without reasonable justification, be restricting competition for repair services” during its Nixing the Fix workshop in 2019.<sup>31</sup> This evidence included “limiting the availability of parts, manuals, diagnostic software, and tools,” “asserting patent rights in an unlawful, overbroad manner,” and “using unjustified technical protection measures.”<sup>32</sup> The FTC’s July 2021 policy statement reflects a striking departure from its May 2021

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<sup>28</sup> See 17 U.S.C. § 1201(d)-(j) (creating permanent exemptions for, *inter alia*, educational institutions, reverse engineering, encryption research, and security testing); *id.* at § 1201(a)(1)(B)-(E) (establishing authority of the Librarian of Congress to create temporary exemptions to the prohibition against bypassing access controls).

<sup>29</sup> Promoting Competition in the American Economy, Exec. Order No. 14,036, 86 Fed. Reg. 36,987, 36,992 (Jul. 9, 2021).

<sup>30</sup> Federal Trade Commission, Policy Statement on Repair Restrictions Imposed by Manufacturers and Sellers, at 2 (Jul. 21, 2021).

<sup>31</sup> *Id.* at 1 (cleaned up).

<sup>32</sup> *Id.* (cleaned up).

report to Congress on the Nixing the Fix workshop, which concluded that “the assertion of IP rights does not appear to be a significant impediment to independent repair.”<sup>33</sup>

The FTC’s alleged evidence of abusive practices by manufacturers boils down to the fact that IP owners are merely exercising their right to exclude. But it is axiomatic that we empower IP owners to decide for themselves whether, when, and how they exercise their IP rights.<sup>34</sup> Take, for example, what the FTC now considers to be the potentially unlawful assertion of patent rights. The evidence in the record came from two commenters. The first commenter cited patent law as one of the “barriers for consumers” to make repairs because the “unauthorized replication of a patented spare part” constitutes patent infringement.<sup>35</sup> This just makes the unremarkable point that patent owners can exclude others from practicing their inventions. The second commenter, a representative of the automotive collision repair industry, complained about “the misuse of design patents on repair parts to block competition from producing equivalent parts.”<sup>36</sup> This commenter appears to take the extreme position that *any* use of design patents to protect automotive parts is abusive because it prevents its members from making those same parts and selling them for a profit. But the Federal Circuit has rejected this commenter’s self-serving invitation to “eliminate design patents on auto-body parts,” and rightfully so.<sup>37</sup> The purpose of patent law is not to subsidize the business models of free riders. Patent law promotes the public good by incentivizing and rewarding the productive labors of inventors by granting them the right to exclude competitors for limited times.<sup>38</sup>

The myth of the right to repair movement is that there is something inherently wrong about IP owners exercising their right to exclude because it limits competition in the market for repair parts and services. But the assertion of IP rights is not anticompetitive in the antitrust sense. Even after promising to take action on repair restrictions in the wake of President Biden’s July 2021 executive order, the FTC has yet to bring an enforcement action under its authority to police antitrust violations and unfair methods of competition.<sup>39</sup> The fact that IP owners exercise the right to exclude does not turn them into prohibited monopolists. On the contrary, it has long been recognized that “a central goal of both patent and antitrust law is the promotion of the public benefit through a competitive economy.”<sup>40</sup> IP law ensures that new products and services are introduced into the

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<sup>33</sup> Federal Trade Commission, *Nixing the Fix: An FTC Report to Congress on Repair Restrictions*, at 26 (May 2021).

<sup>34</sup> *See, e.g., Cont’l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 429 (1908) (“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, as it is the privilege of any owner of property to use or not use it, without question of motive.”); *Stewart v. Abend*, 495 U.S. 207, 228-29 (1990) (“But nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright. In fact, this Court has held that a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work.”).

<sup>35</sup> *See* Federal Trade Commission, *Nixing the Fix: A Workshop on Repair Restrictions*, Comment of International Institute for Industrial Environmental Economics, at 4-6 (Apr. 30, 2019).

<sup>36</sup> *See* Federal Trade Commission, *Nixing the Fix: A Workshop on Repair Restrictions*, Comment of Automotive Body Parts Association, at 1 (Apr. 30, 2019) (cleaned up).

<sup>37</sup> *Auto. Body Parts Ass’n v. Ford Glob. Techs., LLC*, 930 F.3d 1314, 1318 (Fed. Cir. 2019) (cleaned up).

<sup>38</sup> *See, e.g., Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974) (“The patent laws promote this progress by offering a right of exclusion for a limited period as an incentive to inventors to risk the often enormous costs in terms of time, research, and development. The productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy, and the emanations by way of increased employment and better lives for our citizens.”).

<sup>39</sup> *See* Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

<sup>40</sup> *Int’l Wood Processors v. Power Dry, Inc.*, 792 F.2d 416, 427 (4th Cir. 1986); *see also Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1362 (Fed. Cir. 1999) (Newman, J.) (“The patent and antitrust laws are complementary, the patent

market, thus increasing competition in the marketplace.<sup>41</sup> As the FTC has recognized, there is no antitrust liability with an IP owner's "unilateral refusal to assist its competitors" because it might "undermine incentives for investment and innovation."<sup>42</sup> Nor is there a competition law problem when IP rights confer market power that allows an IP owner to charge supracompetitive rates: "The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system."<sup>43</sup> The reason is simple: The ability of IP owners to parlay their exclusive rights into "monopoly prices" is what "attracts business acumen" and "induces risk taking that produces innovation and economic growth."<sup>44</sup> Right to repair supporters claim that the system is broken because IP owners exclude competitors in order to increase their profits, but that is exactly how the innovation economy is intended to work.

## Conclusion

The right to repair movement recasts the normal exercise of exclusive rights by IP owners as abusive and anticompetitive. This is not only wrong, but dangerous. The exclusive rights secured by IP law make it possible for creators and innovators to commercialize their products and services. If these rights are weakened, the public interest will be harmed by the resulting deprivation of the creative innovations that never reach the marketplace. The right to repair movement presupposes that others should be able to profit where they have not sown, because this will somehow, inexplicably, promote the public good. But that view is inconsistent with the "economic philosophy" behind the U.S. Constitution, which recognizes that the "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors."<sup>45</sup> The fact that IP owners are exercising their exclusive rights in the marketplace is not evidence of abuse, and it does not present a competition law problem. It is the free-market system working as it should. And we are already seeing how issues over repair opportunities are playing out in the free market.<sup>46</sup> If consumers dislike the repair policies of a given manufacturer, they can express that dissatisfaction with their pocketbooks. Repair supporters are not the first to suggest that creators and innovators should not reap the rewards of their success, and they will not be the last. But their suggestion that the right to repair issue presents a market failure worthy of congressional intervention should be summarily rejected.

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system serving to encourage invention and the bringing of new products to market by adjusting investment-based risk, and the antitrust laws serving to foster industrial competition.").

<sup>41</sup> *See, e.g.,* SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1203 (2d Cir. 1981) ("The public benefits from the disclosure of inventions, the entrance into the market of valuable products whose invention might have been delayed but for the incentives provided by the patent laws, and the increased competition the patented product creates in the marketplace.") (cleaned up).

<sup>42</sup> U.S. Department of Justice & Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property, at 3 (Jan. 12, 2017).

<sup>43</sup> Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

<sup>44</sup> *Id.* (cleaned up).

<sup>45</sup> Mazer v. Stein, 347 U.S. 201, 219 (1954).

<sup>46</sup> *See, e.g.,* P.J. Huffstutter, Deere & Co. Will Allow Farmers to Repair Their Own Equipment, Reuters (Jan. 23, 2023).