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SB412 right to repair, finance
Finance Committee
February 3, 2021
FAVORABLE

February 1, 2021

Dear Chair Kelley and members of the finance committee:

I write today to express my support for SB412. As a legal academic whose research focuses on digital ownership and the intersection of personal and intellectual property rights, I have grown increasingly dismayed about the erosion of the control we have as consumers over the products we buy. 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.

Repairing the things we own is just common sense. It saves us 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. But all too often, device makers put their own financial interests first. They choke the supply of replacement parts, tools, software, and diagnostic information necessary for consumers to repair devices themselves or to rely on independent repair providers, who often represent a more affordable and convenient alternative. As a result of these anticompetitive behaviors, 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.

As an expert in intellectual property law, I've been frustrated to see IP rights invoked as a defense of the status quo. Nothing in SB412 undermines manufacturers 'legitimate intellectual property interests. Arguments to the contrary are little more than a smokescreen, obscuring an anticompetitive agenda behind appeals to innovation.

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* Toro Co. v. R & R Prod. Co., 787 F.2d 1208, 1213 (8th Cir. 1986); ATC Distribution Grp., Inc. v. Whatever It Takes Transmissions & Parts, Inc., 402 F.3d 700, 703 (6th Cir. 2005); Southco, Inc. v. Kanebridge Corp., 258 F.3d 148 (3d Cir. 2001). 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. *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 83 Fed. Reg. 208, 54023 (October 26, 2018).

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 patent 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).

Nor does access to service information, replacement parts, or tools jeopardize manufacturers 'rights under trade secret law. First, SB412 specifically exempts trade secrets. Section 4(1) of the bill states, "[n]othing in this chapter may be construed to require an original manufacturer to divulge a trade secret." Second, vague and unsupported claims of trade secrecy shouldn't be accepted at face value. It's easy to raise the specter of undisclosed secret information. But in reality, 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, further calling into question its protected status. 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 SB412 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, to say the least.

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

Sincerely,

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Institutional affiliation included for identification only