Proskauer

FTC Focus: Competition And The Right To Repair

Law360 on **June 28, 2024**

This article is part of a monthly column that considers the significance of recent Federal Trade Commission announcements about antitrust issues. In this installment, we discuss what the agency believes copyright can do for competition and the right to repair, and what it might mean for companies and consumers.

What do you do when your iPhone screen shatters? Do you beeline for Apple's Genius Bar to get it replaced? Or maybe you go to that mall kiosk that charges less for the repair?

Perhaps you're ambitious and try to do it yourself? Or do you save yourself the trouble and decide it's time for an upgrade anyway?

The mall kiosk might save you a few dollars, but modifications unauthorized by Apple could potentially cost you your warranty and the kiosk may not even have the part you need. Trying to fix it yourself is similarly risky, not to mention time-consuming.

All in all, the costlier routes — replacing or repairing with Apple — may well be the safest and most efficient options.

But proponents of the right to repair — the legal concept that owners should be allowed to upgrade, modify or repair their own equipment —believe this status quo should change.

"Unnecessary repair restrictions," the Federal Trade Commision said in a recent filing,[1] "can reduce consumer choice, raise repair costs, and drive independent repair shops out of business by denying them access to key inputs."[2]

The FTC indicates that a right to repair will enable cost-effective repair of products, competition between repair providers, and increased longevity of devices to avoid waste.

The enemy of the right to repair, then, is the unavailability of replacement parts, software locks, end user license agreements, and enforcement of intellectual property laws.

In 2019, the FTC took a deep dive[3] into the right to repair, culminating in a May 2021 report called "Nixing the Fix: An FTC Report to Congress on Repair Restrictions,"[4] detailing the commission's stance on repair restrictions and making clear that antitrust enforcement is one avenue to advance the right to repair.

In July 2021, the FTC issued a policy statement committing to "devote more enforcement resources to combat" repair restrictions, even though it "ha[d] generally not been an enforcement priority for … a number of years."

Some U.S. senators are interested in expanding these resources, as well — this June, the Subcommittee on Competition Policy, Antitrust, and Consumer Rights sent a letter[5] to the FTC requesting information on tools or authorities the FTC needed to combat unlawful repair restrictions.

So far, the FTC has stayed true to its mission. It has mounted several legal challenges alleging repair restrictions,[6] and most recently has set its sights on copyright law.

In this article, we take a look at FTC indications on what copyright can do for competition and the right to repair, and what it might mean for companies and consumers alike.

The DMCA and Tech Protection

Enacted in 1998, the Digital Millennium Copyright Act was designed to address copyright infringement in cyberspace.[7] By the mid-90s, the World Wide Web was booming, and lawmakers were struggling to "keep pace with emerging technology."[8]

The DMCA, lawmakers posited, would be the copyright magic bullet; it would protect copyrighted works, while promoting the availability of "the movies, music, software, and literary works that are the fruit of American creative genius."[9] But the DMCA and the right to repair don't necessarily go hand in hand.

The conflict stems from a lesser-known provision of the DMCA that protects

manufacturer-implemented copyright protections called technological protection measures, or TPMs. Manufacturers often embed TPMs into products to prevent third parties from accessing or copying protected content.

TPMs come in many forms, including access controls, which prevent unauthorized parties from gaining access to certain materials — think: passwords, encryption and the like — and copy controls. These prevent unauthorized parties from reproducing certain materials — think: read-only works, print blocking and the like.

Subject to certain exemptions, under Title 17 of the U.S. Code, Section 1201, the circumvention of an access control is a DMCA violation subject to civil and criminal liability.

Now, for an example. Nintendo Co. Ltd. — which on March 3 achieved a $2.4 million settlement[10] for an alleged violation of the DMCA — has TPMs in place to "permit the Nintendo Switch console to interact only with legitimate Nintendo video game files." Nintendo implements these TPMs, it says, to protect "copyright-protected video games."[11]

Imagine you get your hands on the newest Nintendo Switch model, but it has a glitch. You attempt all the classic fixes: unplug and replug, turn it on and off, but no luck.

To fix it, then, you might need to circumvent an access TPM. Strict application of the DMCA would mean your only lawful option would be to seek repair from Nintendo, or someone authorized by Nintendo to circumvent TPMs.

Luckily for you, current DMCA exemptions allow TPM circumvention for the "the diagnosis, maintenance, or repair" of a "device that is primarily designed for use by consumers, when circumvention is a necessary step ... and is not accomplished for the purpose of gaining access to other copyrighted works."[12]

Because, as this example shows, there are legitimate reasons for the circumvention of access TPMs, the DMCA implements permanent and temporary exemptions to its general prohibition.

Permanent exemptions exist for nonprofit libraries and law enforcement, while temporary exemptions are implemented through a triennial rulemaking process.

The ninth iteration of the rulemaking is now underway, and right to repair exemptions have garnered particular debate, eliciting a joint submission from the FTC and U.S. Department of Justice, a first.[13]

An Agency Push for Repair-Related DMCA Exemptions

Under Section 1201, in order to warrant an exemption to the DMCA, one must show that "persons who are users of a copyrighted work are, or are likely to be in the succeeding

3-year period, adversely affected by the prohibition ... in their ability to make noninfringing uses under [Title 17] of a particular class of copyrighted works."[14]

Exemptions have previously been made for repair of computer programs used to control motorized land vehicles, marine vessels, mechanized agricultural vehicles, medical devices, and devices primarily for consumer use, like the Switch.

In their comment,[15] the FTC and DOJ support these existing repair-related exemptions and call for broadening them further, including to industrial and commercial equipment software — think: commercial soft serve machines.

The FTC argues that overenforcement of TPMs can prevent necessary and legitimate access to repair devices, thereby limiting consumer choice.

Indeed, the FTC argues, if the only parties that can circumvent TPMs must be licensed by the manufacturer, then the manufacturer controls the market for repairs.

While the FTC recognizes TPMs function to protect copyrighted material, the commission emphasizes that "it is possible to violate Section 1201 [of the DMCA] without infringing a copyright."

For example, circumventing the TPM on a commercial soft serve machine to repair it would simply restore its intended use "rather than [infringe upon] creative works with expressive or artistic value," according the FTC.

The FTC's says that "TPMs have the potential to cause anticompetitive effects" and, more specifically, that "[c]hanges in technology ... created fresh opportunities for manufacturers to limit Americans' ability to repair their own products."

To the FTC, the DMCA's broad prohibitions harm consumers and workers, making exemptions for DIY and third-party repair crucial to competition, consumer choice and lower prices.

But not all agree. Opponents to expanded exemptions emphasize that an unlimited right-to-repair could create carte blanche for copyright infringement.

TPM protection was not merely intended to prevent infringement, they argue, but to prevent the very ability to infringe.

Opponents say that bad actors seeking to circumvent a TPM for copyright infringing purposes could use repair as a guise for obtaining otherwise legally protected information.[16] Opponents of broad TPM protection argue that TPMs protect consumers by promoting quality repairs, ensuring that when a product is repaired, it is done so properly.[17]

What's Next for the Right to Repair?

So, how will the right to repair fare in this round of DMCA exemptions? If it is anything like previous cycles, the U.S. Copyright Office will make its recommendations in early- to mid-October, and the Librarian of Congress will publish the final rule with a determination of whether to accept some or all recommendations in late October.

In prior cycles, all but one proposed exemption was accepted.[18]

If the FTC is successful, existing exemptions related to computer programs controlling devices that diagnose, maintain or repair consumer products would persist, and would be expanded to programs for commercial and industrial products and equipment.

The similar exemption for computer programs when diagnosing, maintaining or repairing motor vehicles would also persist, and would be expanded to allow owners and repair shops to access, store and share vehicle operational data.

Rights holders in these industries, and others implicated by DMCA exemptions, should consider the precise scope of the applicable exemptions in order to differentiate infringing and noninfringing conduct.

And businesses can do the same with an eye toward expanding their offerings to fit the exemptions. Perhaps most importantly, consumers might have a better chance of getting that long-awaited soft serve they've been craving.

---

[1] https://www.ftc.gov/system/files/ftc_gov/pdf/ATR-FTC-JointComment.pdf.

[2] See also https://www.copyright.gov/1201/2024/comments/Class%205%20-%20Initial%20Comments%20-%20Public%20Knowledge.pdf.

[3] https://www.ftc.gov/system/files/documents/public_statements/1592330/p194400repairrestrictionspolicystatement.pdf.

[4] https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf.

[5] https://www.klobuchar.senate.gov/public/_cache/files/6/b/6b1c3389-79a0-4f1e-aa30-615764613d4e/B8C419F4A8D234E5157EA6F28E58AB09.final-klobuchar-lee-right-to-repair-letter-to-ftc----06.11.24.pdf.

[6] See e.g., Complaint, Harley-Davidson Motor Company Group, LLC, F.T.C. 212-3140 (2022); Complaint, Weber-Stephen Products LLC, F.T.C. 212-3139 (2022); Complaint, MWE Investments, LLC, F.T.C. 222-3012 (2022).

[7] https://www.copyright.gov/dmca/.

[8] https://www.congress.gov/congressional-report/105th-congress/senate-report/190/1.

[9] Id.

[10] https://storage.courtlistener.com/recap/gov.uscourts.rid.56980/gov.uscourts.rid.56980.10.

[11] https://github.com/github/dmca/commit/ccb374868b46ad19371d9f96cccdd6c8fc689cba.

[12] 37 C.F.R. § 201.40(b)(14).

[13] https://www.copyright.gov/1201/2024/.

[14] https://www.law.cornell.edu/uscode/text/17/1201.

[15] https://www.ftc.gov/system/files/ftc_gov/pdf/ATR-FTC-JointComment.pdf.

[16] https://www.copyright.gov/1201/2024/comments/opposition/Class%205%20-%20Opp%27n%20-%20ACT%20The%20App%20Association.pdf.

[17] https://documents.nam.org/COMM/NAM-3740-Right%20to%20Repair%20Paper%20R4%20V1%20FIN.pdf.

[18] https://www.govinfo.gov/content/pkg/FR-2010-07-27/pdf/2010-18339.pdf.

Reproduced with permission. Originally published June 28, 2024, "FTC Focus: Competition And The Right To Repair," *Law360*.

Related Professionals

- **David A. Munkittrick**
  Partner
- **Erica Taylor Jones**
  Associate