



**To: Office of Policy and External Affairs**

PO Box 1450

Alexandria, VA 22313-1450

**Re: Copyright Policy, Creativity, and Innovation in the Digital Economy, Public Comments**

**From: the Digital Right to Repair Coalition, a NJ Non-Profit [www.digitalrighttorepair.org](http://www.digitalrighttorepair.org)**

Gay Gordon-Byrne, Executive Director

**About the Digital Right to Repair Coalition:**

The DRTR Coalition was founded in July of 2013 as a non-profit corporation in the State of NJ with the specific purpose of seeking legislative changes at the State and Federal level to facilitate restoring competitive options for repair of digital devices. Our membership includes leadership from business owners in the repair industries for consumer and business-class products for almost all types of products ranging from cell phones to mainframes across the entire spectrum of electronic products. Most of our members have been repairing technology equipment for decades and many are sub-contractors to the very same manufacturers that are attempting to close off competition through copyright controls.

**Re: Comments for the Internet Policy Task Force**

We have reviewed the Report of July 2013 and wanted to bring the following issues to your attention as they are not discussed in the Report:

Copyright law is becoming a hindrance to owners of physical devices with respect to physical repair. Manufacturers across a wide spectrum of products, from automobiles to cell phones to enterprise servers, are using copyright law to prevent equipment owners from making repairs, extending the useful life of their investments, or even deploying used equipment.

Repair may not command the same level of attention as cell-phone “unlocking”, but is an essential part of the entire digital eco-system. Digital equipment must function or innovations in software do not operate. The more the US economy depends on the consistent availability of digital technologies, the

more important the role of prompt and effective repair. Digital equipment that cannot be repaired becomes e-waste where less than half the materials can be recovered. Digital equipment that cannot be repaired has no value on the used market – destroying the capital investment value of technology purchases.

We believe that the US Copyright Code was not intended to be used to prevent physical repair or block the resale of legally acquired products. Nor do we believe that the Congress intended for Copyright Law to be used to grant service monopolies for physical assets, which is currently the case in many settings and becoming commonplace.

The following 5 points are areas where current law is unclear or is detrimental to the physical process of repair:

**Access to embedded code and associated updates.** Repair often requires access to embedded code and associated error correction, safety and security updates. Since all digital devices include, by design, internal programming (embedded code) to operate the machine, the treatment of such code for purposes of copyright protections is critical to repair and transfer of ownership.

- a. It is the case that manufacturers are claiming copyright protections for code that is integral to the operation of the hardware at its most basic level. Regardless of the name, such code shares the following characteristics:
  - i. Provided by the hardware designer with the machine
  - ii. Supported by the hardware designer
  - iii. Must operate to specifications or licensed products do not work correctly
  - iv. Has no independent value
- b. If such code is considered part of the hardware purchase, then machines would be clearly tangible assets and ordinary activities of repair, restoration, repurposing and resale would be available to owners. It must be noted that such code cannot be pirated as it is machine specific – often to the point of configuration details.
- c. If such code is considered Intellectual Property, then the owner of the physical device does not own a functional machine and cannot control the use of the machine over time. These machines should be licensed and not sold.

Copyright law makes no distinction between these interface and operational routines and licensed operating systems, applications, or content. There are two major areas where manufacturers are using references to embedded code as “IP” that are problematic for both repair and resale.

- a. Embedded code is often flawed when first released. Corrections are issued in various forms, some physical (EC Changes), some on media (CD-Rom) and the most popular delivery method is currently downloads from the manufacturer website. For equipment to be effectively repaired, the repairer must have access to the full library of corrections

made to embedded code in order to complete repairs. If the manufacturer blocks access to the library of corrections, including demanding fees for access or offering access to the library only with payment for a service contract, then the equipment owner is unable to repair the equipment outside of the manufacturer.

- b. Embedded code may also be separated from hardware for purposes of resale. If the manufacturer claims “IP” protections for embedded code, the buyer of a used machine must seek a license agreement to use the equipment. The pricing and terms of any license transfer most often prevent transfer even if the manufacturer states they permit transfer. This should be of enormous concern to any holders of loans or leases of technology equipment as the rights to recover collateral value in a secondary market sale may be obliterated.

Error correction for such code has been traditionally provided at no charge as part of the manufacturers’ commitment to defect support. It is only in recent years that manufacturers have attempted to create new revenue streams for payment for corrections which had been free in the past. By labeling error corrections as “IP”, all but the most savvy of buyers will not argue the point. We suggest that the DMCA be modified to recognize this special category of digital hardware and create appropriate parameters covering which elements are suitable for protection under copyright law and which should be considered “Fair Use”.

**Access to service documentation.** Physical manuals are going out of vogue with the availability of downloadable versions. Physical manuals were transferrable in hard-copy, but the digital version is not. Worse, manufacturers have taken to linking access to service documentation to payment for post-purchase service agreements, thus further diminishing the rights of owners to repair their machines.

Owners of equipment, including machines sold in the secondary market, have continued need for service documentation regardless of how the documentation is delivered. Proliferation or piracy of service documentation is not likely to cause economic harm since the only possible users of copied documentation will have already purchased the asset for which the documentation was created and included in the original purchase. In many cases, it is also questionable if service documentation would meet creative standards of copyrightable materials.

**Access to service diagnostics.** Diagnostics are often works of intellectual property used as a tool to assist with problem determination. Lack of access to diagnostics (physical or software) reduces or eliminates the ability of anyone to repair digital devices. Many diagnostics routines are provided as part of the original hardware purchase and should be readily transferrable between owners.

As with service documentation, there is no separate market for diagnostic tools or software outside of the owners of equipment. Proliferation or piracy of diagnostics is not likely to cause economic harm to the manufacturer since the product sale must precede the need for diagnostics. Diagnostics are also most often created as the most obvious way to deliver repair information and may not meet the creative standards of copyright.

**Access to Service Tools.** The anti-circumvention provision of the DMCA is being used to generally block access to owners of equipment and independent repair companies having nothing to do with content or media piracy.

We understand the piracy issue for content creators, however we believe the use of the statute for non-content purposes is an extensive over-reach of the statute and needs to be adjusted to treat most owners as law-abiding users. The vast majority of applications of digital technology have no relationship to content.

**Service Keys.** Owners of equipment require control of all service keys or they do not fully own the equipment. Many such keys are provided in software form and have been claimed as “IP” on the part of the manufacturer, in order to more easily compel the owner to contract with the OEM exclusively for restoration. Major corporations, as unusually powerful and savvy buyers, have avoided these limitations with no loss of security. Smaller buyers should not be forced into exclusive repair agreements because they lack bargaining power.

We recommend that Copyright law should be amended to affirm the rights of equipment owners to control equipment settings, passwords, and security access even if such “keys” are provided in software form. Manufacturers can still prohibit theft of services through illegal hacking of feature activation functions.

We welcome the opportunity to answer questions, discuss, and elaborate on our positions. Please contact us at your convenience.

Regards,

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