THE LAW SOCIETY OF NEW SOUTH WALES
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Submission on the Productivity Commission's *Right to Repair* Draft Report

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Australian Government's Productivity Commission

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The NSW Young Lawyers Communications, Entertainment and Technology Committee (Committee) makes the following submission in response to Productivity Commission's Right to Repair Draft Report.

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Communications, Entertainment and Technology Law Committee of NSW Young Lawyers aims to serve the interests of lawyers, law students and other members of the community concerned with areas of law relating to information and communication technology (including technology affecting legal practice), intellectual property, advertising and consumer protection, confidential information and privacy, entertainment, and the media. As innovation inevitably challenges custom, the CET Committee promotes forward thinking, particularly with respect to the shape of the law and the legal profession.

Introduction

The NSW Young Lawyers Communications, Entertainment and Technology Law Committee ('the Committee') welcomes the opportunity to comment on the Productivity Commission's Draft Report on the Right to Repair ('Draft Report') on behalf of NSW Young Lawyers.

Information Request 3.1

Information Request 3.1: To better understand whether consumers have reasonable access to repair facilities, spare parts and software updates, the Commission is seeking further information on:

(a) Whether consumers have faced difficulties accessing spare parts or repair facilities under guarantees when their product breaks or develops a fault, including specific examples of the type and age of the product, and the costs incurred by the consumer.

1. The Committee has only considered the issue with respect to mobile devices, such as smartphones, laptops and headphones in this Information Request. In question (a), the Committee first discusses the concept of reasonableness under consumer guarantees, it then proceeds to the difficulties of accessing spare parts or repair facilities by consumers.
2. The Committee notes that, while consumers have considerable amount of access to spare parts or repair facilities under the current legislative regimes, the meaning of 'reasonableness' under section 58(1) of the *Australian Consumer Law* (**ACL**) needs to be clarified. In section 58(1) of the ACL, reasonableness concerns three aspects:
   (i) reasonable actions taken by manufacturers in relation to repair;
   (ii) reasonable availability of repair;
   (iii) reasonable period in which repair is provided.
3. It is unclear whether the "reasonableness" is to be judged by reference to a reasonable consumer or a reasonable manufacturer.
4. The lack of clarity is problematic as a reasonable consumer would favour less repair cost and more repair options, whereas a reasonable manufacturer would prioritise less cost on storage and facility maintenance. More importantly, the current reasonableness test does not take into the policy consideration of waste reduction, which is a core concept of the Draft Report.
5. The Draft Report prioritises reduction of waste and consumer options, shifting the repair burden to manufacturers[1]. Without defining reasonableness as being what a reasonable consumer could expect, the introduction of a Right to Repair into the ACL is undermined from the outset. It will also be difficult to measure whether consumers have reasonable access to spare parts or repair facilities, if the test could be one of a reasonable manufacturer's considerations.

[1] Productivity Commission, *Right to Repair* (Draft Report, June 2021) 3-4.

6. The Committee notes that currently, both legislation and case law do not specify the obligations of manufacturers in relation to repairs. Nor do they assist in understanding the concept of reasonableness under section 58(1) of the ACL.

7. The Committee further notes that section 58(2) of the ACL adds another standard of reasonableness to the already overburdened section 58 of the ACL. Section 58(2) of the ACL operates as an independent provision by enabling a manufacturer to remove consumer guarantee, the multiple standards of reasonableness contained in section 58 of the ACL may undermine compliance to the law and discourage public confidence to the sections in relation to consumer guarantees.

8. The Committee submits that the Productivity Commissions proposal that reasonability under section 58 of the ACL be formulated with reference to the nature of the product supplied,[2] is counter-productive, particularly, if reasonableness is not defined by what a reasonable *consumer* would expect. An alternative approach could see the replacement of the reasonable period with a statutory-defined minimum support period for each specific product. This could promote consistency and clarity in identifying the minimum requirement of consumer guarantees.

9. Concerning the difficulty of accessing spare parts or repair facilities, the Committee is aware that there are few to no official complaints regarding the issue[3]. However, this does not necessarily suggest that such access has been adequate from a consumer standpoint. Most of the official statistics do not consider circumstances where a reasonable consumer would find it meaningless to lodge complaints. These circumstances may include:
    - Where the product has been declared vintage or obsolete by its manufacturer;
    - Where the product contains unique spare parts, which are only produced by its manufacturer (e.g. the lightning port of iPhone);
    - Where the product is designed in a way which is difficult to be disassembled and repaired by an ordinary person;
    - Where the product is modified by a consumer or third party without authorisation of the original manufacturer (e.g. jailbreaking iOS system).

10. Under these circumstances, a reasonable consumer does not possess bargaining power to demand reasonable access to spare parts or repair facilities. Given that manufacturers control the product design and the availability of spare parts, it may be more appropriate for the legislature to decide on the minimum support period of specific classes of products, so as to shift the balance towards

[2] Productivity Commission, *Right to Repair* (Draft Report, June 2021) 88.
[3] ACCC Submission No 106 to Productivity Commission, *Right to Repair* (February 2021) 2; Legal Aid Queensland Submission No 268 to Productivity Commission, *Right to Repair* (Janurary 2021) 6.

consumer protection and waste reduction. This might also address the unreported difficulties experienced by a reasonable consumer.

(b) Costs and benefits of businesses being required to hold physical spare parts or operate repair facilities for fixed periods of time.

11. The Committee recommends that the costs in question (b) may be lowered by introducing uniform designs of spare parts. By reducing variations of designs, it lowers the barrier to mass production of spare parts by the manufacturers. It also provides businesses the incentive to set up repair facilities and train professional repairers, given that the cost and duration of training is lowered under the uniform scheme.
12. By introducing the requirement in question (b), it may encourage the manufacturers to address safety concerns caused by third party repairers. This would occur as manufacturers have strong incentives to ensure their products are properly fixed and this being essential to maintain the brand image of their products[4].
13. The Committee further notes that both the public and regulators will be benefited under the uniform scheme. This is due to spare parts being more easily identified and obtained, and their quality assured.

(c) Whether consumers are experiencing problems using their products due to a software fault or lack of software updates, including specific examples where manufacturers have not addressed the problem because of claims that it is not covered by consumer guarantees.

14. The Committee supports the view that software updates should be considered as 'spare parts' for the purpose of consumer guarantees.
15. The Committee also welcomes the decision in *Australian Competition and Consumer Commission (ACCC) v Apple Pty Ltd (No 4)* [2018] FCA 953 ("*ACC v Apple"*) which established that software faults may be covered by consumer guarantees[5]. However, the Committee notes that the decision in *ACCC v Apple,* the Federal Court did not clarify whether software updates are considered spare parts. It remains unclear whether consumers are protected under these circumstances:
    - Where the software fault causes a minor failure of product and the product remains fit and functional for ordinary use; or

[4] Australian Mobile Telecommunications Association Submission No 9 to Productivity Commission, *Right to Repair* (February 2021) 7; LG Electronics Submission No 38 to Productivity Commission, *Right to Repair* (February 2021) 2.
[5] *Australian Competition and Consumer Commission (ACCC) v Apple Pty Ltd (No 4)* [2018] FCA 953 [66].

- Where the software fault makes the product more vulnerable to cyber-attack.

Information Request 4.3

Information Request 4.3: The Commission is considering recommending provisions similar to the Magnuson-Moss Warranty Act in the United States, which prohibit manufacturer warranties from containing terms that require consumers to use authorised repair services or parts to keep their warranty coverage. We are seeking feedback and evidence on the costs and benefits of this approach. In particular:

(a) would manufacturers respond by increasing product prices or making their warranties less generous? Would this latter change have any practical impact on consumers given they are also covered for defects under consumer guarantees?

17. The Committee notes that manufacturers may increase product prices or make their warranties less generous in response to provisions similar to the *Magnuson-Moss Warranty Act (1975)* (1975) 15 U.S.C. 2301 (***Magnuson-Moss Warranty Act***). Given the complexity of *Magnuson-Moss Warranty Act*, it may be expensive for warrantors to merely comply with the warranty disclosure requirements as this would require warrantors to monitor the development of legislation and potentially redraft their warranties if there is any legislative change[6].

18. However, an empirical study of the effects of the Magnuson-Moss Warranty Act found that around 75% of manufacturers in the United States (**US**) either did not change or did not substantially change their warranties *A,*[7] suggesting that the introduction of the *Magnuson-Moss Warranty Act*, has not substantially burdened the manufacturer. Instead, such provisions merely improves the disclosure of information to consumers, rather than legislating substantive enforceability into the warranties.

19. The Committee further notes that the current ACL regime provides that manufacturers can opt out of the consumer guarantee in relation to repairs. Under section 58(2) of the ACL, manufacturers can opt out by informing consumers with written notice either at or before the time of purchase.

20. Currently, there are few manufacturers using opt-out clauses.[8] However, it is unclear whether the introduction of a Right to Repair would encourage the use of opt-out clauses among manufacturers.

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[6] Kathleen F. Brickey, 'The Magnuson-Moss Act - An Analysis of the Efficacy of Federal Warranty Regulation as a Consumer Protection Tool' (1978) 18(1) *Santa Clara Law Review* 73, 95.
[7] Michael J. Wisdom, 'An Empirical Study of the Magnuson-Moss Warranty Act' (1979) *Stanford Law Review* 31(6) 1117, 1141.
[8] ACCC submission 106, p.2.

The Committee recommends removing section 58(2) of the ACL or to raise the bar in the section so that manufacturers will not abuse the opt-out clauses.

(b) How could such a prohibition be designed and communicated to ensure that consumers are aware that voiding terms are now prohibited?

21. Similar to Draft Recommendation 4.2, the Committee suggests that the Federal Government amend Rule 90 of the *Competition and Consumer Regulations*, to require manufacturers' warranties on goods to include text stating that warranty void terms are now prohibited.
22. The Committee submits that the text in these warranties should be worded in plain English so that there is no confusion of interpretation. The prohibition should be printed out at the first paragraph of the warranty with larger font size, so as to distinguish it from other warranty terms.

(c) How could the prohibition be designed to limit manufacturer liability for damage beyond their control? For example, the Magnuson-Moss Warranty Act permits warranty terms that limit manufacturer liability for damage caused by unauthorised repairs or parts, if they can demonstrate third-party fault.

(d) In a similar vein, should terms within end-user license agreements that purport to restrict repair related activities (discouraging third-party repair) also be prohibited?

23. The Committee submits that warranty void terms should be prohibited, except in circumstances where manufacturers could prove that the third-party repair was conducted below a statutory-defined minimum standard.
24. The Committee is aware of the potential safety concerns due to unqualified third-party repair. The Committee suggests that the Federal Government refer to European Union's approach where repairers must be registered or accredited in order to repair certain electronics.[9]
25. The Committee further suggests that the onus of proof should be on manufacturers asserting sub-standard third-party repairs.

[9] Productivity Commission, *Right to Repair* (Draft Report, June 2021) 4, 39.

(e) Is a disclosure as proposed under draft recommendation 4.2 sufficient or is a legislative prohibition required?

26. The Committee notes that draft recommendation 4.2 is sufficient to avoid any misleading or deceptive misrepresentations made by manufacturers and should improve the clarity for manufacturers around how mandatory warranties are to be communicated to consumers with respect to their entitlements to consumer guarantees under the ACL.

27. The Committee further notes that a legislative prohibition may not be particularly useful given that the ACCC tends to rely upon section 18 of the ACL when manufacturers fail to honour the warranty terms. The mere fact that manufactures do not conform to guarantees is not a contravention of ACL; it is not prohibited in a way that section 18 provides misleading or deceptive conduct is prohibited.[10]

Information Request 5.1

Information Request 5.1: Improving Access To Repair Information

28. Draft Finding 5.2 of the Draft Report proposes two main options for amending intellectual property protections to improve access to repair information, including amending the *Copyright Act 1968* (Cth) (**Copyright Act**) to:

- Introduce an exception to copyright infringement for the reproduction and sharing of repair information by way of a "*fair use*" exception or repair-specific "*fair dealing*" exception; and
- Include an exception (e.g. to sections 116AN, 116AO, and 116AP of the Copyright Act) to allow repairers to legally procure tools to access repair information protected by digital locks, such as technological protection measures (**TPMs**) and to clarify the existing exception for the circumvention of digital locks for the purpose of repair.

As a third measure, the Productivity Commission is also considering an amendment to the Copyright Act to:

- Prohibit the use of contract terms that restrict repair-related activities otherwise permitted under the Copyright Act.

29. By way of response to the Productivity Commission's Information Request 5.1, the Committee provides information in respect of each of these three measures below.

[10] John W Carter and Laina Chan, *Contract and the Australian Consumer Law* (Federation Press, 2015) [2-05].

(a) Exception to copyright infringement for the reproduction and sharing of repair information

30. The Committee notes the Productivity Commission's Finding 5.1 that '*[i]n Australia, evidence on the extent to which intellectual property protections restrict repair is patchy and largely anecdotal*'. With that in mind, the Committee submits any amendment to the Copyright Act that erodes the statutory protections afforded to the owners of copyright works (and patents, to the extent discussed in the Draft Report) should be made with the greatest caution.
31. The purpose of copyright law is *'to balance the public interest in promoting the encouragement of "literary", "dramatic", "musical" and "artistic works", as defined, by providing a just reward for the creator, with the public interest in maintaining a robust public domain in which further works are produced'.*[11] Any amendment to the Copyright Act should promote the development future innovation by protecting the interests of both copyright owners and the public alike.
32. In circumstances where the Productivity Commission has been presented with minimal evidence to support the need for a particular amendment (i.e. legitimate repair activities that have not been shown to be substantially inhibited by intellectual property protections), such an amendment is unwarranted.
33. It is worth pointing out that, putting aside the proposal to permit *acts* of repair (by way of an exception to copyright infringement), the proposal in the Draft Report to permit the sharing of repair information would be out of step with both the US and Europe. In those countries, there are no exceptions to copyright infringement for the unauthorised sharing/distribution of copyrighted repair information and the unauthorised distribution of software tools (e.g. restoration disks needed for repairs/to make a device operational again) is similarly prohibited.[12]

Fair Dealing

34. If an exception to copyright infringement is required, then the Committee considers that the Copyright Act should be amended to include a new '*fair dealing'* exception for the purposes of repair rather than a 'fair use' exception to allow the reproduction and sharing of repair manuals.
35. As per Burley J's recent decision in *AGL Energy Limited v Greenpeace Australia Pacific Limited* [2021] FCA 625 (***AGL v Greenpeace***), the fair dealing exception requires that the use of the copyright work

[11] *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14, [71].
[12] Sahra Svensson et al, 'The Emerging 'Right to Repair' legislation in the EU and the U.S.' (Paper presented at Going Green CARE Innovation, 2018), 7.

be both "fair" and for the prescribed purpose of the specific fair dealing exception.[13] The Committee submits that a legislated fair dealing definition including words to the effect: "for the purpose of repair" would be an appropriate amendment.

36. The line of case law considering the fair dealing exceptions will ensure that any dealing with a copyright work for the purpose of repair, and where there is no ulterior motive for the dealing,[14] will not infringe the copyright in the work, so this also protects the copyright owner's interests in the copyright work by:

a) ensuring the objective purpose of the dealing with the copyright work is for repair; and

b) considering the fairness of the dealing, including:[15]

i. Whether there is clear attribution of authorship;

ii. Whether there is an ulterior motive;

iii. The effect of using the copyright work on the potential market for, or value of, the work;

iv. The amount of the copyright work reproduced;

v. The possibility of obtaining the copyright work within a reasonable time and at an ordinary price;

vi. The subjective intentions and motives of the person/entity using the copyright work;

vii. Whether the copyright work has previously been published; and

viii. Whether there was any impropriety in obtaining the copyright work.

37. As noted above, in Australia one of the factors relevant to whether a dealing is "fair" is an assessment of any "ulterior motive" (such as whether the purpose of the dealing was, in actual fact, a commercial exploitation of the copyright work), and the effect of using the copyright work on the potential market for the work.[16] These two factors explain, in part, why many of Greenpeace's dealings with AGL's

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[13] See also, Graeme W Austin, 'Four Questions about the Australian Approach to Fair Dealing Defenses to Copyright Infringement' (2010) 57(3) *Journal of the Copyright Society of the U.S.A.* 611, 617; *Universal Music Publishing Pty Ltd v Palmer (No 2)* [2021] FCA 434, [287]; *Pokémon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541, [69]-[70]; *AGL Energy Limited v Greenpeace Australia Pacific Limited* [2021] FCA 625, [36].
[14] E.g. see *AGL Energy Limited v Greenpeace Australia Pacific Limited* [2021] FCA 625, [36], [75] and [78]; *Pokémon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541, [70].
[15] *AGL Energy Limited v Greenpeace Australia Pacific Limited* [2021] FCA 625, [46]-[51] and [73]-[86] (see also [56]-[57]); *Universal Music Publishing Pty Ltd v Palmer (No 2)* [2021] FCA 434, [301]-[305]; *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2002] FCAFC 146, [97], [98] and [101]; *TCN Channel Nine v Network Ten* [2001] FCA 108, [66].
[16] *AGL Energy Limited v Greenpeace Australia Pacific Limited* [2021] FCA 625, [46]-[51], [56]-[57] and [73]-[86]; *Universal Music Publishing Pty Ltd v Palmer (No 2)* [2021] FCA 434, [301]-[305]; *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2002] FCAFC 146, [97], [98] and [101]; *TCN Channel Nine v Network Ten* [2001] FCA 108, [66].

copyright work in *AGL v Greenpeace* were found to be "fair", yet the dealings in other cases were found to infringe.[17]

38. On this basis, individual consumers that repair a product are likely to be able to rely on a fair dealing exception for the purpose of repair. The nature of their dealing with a copyright work is unlikely to be for competitive or commercial exploitation and thus is more likely to be considered "fair".[18]

39. For commercial repairers, the dealing is less likely to be considered "fair" depending on the circumstances of the dealing (including the factors set out above). This is far from an absolute rule, it has been noted that while some courts in the US are hesitant to find fair use in a commercial context, market monopoly is a factor that can outweigh a presumption against fair use in a commercial context,[19] assuming the alleged infringer does not supplant the original equipment manufacturers' (**OEM's**) position in the market.[20]

40. Issues of the right to repair have not arisen to any significant degree in Australian copyright decisions. However, in circumstances where an OEM or other copyright owner has the potential to create a monopoly by restricting competition, a judicial consideration of whether a repairer's dealing with a copyright work is "fair" (for the purposes of a fair dealing exception for repair) would likely take any such monopoly into account. This might occur through factors such as the effect of the dealing on the potential market for the work and the possibility of obtaining the copyright work within a reasonable time and at an ordinary price.

41. The main uncertainty that will arise from a fair dealing exception for the purposes of repair lies in what constitutes "repair". To this end, the High Court's decision in *Calidad Pty Ltd v Seiko Epson Corporation* [2020] HCA 41 (***Calidad***), regarding the doctrine of exhaustion as it applies to patent law in Australia, provides some guidance. However, as the Productivity Commission notes at Box 5.7, '*[s]ome uncertainty remains as to where exactly the boundary lies, particularly in different factual circumstances (such as the dismantling for repair of a simple (non-complex) product'.*

42. Further, the definition of "repair" pursuant to *Calidad* is specific to repair in the context of a patented invention. The line between infringement and non-infringement depends on whether or not a new product is made in such a way as to infringe the patentee's exclusive rights to manufacture the invention.

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[17] For example, see *TCN Channel Nine v Network Ten* [2001] FCA 108, [70]; and *Universal Music Publishing Pty Ltd v Palmer (No 2)* [2021] FCA 434, [300].
[18] In relation to the US context, see Daniel Cadia, 'Fix Me: Copyright, Antitrust, and the Restriction on Independent Repairs' (2019) 52(3) *U.C. Davis Law Review* 1701, 1730; and *Sony Corp. of Am. v Universal City Studios Inc.* (1984) 464 US 417, 421-23, 445-446, 456.
[19] *Sega Enterprises Ltd v Accolade Inc* 977 F 2d 1510 (9th Cir, 1992)
[20] Daniel Cadia, 'Fix Me: Copyright, Antitrust, and the Restriction on Independent Repairs' (2019) 52(3) *U.C. Davis Law Review* 1701, 1721 and 1729-30.

43. The High Court stated that modifications will amount to "making" a new product if those modification are to parts of the invention '*as claimed in the Patent'*, requiring a detailed comparison of the modifications with the features of the claims.[21] It is not apparent how this approach would apply to repair of a copyright work, or using a copyright work for the purpose of repair, when considering a fair dealing exception for the purpose of "repair".

44. While future cases will clarify the law over time, certainty is desirable in any legislative amendment. As such, any amendment to the Copyright Act that does not define "repair" will continue to present the same issues for repairers who cannot be certain whether their activities are subject to the exception and who do not have the resources to challenge a copyright owner in court. Conversely, if "repair" is defined too narrowly, many repair-related activities may be accidentally omitted or the definition may not keep up with changing technology.

45. The Federal *Copyright Act 1976* (17 U.S.C. §§ 101-810) in the US, specifically sub-section 117(d), defines "repair" of a machine as *'the restoring of the machine to the state of working in accordance with its original specifications and any changes to those specifications authorized for that machine'*. The same Act separately defines "maintenance" of a machine as '*the servicing of the machine in order to make it work in accordance with its original specifications and any changes to those specifications authorized for that machine'*.[22]

46. The Productivity Commission should consider any distinctions that may be drawn between "repair" and "maintenance" in Australia and whether only "repair", or both "repair" and "maintenance", are to be included in the exceptions contemplated.

47. In terms of repair activities carried out in relation to software, while both the US and Europe permit repair, the exceptions do not apply in all cases. In Europe at least, the exception can be set aside or limited by contract law (see section 3 below for further discussion on this issue).[23]

Exceptions to allow the circumvention, and procurement of tools for circumvention, of digital locks for the purpose of repair

49. The Draft Report notes, at page 174, that no submissions were received from repairers indicating that current copyright laws presently act as a barrier to completing software repairs. Without evidence that

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[21] *Calidad Pty Ltd v Seiko Epson Corporation* [2020] HCA 41.
[22] Brian T Yeh, *Repair, Modification, or Resale of Software-Enabled Consumer Electronic Devices: Copyright Law Issues* (CRS Report, 11 August 2016), 4.
[23] Sahra Svensson et al, 'The Emerging 'Right to Repair' legislation in the EU and the U.S.' (Paper presented at Going Green CARE Innovation, 2018), 6.

any issue is presented by the current protections for digital locks, the Committee considers that no exception should be added to the Copyright Act.

50. Digital locks, including Digital Rights Management (**DRM**) and TPMs, are generally intended to prevent piracy of copyrighted software. Allowing legal circumvention of digital locks may lead to the misuse of intellectual property rights and trade secrets, including through reverse engineering on a device. Moreover, the potential compromise of safety, efficacy and privacy, particularly in terms of medical devices and medical software, is significant.

51. In both the US and Europe, anti-circumvention provisions have been introduced [reference]. Procurement of tools to break digital locks are prohibited (in the US, this is even if such tools are used for permissible repairs).[24] Moreover, the unauthorised distribution of software tools (e.g. restoration disks needed for repairs/to make a device operational again) are prohibited.[25]

52. If an exception were to be included in the Copyright Act allowing circumvention of digital locks, the Productivity Commission should consider the form of that exception. The fair dealing exceptions, discussed in section 1 above, include an aspect of "fairness", requiring that the dealing with the copyright work be "fair" and it is submitted that this provides some guidance.

53. While circumvention of TPMs (or manufacturing or providing a circumvention device) is prohibited under the Copyright Act,[26] it is not an infringement of copyright. As a result, the fair dealing exceptions do not apply. Any exception to the prohibitions on the circumvention of TPMs should not act as a blanket exception for the purpose of repair, but should also include consideration of whether or not the circumvention (or manufacture/provision of a device for circumvention) is "fair".

54. In the US, even though the statutory prohibition on the circumvention of digital locks is not absolute, regulations are issued every three years. This provides temporary exceptions that give '*consumers the right to disable digital locks that control access to specific "classes" of copyrighted materials'* during a three year period, following a lengthy rulemaking proceeding through which members of the public make submissions on the classes to be included.[27]

55. The Committee submits the US system of temporary exceptions provides appropriate checks and balances on the circumvention of digital locks, while also allowing the exceptions to adapt to changing technologies and the needs of the public. The three year period for each class of goods, subject to the

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[24] Sahra Svensson et al, 'The Emerging 'Right to Repair' legislation in the EU and the U.S.' (Paper presented at Going Green CARE Innovation, 2018), 7, citing Estelle Derclaye, *Repair and Recycle between IP Rights, End User License Agreements and Encryption* (Kluwer Law International, 1st ed, 2009) ch 2.
[25] Sahra Svensson et al, 'The Emerging 'Right to Repair' legislation in the EU and the U.S.' (Paper presented at Going Green CARE Innovation, 2018), 7.
[26] Copyright Act 1968 (Cth), ss 116AN, 116AO, 116AP, 116AQ.
[27] Brian T Yeh, *Repair, Modification, or Resale of Software-Enabled Consumer Electronic Devices: Copyright Law Issues* (CRS Report, 11 August 2016), 9.

exception, also allows re-evaluation of the effects of the exception applying to each specific class. Where significant issues of safety, efficacy, privacy or copyright infringement arise, those issues can be presented to the regulator as part of consideration of whether that class continue to be subject to the exception in future.

56. The Committee considers that a broad exception for the circumvention of digital locks would not be appropriate without some checks and balances. This is particularly so in industries or for classes of goods, where the circumvention of digital locks may lead to safety issues, data breaches or substantial negative impacts on copyright owners (e.g. damage to reputation as a result of issues with copyrighted products that have been improperly repaired, or acts of copyright infringement, such as pirated software).

57. If the Productivity Commission considers that an exception is required, the Committee suggests that it should be in a similar form to the fair dealing exceptions, thereby importing the "fairness" requirements of the fair dealing exceptions. Alternatively, any fair dealing exception for the purpose of repair added to the Copyright Act (as discussed in section 1 above) explicitly include an exception to sections 116AN, 116AO and 116AP of the Copyright Act, as well as the exception to copyright infringement.

58. In response to Box 5.5 on page 167 of the Draft Report, the Committee agrees that the current exception under regulation 40(d) of the *Copyright Regulations 2017* (Cth) is unclear. The Committee recommends that this exception be clarified so that it is apparent whether or not the exception applies only if the TPM is malfunctioning (by interfering with, or damaging, the host product).

59. The Committee further notes that the exception is likely to be applied more broadly in circumstances where the TPM is not required to first be malfunctioning. Accordingly, the exception should expressly include a requirement that the circumvention of the TPM must be *necessary* for the diagnosis, repair or maintenance to be conducted, and the circumvention should be "fair" as already outlined.

Prohibition of contractual arrangements restricting repair-related activities

60. In response to Information Request 5.1 of the Draft Report, the Committee agrees with the Productivity Commission that contractual arrangements, particularly licensing arrangements, may impede the efficacy of an exception to copyright infringement for the purpose of repair. However, in circumstances where there is no issue under competition law (e.g. the copyright owner does not have a monopoly or is not substantially restricting competition) or consumer law (e.g. there is no significant power imbalance between the copyright owner and licensor/purchaser when negotiating terms), copyright owners and those with whom they contract should be entitled to agree their own contractual arrangements.

61. As noted on pages 156 to 157 of the Draft Report, supplying products (particularly software) pursuant to a license, rather than by sale of the product, is one means by which an exception to copyright infringement for the purpose of repair may be circumvented.

62. Software companies tend to structure transactions with consumers as a license, rather than as an outright sale, providing the end user with a limited license to use the software - an end user license agreement (**EULA**).[28] The terms of EULAs typically restrict copying, usage (e.g. using the software on hardware devices that are not produced or authorised by the company), further distribution (e.g. reselling or donating to others), modifications, legal remedies and other activities with respect to the copyrighted software.[29]

63. US Courts have upheld the enforceability of "shrinkwrap licenses" and "click-through licenses".[30] Fair contractual arrangements are ensured by the requirement that, to enforce a EULA, a software developer must provide a meaningful opportunity for review of the terms of the EULA and a meaningful way for the customer to indicate consent to those terms.[31]

64. Frequently, EULAs are utilised to avoid the effects of the "first sale doctrine" under US copyright law, as noted above. In the US, where an equivalent to the doctrine of exhaustion applies to copyright law, known as the "first sale doctrine", a copyright owner's rights are only limited in terms of their distribution rights.

65. Owners of lawful copies of a copyright work may distribute that work without obtaining prior consent, but cannot reproduce or publicly perform the work without infringing copyright in the work (subject to statutory exceptions/doctrine of fair use).[32] However, the doctrine does not apply if the copyright owner merely licenses a copy of the work to a consumer without passing legal title through an outright sale.[33]

66. The Committee notes the Productivity Commission's reference to the possibility that the doctrine of exhaustion may be imported into Australian copyright law through the common law, similar to the doctrine's recent adoption of the doctrine into Australian patent law in the High Court's decision in *Calidad*.

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[28] Brian T Yeh, *Repair, Modification, or Resale of Software-Enabled Consumer Electronic Devices: Copyright Law Issues* (CRS Report, 11 August 2016), 5.
[29] Brian T Yeh, *Repair, Modification, or Resale of Software-Enabled Consumer Electronic Devices: Copyright Law Issues* (CRS Report, 11 August 2016), 5, 7, 13.
[30] Brian T Yeh, *Repair, Modification, or Resale of Software-Enabled Consumer Electronic Devices: Copyright Law Issues* (CRS Report, 11 August 2016), 5 and 13, citing *ProCD Inc. v Matthew Zeidenberg and Silken Mountain Web Services Inc* 86 F 3d 1447, 1449 (Ill 7th Cir. 1996) and *Berkson v Gogo LLC* 97 F Supp 3d 359, 397 (E.D.N.Y., 2015).
[31] R. W. Gomulkiewicz, 'Is the License Still the Product?' (2018) 60 *Arizona Law Review* 425, 462.
[32] Brian T Yeh, *Repair, Modification, or Resale of Software-Enabled Consumer Electronic Devices: Copyright Law Issues* (CRS Report, 11 August 2016), 7.
[33] Brian T Yeh, *Repair, Modification, or Resale of Software-Enabled Consumer Electronic Devices: Copyright Law Issues* (CRS Report, 11 August 2016), 7 and 12, citing Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* (Matthew Bender, 2010) 8.12[B][1][a]. See also *Vernor v. Autodesk, Inc.* 621 F.3d 1102 (9th Cir. 2010).

67. However, in *Calidad* the High Court accepted that a patentee's rights with respect to a particular product are exhausted '*once that product is sold* ***without conditions as to use***'[34] (emphasis added). Much like the use of licences in the US, it appears as if contractual arrangements will allow intellectual property rights owners in Australia to avoid application of the doctrine of exhaustion pursuant to the principle of freedom of contract.

68. Moreover, while the "first sale doctrine" exists in the US, it is subject to several statutory exceptions to protect copyright owners in specific circumstances.[35] If certain contractual arrangements were prohibited or if the doctrine of exhaustion were to be included in Australia copyright law (by way of legislative amendment or common law), consideration should be given to what exceptions would need to apply. In the US, particular exceptions were '*prompted by concern that commercial lending could encourage unauthorized copying and displace sales, thereby diminishing the incentive for creation of new sound recordings*' and software programs.[36]

69. The Committee does not believe the Copyright Act should be amended to prohibit contractual arrangements, particularly licensing arrangements, from restricting repair-related activities that would otherwise be permitted under proposed amendments to copyright law. It has been said that such a prohibition '*potentially imperils the business models on which software developers rely to create innovative products and to bring those products to market in a variety of useful ways'.*[37]

70. Allowing licensing arrangements to continue unimpeded, including "software as a service", enables business model innovation, such as experimentation in the software industry of providing different mixes of goods and services.[38] In an information economy, where licenses are the predominant transaction model, '[*t]he software industry relies on licenses to develop innovative products and bring them to market in a variety of creative ways'.*[39]

71. The Committee considers that, in Australia, a combination of competition law and consumer law are the most appropriate mechanisms to safeguard the public interest and ensure fair contractual arrangements in respect of the right to repair.

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[34] *Calidad Pty Ltd v Seiko Epson Corporation* [2020] HCA 41, paragraph 9.
[35] For example, see *The Record Rental Amendment Act of 1984* 17 USC §109(b)(1)(A) (1984), and *The Computer Software Rental Amendments Act of 1990* 17 USC §109(b)(1)(A) (1990).
[36] US Copyright Office, *The Computer Software Rental Amendments Act of 1990: The non-profit library lending exemption to the "rental right"* (Report on Computer Software Rental Act, 1994) iii. Brian T Yeh, *Repair, Modification, or Resale of Software-Enabled Consumer Electronic Devices: Copyright Law Issues* (CRS Report, 11 August 2016), 8.
[37] R. W. Gomulkiewicz, 'Is the License Still the Product?' (2018) 60 *Arizona Law Review* 425, 425.
[38] R. W. Gomulkiewicz, 'Is the License Still the Product?' (2018) 60 *Arizona Law Review* 425, 463-464.
[39] R. W. Gomulkiewicz, 'Is the License Still the Product?' (2018) 60 *Arizona Law Review* 425, 464.

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Concluding Comments

NSW Young Lawyers and the CET Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions, please contact the undersigned at your convenience.

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