

## **Right to Repair:**

### **A jurisprudential analysis of Property Rights in the Digital Age**

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#### **ABSTRACT**

The legal concept of "Ownership" has been defined by notable jurists such as Salmond and Hohfield, theorizing that "ownership" contains within its ambit a bundle of rights. This is true for both tangible and intangible property rights, granting owners the right to enjoy, modify, sell, and lease their property as they please. Therefore, the ability to modify and repair goods is inherent in the jurisprudential concept of ownership. However, with the emergence of stringent protection of Intellectual Property Rights (IPR) and the changing nature of commodities, a conflict between the rights associated with ownership of tangible property and those associated with intangible property has been revealed. This has ignited a debate where consumers' interest in the right to repair is pitted against the manufacturers' desire for protection of IPR. While acknowledging that the right to repair protects the property rights of consumers, it also encroaches upon manufacturers' exclusive IPR. Achieving a delicate balance between these divergent property rights is essential. Policies must reconcile consumer and manufacturer interests while promoting innovation and sustainability. Resolving this conflict requires nuanced approaches to safeguarding property rights, specifically in the sphere of electronic devices. Thus, a jurisprudential analysis of property rights must be conducted to establish better-suited legislations.

**Keywords:** *Right to Repair, Property Rights, Planned Obsolescence*

## INTRODUCTION

Salmond described ownership over property in the following manner:-

*“Ownership denotes the relation between a person and object forming the subject-matter of his ownership. It consists in a complex of rights, all of which are rights in rem being good against all the world and not merely against specified persons. Though in certain situation some of these rights may be absent, the normal cases of ownership can be expected to exhibit the following incidents.”*<sup>1</sup>

Hohfield further expanded on this concept and analysed property rights ultimately concluding that *property rights are essentially a “bundle of rights”*. This theory contends that property is made up of five different rights: right of possession, right of control, right of exclusion, right of enjoyment and right of disposition.<sup>2</sup>

Property as a bundle of rights was precedentially recognised in India by para 28 of the judgement delivered by the Hon’ble Supreme Court of India in the case of *Guru Datta Sharma v. State of Bihar*<sup>3</sup> wherein the constitution bench analysed the House of Lords decision in *Belfast*<sup>4</sup> and stated that property comprises of a bundle of rights. The bench went on to establish that this bundle of rights doctrine is also applicable to intellectual property rights (IPR).

This equal application of the bundle of rights doctrine to both intellectual and tangible property creates an absurd situation where protecting one type of property rights necessitates diluting the other. This is highlighted in numerous industries, for example, in the auto-mobile industry where to protect their IPR the manufacturers refuse to share parts of the automobile with repair shops, hence, denying the buyers the opportunity to repair the auto-mobile themselves or get it repaired through a third-party repair shop.

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<sup>1</sup> Salmond on Jurisprudence by P J Fitzgerald Edition: 12th Edition 1966, South Asian Edition, 2022

<sup>2</sup> Douglas, S. and McFarlane, B. (no date) ‘Chapter 10:Defining Property Rights’, in Philosophical Foundations of Property Law Philosophical Foundations of Property Law. 2013th edn, pp. 219–223.

<sup>3</sup> (1962) 2 SCR 292

<sup>4</sup> Belfast Corporation Appellants; And O. D. Cars Ltd. Respondents., [1960] A.C. 490

Similarly, electronic device manufactures claim IPR over the operating system (OS), additional softwares, the device hardware components and the manufacturing process. Recently, they have adopted the methodology of creating products that seamlessly integrate IPR protected software and hardware components. This integration is engineered to restrict consumers' ability to modify, upgrade, or repair their devices. This practice is often justified under the guise of fostering innovation and safeguarding IPR. This is why the issue of right to repair raises quintessential questions regarding the very nature of property rights. Since, safeguarding the right to repair protects the property rights of the consumers it also encroaches upon manufacturers' exclusive IPR.

## **CONCLUSION**

In conclusion, the analysis of property rights in the digital age, particularly through the lens of the Right to Repair movement, underscores a conflict between tangible property rights and IPR. While the legal framework has historically recognized property as a bundle of rights, including the right to repair, the advent of stringent IPR protection and planned obsolescence strategies has disrupted this balance. As consumers advocate for their right to repair, manufacturers uphold their exclusive IPR, creating a complex legal landscape.

The jurisprudential analysis underscores the need for a nuanced approach in crafting legislation that navigates the complexities of property rights in the digital age. By fostering dialogue and collaboration between stakeholders, policymakers can work towards solutions that uphold both tangible and IPR. Ultimately, harmoniously constructing and interpreting these divergent rights while keeping consumer interest in mind is essential to address the challenges posed by the Right to Repair movement and ensure a fair and equitable legal framework for all parties involved.

## RIGHT TO REPAIR: A HISTORICAL PERSPECTIVE

Evidence of humans repairing their property can be traced back to as early as human civilisation itself. Historical evidence of repairs can be found as far back as the anthropological age. Anthropological evidence dates back a million years and demonstrates that even the simplest tools were reshaped and repaired by our Palaeolithic ancestors. These include hand-made axes, pointed stones among others.<sup>5</sup>

Approximately, 300,000 years ago, anthropological evidence shows that as composite tools such as spears, with wooden handles came into being they gained popularity amongst the early humans owing to the ease of replacing the parts of these tools or getting them repaired. Moreover, by the very design these tools lasted longer and were able to withstand more than the pre-existing stone tools.<sup>6</sup> Moreover, vessels dating back about 20,000 years also reveal that Neolithic humans had developed techniques to repair vessels made when pottery became a recognised skill.<sup>7</sup>

Many traditional techniques of repair have thus, been culturally recognised through concepts such as *tikkun olam* which in Hebrew translates to “repair of the world” and the Japanese zen practice of “*wabi-sabi*” which emphasises the need for repair and sustainability as well as the philosophy of “re-weaving the basket of life”.<sup>8</sup>

In India the focus on repairing and trying to make devices last as long as possible is colloquially referred to as “*Jugaad*”.<sup>9</sup> Thus, it is natural to arrive at a conclusion that the concept of repair has been traditionally engrained and historically practiced across the globe. It is only the advent

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<sup>5</sup> Ron Shimelmitz, Michael Bisson, Mina Weinstein-Evron & Steven L. Kuhn, Handaxe Manufacture and Re-Sharpening throughout the Lower Paleolithic Sequence of Tabun Cave, *Quaternary International* (2017) [P. 117, 428].

<sup>6</sup> Paola Villa, Paolo Boscato, Filomena Ranaldo & Annamaria Ronchitelli, Stone Tools for the Hunt: Points with Impact Scars from a Middle Paleolithic Site in Southern Italy, *Journal of Archaeological Science* (2009) [P. 850]

<sup>7</sup> Sindya N. Bhanoo, Oldest Known Pottery Found in China, *New York Times* (June 28, 2012), [www.nytimes.com/2012/07/03/science/oldest-known-pottery-found-in-china.html](http://www.nytimes.com/2012/07/03/science/oldest-known-pottery-found-in-china.html) [Accessed 09 February 2024].

<sup>8</sup> Wackman, John., Knight, Elizabeth. *Repair Revolution: How Fixers Are Transforming Our Throwaway Culture*. United States: New World Library, 2020. Available at: [https://books.google.co.in/books?hl=en&lr=&id=HNP9DwAAQBAJ&oi=fnd&pg=PP1&dq=wabi+sabi+%22right+to+repair%22&ots=IMzlfzAtg2&sig=25f2him24aEvqvoQzyre2xV3tFE&redir\\_esc=y#v=onepage&q=wabi%20sabi%20%22right%20to%20repair%22&f=false](https://books.google.co.in/books?hl=en&lr=&id=HNP9DwAAQBAJ&oi=fnd&pg=PP1&dq=wabi+sabi+%22right+to+repair%22&ots=IMzlfzAtg2&sig=25f2him24aEvqvoQzyre2xV3tFE&redir_esc=y#v=onepage&q=wabi%20sabi%20%22right%20to%20repair%22&f=false) [Accessed:10 February 2024]

<sup>9</sup> Singh, J., Arora, C. (2021). Upcycling, Jugaad and Repair Cafes for Prosumption. In: Sung, K., Singh, J., Bridgens, B. (eds) *State-of-the-Art Upcycling Research and Practice*. Lecture Notes in Production Engineering. Springer, Cham. [https://doi.org/10.1007/978-3-030-72640-9\\_9](https://doi.org/10.1007/978-3-030-72640-9_9)

of late-stage capitalism and with-it rapid consumerism that has made repairing obsolete leading to shorter product life and decreased sustainability<sup>10</sup>.

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<sup>10</sup> J. Ron Stanfield & Jacqueline B. Stanfield (1980) Consumption in Contemporary Capitalism: The Backward Art of Living, *Journal of Economic Issues*, 14:2, 437-451, DOI: 10.1080/00213624.1980.11503755

## **IPR, PLANNED OBSOLESCE AND THE RIGHT TO REPAIR**

What is perhaps worse is that this decline in repairs did not occur naturally. It was categorically designed to emerge out of abuse of IPR combined with planned obsolescence. Thus, the perplexing conundrum highlighted by the right to repair movement can be understood through the example of electronic devices such as laptops, mobile phones, smart-watches etc which excellently capture this conflicting position of law. This may be better understood by critically analysing the terms of use set out by the leading big tech software manufacturers like Microsoft and Apple.

In the case of Microsoft, if a user purchases a laptop which uses the Windows Operating System (OS), upon purchase the device itself may be owned by the consumer who has purchased the same, however, the Windows OS running on the device is only licensed for use. Thus, purchase of the device doesn't provide the consumer all the "bundle of rights" associated with ownership of property.

This is clearly spelt out in the terms of use pertaining to the Windows OS made available by Microsoft which vide point 2(c) explicitly restrict the "licensee" of the Windows OS from engaging or using or virtualizing the features of the software separately, publishing, copying (other than as permitted), renting, leasing, or lending the software; transferring the software (except as permitted); working around any technical restrictions or limitations in the software; using the software as server software, for commercial hosting, making the software available for simultaneous use by multiple users over a network among many other such restrictions.<sup>11</sup>

Another industry leader, Apple is also known for its stringent licensing policies. Apple's terms of use go a step further and make the terms of use more stringent and also aim to regulate the use of the hardware<sup>12</sup>. These restrictions directly counter the association of property rights with the bundle of rights theory. This is justified by the creators of the software by claiming

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<sup>11</sup> Microsoft (2018) MICROSOFT SOFTWARE LICENSE TERMS WINDOWS OPERATING SYSTEM, Microsoft. Available at: [www.microsoft.com/en-us/Useterms/Retail/Windows/10/UseTerms\\_Retail\\_Windows\\_10\\_English.htm](http://www.microsoft.com/en-us/Useterms/Retail/Windows/10/UseTerms_Retail_Windows_10_English.htm) (Accessed: 10 February 2024).

<sup>12</sup> Apple (no date) *APPLE INC. SOFTWARE LICENSE AGREEMENT FOR macOS Sonoma*. Available at: <https://www.apple.com/legal/sla/docs/macOSSonoma.pdf> (Accessed: 09 February 2024).

that they are merely protecting their IPR over the software and that the user's only purchase a "licence to use" the software which does not grant them ownership in any manner.<sup>13 14</sup>

The concept of a "licence to use" thus, emerges as a very crucial aspect to understand and garner a better insight into this conflict. The difference between "licence to use" and ownership can best be inferred from the judgement delivered by the Hon'ble Supreme Court of India, in the case of *CST v. Quick Heal Technologies Ltd*,<sup>15</sup> the Apex Court in para 54 of their judgement clearly enunciated the same. In relevant portion it reads as follows:

*"54.1. It (licensing) is not the transfer of the property in goods, but it is the right to use the property in goods.*

*54.3. In the transaction for the transfer of the right to use goods, delivery of the goods is not a condition precedent, but the delivery of goods may be one of the elements of the transaction.*

*54.4. The effective or general control does not mean always physical control and, even if the manner, method, modalities and the time of the use of goods is decided by the lessee or the customer, it would be under the effective or general control over the goods.*

*54.5. The approvals, concessions, licences and permits in relation to goods would also be available to the user of goods, even if such licences or permits are in the name of owner (transferor) of the goods.*

*54.6. During the period of contract exclusive right to use goods along with permits, licences, etc. vests in the lessee."*

Moreover, another aspect of this conflict is the nature of modern-day consumerism. The history of decline in the practice of repairing reveals a trend of planned obsolescence.

This can be directly traced to an experiment undertaken by General Motors. In 1924, the automobile market reached its saturation point in Europe, thus, sales stagnated and corporate profits in the automobile industry declined. This led to General Motors' executive Alfred P.

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<sup>13</sup> Apple (no date) APPLE INC. SOFTWARE LICENSE AGREEMENT FOR macOS Sonoma. Available at: <https://www.apple.com/legal/sla/docs/macOSSonoma.pdf> (Accessed: 09 February 2024).

<sup>14</sup> Microsoft (2018) MICROSOFT SOFTWARE LICENSE TERMS WINDOWS OPERATING SYSTEM, Microsoft. Available at: [www.microsoft.com/en-us/UseTerms/Retail/Windows/10/UseTerms\\_Retail\\_Windows\\_10\\_English.htm](http://www.microsoft.com/en-us/UseTerms/Retail/Windows/10/UseTerms_Retail_Windows_10_English.htm) (Accessed: 10 February 2024).

<sup>15</sup> (2023) 5 SCC 469

Sloan Jr. to devise an annual plan where each year a new model would be created with minor changes to convince car owners to buy new replacements each year.<sup>16</sup> This led to a substantial increase in their car sales over time.

Another such significant experiment came before Sloan's idea, this was the 1880s experiment conducted by Yankee watches<sup>17</sup> in the 1880s, when watch production was gaining momentum. During that period a company called Waterbury produced cheap but reliable pocket watches, these watches could be easily taken apart and reassembled.

Another watch company - Ingersoll was intrigued by this and introduced a watch called the Yankee which they sold for a significantly lower price than Waterbury watches and the watches of all other competitors. In addition to almost a ten times difference in watch pricing Ingersoll offered free repairs if a Yankee watch was mailed in it'd be repaired and made fully functional in a few weeks. However, interestingly, people realised that they'd be better off buying a new watch which was already cheaper than the rest than waiting for the old one to be repaired. This resulted in only about three percent of Yankee watches ever being brought in for repairs and a significant profit for the company.<sup>18</sup>

This led to numerous other companies like *Coca-Cola* and *Gillette* also replacing repairable and sustainable products like reusable bottle caps and razors to single use disposable products.<sup>19</sup> This practice has now been adopted by most if not all automobile sellers as well as electronic device manufacturers as revealed by a study conducted by Global Information Society Watch in 2010<sup>20</sup>.

Observing the instances of planned obsolescence and abuse of IPR a Right to Repair movement has gained momentum. This movement was first legally recognised in the USA by a 2012 Massachusetts law<sup>21</sup> developed to regulate the automobile sector. A similar bill has been

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<sup>16</sup> "Annual model change was the result of affluence, technology, advertising". Automotive News. September 14, 2008.

<sup>17</sup> Lucsko, David N. The Business History Review 82, no. 2 (2008): 410–12. <http://www.jstor.org/stable/40539014> [ Accessed: 09 February 2024]

<sup>18</sup> *Ibid*

<sup>19</sup> *Ibid*.

<sup>20</sup> Association for Progressive communications (APC)& Humanist institute for cooperation with developing countries (Hivos) Global Information Society Watch 2010 Focus on ICTs and environmental sustainability. Available at [https://www.apc.org/sites/default/files/gisw2010\\_en.pdf](https://www.apc.org/sites/default/files/gisw2010_en.pdf) [ Accessed: 09 February 2023]

<sup>21</sup> HOUSE . . . . . No. 4362 The Commonwealth of Massachusetts An Act protecting motor vehicle owners and small businesses in repairing motor vehicles FILED ON: 7/31/2012



pending at the federal level since 2001<sup>22</sup> as well as an exception to Copyright law to allow farmers to repair and modify the software of their tractors.<sup>23</sup>

The European Union has also adopted a few legislations regarding the Right to repair and many more are under deliberation before the parliament<sup>24</sup>. The European Commission has announced the establishment of a 'right to repair', the right to repair after the legal guarantee has expired, and the right for consumers to repair products themselves.<sup>25</sup> Currently, EU contract laws give consumers a right to have faulty products repaired during the legal guarantee, while the new generation of ecodesign rules require the availability of spare parts for a certain time, at least for some products. Repair-related requirements are also present in the rules on the EU Ecolabel.<sup>26</sup> The European Parliament has been in favour of improving consumers' right to repair for over a decade, and has taken up concrete proposals to make repairs systematic, cost-efficient and attractive.<sup>27</sup> While these aim to strengthen tangible property rights providing consumers with more autonomy to engage with their devices at the same time it also worsens the position of IPR forcing manufacturers to loosen their intangible rights to control their intellectual property.

Beyond the United States and the European Union, the right to repair movement has gained momentum on a global scale. Countries such as Australia, Canada, and Japan are also considering legislative measures to address the challenges posed by planned obsolescence and restrictive IPR practices<sup>28</sup>. In Australia, for example, the Productivity Commission has called for reforms to empower consumers with greater repair options and promote environmental sustainability<sup>29</sup>.

<sup>22</sup> S.2617 — 107th Congress (2001-2002) Motor Vehicle Owners' Right to Repair Act of 2001

<sup>23</sup> "Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies" (PDF). *govinfo.gov*. October 28, 2021. pp. 11–15 available at: <https://www.govinfo.gov/content/pkg/FR-2021-10-28/pdf/2021-23311.pdf> [Accessed 09 February 2024]

<sup>24</sup> **Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees** *Official Journal L 171*, 07/07/1999 P. 0012 – 0016 available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31999L0044> [Accessed 09 February 2024]

<sup>25</sup> European Parliament Briefing on The Right to Repair available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/698869/EPRS\\_BRI\(2022\)698869\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/698869/EPRS_BRI(2022)698869_EN.pdf) ; [Accessed 09 February 2024]

<sup>26</sup> *Ibid*

<sup>27</sup> *Ibid*

<sup>28</sup> Pihlajarinne, Taina, European Steps to the Right to Repair: Towards a Comprehensive Approach to a Sustainable Lifespan of Products and Materials? (October 9, 2020). University of Oslo Faculty of Law Research Paper No. 2020-32, Available at SSRN: <https://ssrn.com/abstract=3708221>

<sup>29</sup> Rimmer, Matthew, Shane Rattenbury, the Productivity Commission, and the Right to Repair: Intellectual Property, Consumer Rights, and Sustainable Development in Australia (June 20, 2023). *Berkeley Technology Law Journal*, 2022/ 2023, 37 (3), 989-1056., Available at SSRN: <https://ssrn.com/abstract=4213963>

Therefore, it is evident that the right to repair movement has revealed a striking conflict in the very nature of property rights and as various jurisdictions aim to resolve this conflict by creating new laws to strengthen the tangible right to property of the consumers, doing so consequently worsens the intangible property rights that vest with the manufacturers. Thus, the ultimate answer to a right to repair policy lies with creating a balance between these two divergent property rights.

## **CONCLUSION**

In conclusion, the analysis of property rights in the digital age, particularly through the lens of the Right to Repair movement, underscores a conflict between tangible property rights and IPR. While the legal framework has historically recognized property as a bundle of rights, including the right to repair, the advent of stringent IPR protection and planned obsolescence strategies has disrupted this balance. As consumers advocate for their right to repair, manufacturers uphold their exclusive IPR, creating a complex legal landscape. The jurisprudential analysis underscores the need for a nuanced approach in crafting legislation that navigates the complexities of property rights in the digital age. By fostering dialogue and collaboration between stakeholders, policymakers can work towards solutions that uphold both tangible and IPR. Ultimately, harmoniously constructing and interpreting these divergent rights while keeping consumer interest in mind is essential to address the challenges posed by the Right to Repair movement and ensure a fair and equitable legal framework for all parties involved.