Kluwer Copyright Blog

Repairing products and EU IP law: A forthcoming copyright development?

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The ongoing public discourse on Sustainability – meant here not in its plain-language meaning but rather in its evolving definition in law- and policy-making (see e.g. Verschuuen) – pivots, to a significant extent, on the need to promote better models of consumption and production. This need to optimize the exploitation of natural resources and reduce waste finds an important ally in the so-called repair culture. The EU has moved important steps forward in fostering the repair of products as part of its Green Deal and Circular Economy Action Plan. It did so mainly by intervening in its consumer protection legal framework, with the aim to oblige some manufacturers to repair their products as well as to ensure a fair EU market for independent spare parts and repair service providers (see the 2024 EU Repair Directive).

The intention to foster a culture of repair has also permeated the EU IP legal framework. The recent EU Design Law reform package is a glaring example, as it introduced the so-called repair clause, taking the cue from the famous CJEU ruling in *Acacia* and fully harmonizing the legal defence of repair for spare parts manufacturers (see Article 20a EU Design Regulation and Article 19 EU Design Directive).

What the EU Design reform performed is an utterly necessary legislative finetuning. In fact, Article 5(6) Repair Directive prohibits manufacturers from impeding the repair of their products by way of software or hardware techniques, contractual clauses, or opposing the use of spare parts. Nevertheless, this provision applies with no prejudice to the protection of IP rights. This might seem to suggest that the EU legislator leaves open the possibility of IP legal protection to serve as a lawful ground to impede repairability.

The possible interpretations on this point are two: either the EU legislator underestimates the

potential of IP legal protection in blocking repair activities, or the Repair Directive relies on the ability of the EU IP legal framework to make itself compatible with the EU Circular Economy goals, thus avoiding contradicting legislation. The newly harmonized repair clause in EU Design Law supports this latter approach. By clarifying the conditions under which spare parts manufacturers do not infringe design rights, it creates systematic cohesiveness with the obligation in Article 5(6) EU Repair Directive. EU copyright law did not perform any specific finetuning with the rise of the repair culture, despite its relevance being significant. Suffice it to think of instruction manuals, original and customized spare parts, and software components as classic examples of subject matter that can easily qualify for copyright protection. Moreover, the open question of the copyrightability of product design further strengthens the need to take copyright protection into account (see, among others, *Cofemel*, *Brompton*, and pending case *Konektra*).

This means that, potentially, the production and commercialization of a spare part may not amount to design infringement, but the question might arise as to copyright violation. This is due, in particular, to two main legal considerations.

First, the only partial harmonization of the copyright exception dedicated to the repair of equipment. Art.5(3)(l) of the InfoSoc Directive, like many other parts of the same provision, is a copyright exception that Member States can choose to implement, but are not obliged to. In light of ReCreating Europe's mapping of copyright flexibilities, Rosborough's analysis and our recollection, across the EU, only 10 Member States did so.

Second, more strictly related to the digital and software dimensions of repairing activities, the Computer Program Directive does not address any specific needs underlying the repairability of products. Besides not introducing a mandatory exception to use software for repair purposes, it also does not provide rules on Technological Protection Measures (TPMs) that match with the obligation stemming from the Repair Directive not to block repairers by way of software, hardware, or contractual arrangements.

In light of the above, it is worth asking whether EU copyright law will be next to finetune its provisions with the need to foster the EU repair culture – and if so, how. Several relevant experiences across the world might serve as inspiration. As Rosborough explains, the legislative developments often labelled under the motto "right to repair" come in different shapes, ranging from the introduction in legal systems of rights or legal defences for individual consumers and independent repairers, up to the establishment of new obligations for original manufacturers to market repairable products.

Among the most notorious examples is the Canadian legal system, whose reform specifically targeted the Copyright Act and allowed the circumvention of TPMs for repairability and interoperability purposes (see An Act to amend the Copyright Act (diagnosis, maintenance and repair) and An Act to amend the Copyright Act (interoperability), both of 2024). Similarly, in the US, where right to repair laws have been introduced in every State, federal copyright law (in particular, the Digital Millennium Copyright Act) allows for temporary exceptions to the prohibition of circumvention of TPMs for the purpose of repairing products (for an on-point critical analysis, see e.g. Rimmer).

As the experience in these countries suggests, the need for a finetuned copyright legal framework is expected to also come to the surface in the EU, either in the legislative debate due to the growing focus on Sustainability regulation or in judicial settings, as repair becomes an ever more cross-

border market practice. Besides the imperative to take the opportunity to build systematic cohesiveness of the EU legal system, this aspect could be, in our view, of tremendous impact in stimulating the policy and doctrinal debate on possible ways forward – creating momentum around the effectiveness of regulating the interplay between copyrights and repair culture statutorily or judicially, on the language to be used, on the need for redrafting copyright exceptions and the three-step-test (see, among others, the proposal for IP flexibilities for any uses extending the lifespan of products by Pihlajarinne), and, importantly, on the need to modernize the copyright legal system in light of current market practices and EU values and objectives.

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