



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL
ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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IS THE RIGHT TO REPAIR MOVEMENT RELEVANT IN INDIA?

AUTHORED BY - ABEER SHRIVASTAVA

The Movement

The world has radically changed during the novel Covid-19 pandemic, more prominently so, in the domain of usage and manufacturing of electronics to aid us better adapt to a virtual lifestyle. With the extensive utilisation of technology, it is bound to happen that devices endure wear and tear and may need repairing from time to time. When this happens, it is more often than not that the only choice available to the consumers is to approach the manufacturer of the device and use only their branded parts. This practice not only takes away a major degree of agency from the owner of the device but also damage the environment by generating unnecessary e-waste. This is where the right to repair movement comes into action, an idea that originated in the USA following the Motor Vehicles Owners' Right to Repair Act 2012, which mandated the manufacturers to provide the necessary documents and information to allow anyone to repair their vehicles¹; however, the roots of the movement can be traced as back as the 1950s i.e. to the inception of the computer era². The purpose of this movement is to compel companies to manufacture spare parts and to provide information to the customers as well as to local repair shops, about repairing their devices in order to increase the lifespan of such products; in addition to another purpose envisioned during the later stages of this movement which was to prohibit electronics accumulating in landfills. It was stated in a New York Times report that in the process of manufacturing an iPhone, only the mining and manufacturing contributes to approximately 83% of the iPhones heat trapping emissions in the atmosphere throughout its life which is roughly 57% of an average washing machine.³

¹ Prateek Arora, 'Does India Need a 'Right to Repair' Legislation?' (The Daily Guardian, 13th August) <<https://thedailyguardian.com/does-india-need-a-right-to-repair-legislation/>> accessed 4 October 2021.

² Rahil Philipose, 'Explained: What is the 'right to repair' movement?' (The Indian Express, 14 July 2021) <<https://indianexpress.com/article/explained/explained-what-is-the-right-to-repair-movement-7400287/>> accessed 4 October 2021.

³ Id.

The onset of the right to repair movement also initiated an argument about aiding small businesses and repair shops boost their trade ultimately strengthening the tertiary sector. It is well known that in a monopoly the prices of products go high and the quality drops; the movement primarily opposes the price and affordability of such repairs.⁴

Currently in 2021, more than 32 US states are discussing legislations with regard to the right to repair at while in the UK the Right to Repair law came into effect on July 1, 2021, which mandates manufacturers to provide consumers access to spare parts of appliances and to provide repair shops with complicated parts of the same.⁵

Resistance to the Movement

Giants in the tech space such as Apple, Amazon, Tesla and Microsoft actively disavour the wave justifying their opinion in view of potential threats to the protection of their intellectual property and trade secrets.⁶ Microsoft and Google opine that this would allow unaffected access to their sensitive diagnostic information and on a similar note Tesla predicts that this would weaken their cyber security making the entire system susceptible to cyber attacks.⁷ This theory was later debunked by a group of prominent security experts including Harvard professors.⁸ The right to repair movement revolving around electronics refers to bringing a change in government legislation, intended to allow customers the ability to repair and modify their own electronic devices where otherwise the manufacturer of devices requires the consumer to use only their offered services. A term popular for the same is 'planned obsolescence'⁹ which entails that, manufacturers design devices so that they last specifically for a limited time and inevitably must be replaced. Huge corporations like Apple, Microsoft, Amazon, and Tesla have argued that opening up their intellectual property to third party

⁴ Id.

⁵ The Hindu Net Desk, 'The Right to Repair Movement' (The Hindu, 4 August 2021) <<https://www.thehindu.com/news/international/right-to-repair-movement/article35722520.ece>> accessed 4 October 2021.

⁶ Supra, note 5.

⁷ Id.

⁸ Anonymous, 'Should Make in India come with Right to Repair?' (The Times of India, 7 October 2019) <<https://timesofindia.indiatimes.com/t10-oct-8-2019/1-should-make-in-india-come-with-right-to-repair/articleshow/71481253.cms>> accessed 4 October 2021.

⁹ Jai Vipra, 'Right to repair', the legislation India needs to save money, minimize e-waste' (The Federal, 13 March 2021) <<https://thefederal.com/analysis/india-drags-its-feet-in-the-face-of-climate-catastrophe/>> accessed 4 October 2021.

repair services or amateur repairers could impact the safety and security standards of their devices and may as well lead to exploitation of the same. In a country like India, this movement is of pertinence since authorised workshop of any company are exponentially scarce than third party repairers. Additionally, the lower and middle class population of a developing country cannot bear the costs of repairing at big names in the market.¹⁰

Indian Scenario

Currently, India lacks a legislation that deals with the movement in question but the judgement of the Competition Commission of India in the case of *Shamsher Kataria v HondaSiel Cars India Ltd.*¹¹ is regarded as a step towards it wherein 14 automobile manufacturing companies were held liable for engaging in anti- competitive practices and abusing their dominant position, by selling spare parts only to authorized dealers and not to independent retailers. Consequently, the CCI order, provided consumers with a choice between independent mechanics and authorized dealers to aid independent mechanics in providing aftermarket services as well as enable healthy competition in the market.¹²

It would be noteworthy that was also held that intellectual property rights cannot be used as a shield against cases of alleged abuse of dominant position according to Indian competition law.¹³

The main intent of Indian Trademark Law is to protect the goodwill and reputation of a business earned via using a specific mark in the course of its trade and in doing so protect the interest of the general public so that they do not get tricked into purchasing an item that I never intended to. To understand how the movement is opposed with respect to trademark law in India, we need to contrast it with the following two types of infringements, which can innervate the owner of the trademark to file a standard claim of infringement of trademark: The type which is dealt under §

¹⁰ Supra, note 2.

¹¹ Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors., Competition Commission of India, Case No. 03/2011, Date: 27/07/15, < <https://www.cci.gov.in/sites/default/files/03201127.pdf> > accessed 4 October 2021. ¹²

¹² Prateek Arora, 'Does India Need a 'Right to Repair' Legislation?' (The Daily Guardian, 13th August) <<https://theguardian.com/does-india-need-a-right-to-repair-legislation/>> accessed 4 October 2021

¹³ Himanshu Arora, "Right to Repair" vis-à-vis Indian trade mark law: A comparative analysis' [2021] 24(1-2) The Journal of World Intellectual Property <<https://onlinelibrary.wiley.com/doi/epdf/10.1111/jwip.12183#:~:text=The%20%20Right%20to%20Repair%20is,to%20self%2Drepair%20the%20goods>> accessed 18 October 2021.

29(1) of the Trade Marks Act along with *Pepsi Co. Inc. v. Hindustan Coca Cola*¹⁴ ; and the type which is dealt under § 30(3) and 30(4) along with *Kapil Wadhwa v. Samsung Electronics*¹⁵.

There are two types of actionable infringements which are envisaged in the law i.e., i) to misuse another entity's registered trademark upon goods not sanctioned by the owner of such trademark and ii) to alter the original mark or condition of the goods by which the physical condition or function of a trademark is materially affected.¹⁶

i) § 29 (1) of the Trade Marks Act, 1999¹⁷ mandates that any activity which results in or may result in the exploitation of a mark or affects its essential functions amounts to the "use" of a mark. The other fundamental requirement for claiming infringement is that the "use" of a mark must be in the "course of trade"; the phrase is not defined however generally refers to using a mark for commercial purposes rather than personal use. In the *Pepsi* case¹⁸ it was observed that the phrase would mean in the course of business and that the purpose for which such mark was used will not exempt and infringement provided that it was used in the course of business and was capable of depicting the correlation in the course of trade between the goods in question and the proprietor of such registered trademark. The final pivotal condition is that the use of a mark in the course of trade shall render such as a "use" of a trademark for the purpose of depicting the inception of the goods hence, even when a mark is used in the course of business, clearly showing that its use shall not formulate an impression in the mind of the average consumer of the existence of a commercial connection or relationship between the user and the original proprietor of the trademark, an action of infringement against such case would not succeed because the trademark is not suffering detrimental effect.¹⁹

ii) § 30(3) and 30(4) of the Act²⁰ when read together suggest that if a person *sells* the goods in the market post *lawfully* acquiring the same under a registered trademark or *otherwise deal* in the

¹⁴ *Pepsi Co. Inc. v. Hindustan Coca Cola*, 2001 PTC 699.

¹⁵ *Kapil Wadhwa v. Samsung Electronics*, 2013 (53) PTC 112 (Del).

¹⁶ *Supra*, note 13.

¹⁷ The Trade Marks Act, 1999, Act No. 47 of 1999.

¹⁸ *Supra*, note 14.

¹⁹ *Supra*, note 13.

²⁰ *Supra*, note 17.

goods, it would not amount to infringement unless the dealings indicate legitimate reasons for the proprietor to oppose them and specifically if such dealing alters the quality of the goods; such change being illustrative in nature. The phrase “otherwise dealing” has a wider purview than the expression “use” owing to the differences between physiology of the statutes of the act and literal interpretation.

To draw a contra distinction with the right to repair, two manners in which products can be repaired should be discussed.

iii) For the consumer to replace a malfunctioning part of a product it can either buy it from the authorised dealer or from independent manufacturers or by making the part on their own.

- a) If the consumer procures a part from independent manufacturers, it cannot be called as them “using” the trademark since the part amounts to the ultimate purchaser of the product. Therefore, there is no infringement.
- b) If the consumer is manufacturing the product on its own then it can be said that it is “using” a trademark however only in the case when it utilises such products for commercial purposes and not for private ones. Therefore, in the latter case there is no infringement.
- c) If the consumer makes modifications into the pre-existing parts and not replaces parts in order to make the product function one cannot construe “usage” of the trademark in such ascenario. Therefore, there is no infringement.

However, in situations wherein a self repair of trademarked parts is carried out by the consumer regardless of it being for personal use or commercial and such repairs impairs the condition of the product making it evident for bystanders that the trademark part is malfunctioning it would amount to infringement; and would satisfy the requirements of § 30(4) even though it was carried out for private use.²¹

iv) If the consumer approaches an independent repairer.

- a) § 29(6) of the Act does not differentiate between manufacturers, wholesalers, agents or

²¹ Supra, note 13.

retailers. If the independent repairer procures the part from an independent manufacturer and sells it to the ultimate consumer then it can be held that such repairer was “using” the trade mark. Therefore, anyone in the entire chain of distribution would be held liable for infringement.

If the repairer manufactures its own product however in a way indicates that such part has its origins sourced to a product with a registered trademark the repairer can be held liable for infringement, here as well.²²

- b) If the repairer does not replace the parts entirely but makes minute modifications and subsequently sells the product it can be said that the first type of infringement is occurring. However, the nuances of whether there is the first infringement or the second infringement or no infringement at all lies in the relationship between the ultimate consumer and the repairer. In case of a *contract of service* for example in an employer employee situation if the employee is liable for infringement so shall be the employer. In case of a *contract for service* for example in an employer client situation the employer shall generally not be liable for infringement barring exceptions. In case of a repairer putting up advertisements to inform consumers that they can carry out modifications other than authorised centres can be held liable for infringement.

Even though the right to repair is not explicitly mentioned in the Constitution, its spirit can be deduced from the provisions of the Indian trademark law. It can further be deduced that the law in India gives priority to the right to repair resting with the consumers over the rights of trademark resting with the proprietor. However, a balance between the two should be aimed to be achieved some solutions for the same are as follows: denying registration to the shape of a part of a product; to enact laws which make it mandatory for a repairer to mend any conspicuous marks on the product which may impact the brand’s reputation; ultimately, suggestions should be towards incorporating the right to repair in all intellectual property as well as competition law statutes.²³

²² Id.

²³ Id.

Recent Developments

On November 17, 2021, Apple announced that its customers will have an option to 'self-repair' their devices, a decision, viewed as a drastic step towards ensuring the right to repair within the society. This program would essentially allow individuals as well as third parties to repair Apple products by using genuine parts. It was also announced that such parts and tools will be offered by the tech giant itself and there would be a manual for each device.

However, this programme will be aimed towards technicians who possess prior knowledge of repairing electronic devices; and passively discourages the regular customer to indulge in repair work. This step has also improved the image of Apple taking away from its previous image of a company trying to establish a monopoly.²⁴ Many in the market are speculating this move to not be altruistic but originating from the pressure put by repair activists and environmental advocates. In the initial rollout of the programme, primarily in the US, it will focus on repairing the display, battery, camera exclusively for iPhone 12 and 13 with future plans of expanding the programme to all of its devices with the onset of the custom silicon manufactured by the company itself. The competitors of the company for example Microsoft, have also agreed to introduce its own repair solution, in response to a resolution presented by environmental activists, the caveat being it will do so after conducting a study of its own in the said domain. Movements such as the Green Century Revolution and the As You Sow have been pioneers to propagate the environmental and social benefits of access to repair and already 27 states of the US have begun considering right to repair bills.²⁵

To conclude, the movement of the right to repair not only enables a win-win situation for the consumers and the manufacturers and independent repairers but also for the general public since repair information will be available widely and will help in eradicating monopolies in the market. The movement is pertinent to India not only to improve its tertiary sector but also to supplement its weak e-waste management laws.

²⁴ Anuj Bhatia, 'Explained: What Apple's decision to allow iPhone repairs means for consumers' (The Indian Express, 19 November 2021) <<https://indianexpress.com/article/explained/apple-iphone-mac-right-to-repair-explained-7630874/>> accessed 1 December 2021.

²⁵ Maddie Stone, 'The shareholder fight that forced Apple's hand on repair rights' (The Verge, 17 November 2021) <<https://www.theverge.com/2021/11/17/22787336/apple-right-to-repair-self-service-diy-reason-microsoft>> accessed 1 December 2021.