Addendum – Right to Repair: Whose Right is it Anyway?

William Gass

Since the drafting of Right to Repair: Whose Right is it Anyway, two note-worthy developments have occurred that may indicate future changes regarding consumer’s right to repair, namely: (1) a Memorandum of Understanding signed by John Deere and the American Farm Bureau Federation outlining John Deere’s commitment to advance consumers’ right to repair through non-legislative means and (2) Colorado’s approval of amendments to the, now-named, “Consumer Repair Bill of Rights Act.”

Memorandum of Understanding

On January 8, 2023, John Deere (“Deere”) and the American Farm Bureau Federation (the “AFBF”) signed a Memorandum of Understanding (“MOU”) memorializing Deere’s commitment to enhancing farmers’ and independent repair facilities’ ability to control the operation and upkeep of equipment in exchange for the AFBF’s commitment to encourage local Farm Bureaus to refrain from supporting “Right to Repair” legislation. Unfortunately, Deere’s signing of the MOU may be met with some skepticism when viewed in light of Deere’s past business practices. Additionally, the MOU may be readily discarded as it allows Deere to withdraw from the MOU either after fifteen days' notice following the enactment of legislation covering the same issues as the

1 Alex Joseph Gambino, Right to Repair: Whose Right is it Anyway?, 25 TENN. J. BUS. L. 125 (2023)
2 Memorandum of Understanding between Am. Farm Bureau Fed'n and John Deere (Jan. 8, 2023), https://www.fb.org/files/AFBF_John_Deere_MOU.pdf [https://perma.cc/VM5T-UECT] [hereinafter Deere MOU]. The MOU grants farmers and independent repair facilities access to parts and software without fear of compromising the safety of the equipment, violating the manufacturer’s copyrights, or breaching federal and state emissions control requirements. Id.
3 Gambino, supra note 1 at, 152 (citing DEERE & COMPANY, Self-Repair Made Easy, https://www.deere.com/en/our-company/repair/ (last visited Oct. 25, 2022)) (explaining Deere’s past statements of openness to third-party or self-repair but declining to allow such action under the terms of their products). Deere has updated their website to now include the MOU and articles about their diagnostic tools which are available for purchase.
MOU or after thirty days’ notice following changed circumstances.\(^4\) However while questions may exist regarding limitations—especially with the looming specter of copyright infringement,\(^5\) costs, and the duration of the MOU, the concerns about access to parts and repair alternatives\(^6\) are partially alleviated by the signing of the MOU.

Under the MOU, Deere allows farmers and independent repair facilities to legally fabricate or obtain tools, from third parties or Deere, for their own use.\(^7\) Deere also agreed to provide tools, data, and documentation to the independent repair facilities on “Fair and Reasonable” terms.\(^8\) Authorized repair facilities have access to the same data, tools, and documentation,\(^9\) but they, with Deere, are additionally charged with delivering immediate, remote services when practical.\(^10\) However, Deere only agreed to allow distribution of Deere’s parts from third parties\(^11\) and data previously collected by Deere that originated from

\(^4\)Deere MOU, supra note 2, at § (III)(A).
\(^6\) Deere MOU, supra note 2, at §§ (II)(B), (V)(G). Alternative repairs, here, appear to be repairs conducted through a third-party using Deere’s repair equipment rather than an agent of Deere.
\(^7\) Deere MOU, supra note 2, at § (II)(B)(8). The creation of tools and software by third parties are still subject to trademark, copyright, and other intellectual property claims of infringement. “Software” is also narrowly defined to be just the ADVISOR system. Deere MOU, supra note 2, at § (V)(I). The definition of “Tools” is also narrow since it requires the apparatus to originate from Deere. Deere MOU, supra note 2, at § (V)(M).
\(^8\) Deere MOU, supra note 2, at § (II)(C).
\(^9\) Deere MOU, supra note 2, at §§ (II)(B)(1), (V)(B).
\(^10\) Deere MOU, supra note 2, at § (II)(B)(5).
\(^11\) Deere MOU, supra note 2, at § (II)(B).

Manufacturer shall not prevent Farmers and Independent Repair Facilities from legally fabricating or otherwise obtaining Tools, Specialty Tools, Software and Documentation from a third party, whether or not such Tools, Specialty Tools, Software and Documentation are currently available from the Manufacturer or an Authorized Repair Facility, for use solely in the ordinary course of their own lawful businesses and not for resale or distribution.

Deere MOU, supra note 2, at § (II)(B)(8). Tools are defined as:

][ Software, any hardware implement (specialty or otherwise) or other apparatus originating from the Manufacturer used for Data readout, diagnosis, maintenance or repair of Agricultural Equipment, including Software or other mechanisms that calibrate functionality or perform any other function required to operate, maintain, upgrade, activate, or bring the Agricultural Equipment back to fully functional condition.
the farmer’s equipment.\textsuperscript{12} Even with the restriction, Deere is departing from their restrictive stance that disallowed self and third-party repairs.\textsuperscript{13}

The MOU also memorializes the agreement to grant farmers access to Deere’s diagnostic information found in the product manuals, repair codes, and Deere’s ADVISOR system.\textsuperscript{14} However, Deere will still protect its intellectual property as evidenced by the MOU’s assertion that it should not be construed as requiring disclosure of trade secrets or confidential information.\textsuperscript{15} While the extent of what constitutes a trade secret is not defined, Deere is now granting farmers and independent repair facilities access to previously restricted codes, parts, and information necessary to complete or facilitate repairs.\textsuperscript{16}

All access is subject to “Fair and Reasonable” equitable terms which consider factors like Deere’s suggested retail price, distribution, and Deere’s obligations.\textsuperscript{17} Assumedly, Deere is able to set a high suggested

Deere MOU, \textit{supra} note 2, at § (V)(M).

\textsuperscript{12} Data is defined as:

[\textit{E}] Transmitted or compiled information arising from the operation of a Farmer’s Agricultural Equipment or its parts.

Deere MOU, \textit{supra} note 2, at § (V)(D).


\textsuperscript{14} Deere MOU, \textit{supra} note 2, at §§ (II)(A)(1)-(3). Deere is granting access to the ADVISOR system and other tools contrary to Mr. Gambino’s concerns. Gambino, \textit{supra} note 1, at 152 (citing DEERE & COMPANY, \textit{Self-Repair Made Easy}, https://www.deere.com/en/our-company/repair/ (last visited Oct. 25, 2023)).

\textsuperscript{15} Deere MOU, \textit{supra} note 2, at §§ (II)(A)(1)-(5), (V)(E).

\textsuperscript{16} Deere MOU, \textit{supra} note 2, at § (II)(B).

\textsuperscript{17} Deere MOU, \textit{supra} note 2, at § (II)(A). As defined in the MOU, "Fair and Reasonable" means:

[\textit{E}]quitable terms for access to or receipt of any item pertaining to Agricultural Equipment, including any Tools, Specialty Tools, Software and Documentation, in light of relevant factors, including and subject to the limitations of Section II.A., the Manufacturer's
price and use that as justification for a higher price downstream. Since the MOU was signed and Deere is apparently changing their course, time will tell if the implementation of the MOU results in “Fair and Reasonable” outcomes. Even with the potential for costs to create restrictions under the equitable terms, the MOU seems to indicate a shift in the Right to Repair paradigm where equipment manufacturers are threatened by “Right to Repair” legislation and are willing to grant equipment owners and repair operations access to software, parts, and services in exchange for a lower potential for new legislation.

In April, Colorado passed an amendment to their Right to Repair law. Deere was, and continues to be, presented with an option: withdraw their MOU or keep the MOU in effect after Deere and AFBF discuss the MOU’s termination. For now, Deere, apparently, has decided that the removal of the national MOU is not an effective solution to protect its business interests in light of the new right to repair legislation.

Farmers and independent repair facilities should see the MOU and Deere’s response to state legislation as good news. While customers may not modify embedded software and may have to pay “Fair and Reasonable” amounts for services when required, customers do not have to utilize approved Deere repair services and technicians and may acquire manufacturer’s parts for personal repairs. Nationally, Deere is still committed to granting greater access to its software and parts, and Colorado has taken steps to curtail practices that violate state residents’ right to repair. Practitioners and farmers should pay close attention to the language of new state laws to determine if the law increases obligations to manufacturers in the state. If the MOU is deemed to be ineffective to limit new state legislation, manufacturers may withdraw from national private sector commitments leaving legislative action as the next federal solution to protect farmers and independent repair facilities.

Deere MOU, supra note 2, at § (V)(G).
19 Deere MOU, supra note 2, at § (III)(A).
20 Deere MOU, supra note 2, at § (II)(B)(3). Mr. Gambino noted:

[T]he truth of the matter is that Deere allows customers to repair their products so long as customers do not modify imbedded software, customers utilize approved Deere repair services and technicians, and customers pay for additional add-on services when maintenance, repair, and diagnostics are required.

Gambino, supra note 1, at 153.
Colorado House Bill 23-1011

On April 25th, 2023, the Governor of Colorado signed into law Colorado House Bill 23-1011. The bill codified new Colorado Revised Statutes and amended pre-existing statutes, which, in effect, “require[s] that an agricultural equipment manufacturer facilitate the repair of its equipment by providing certain other persons with the resources needed to repair the manufacturer’s agricultural equipment.” To require action by the agricultural equipment manufacturers, Colorado Revised Statute § 6-5-1501, a wheelchair repair statute, was amended to include and define “agricultural equipment” as all manner of ground based, non-irrigation, equipment that is used to “plant, cultivate, or harvest agricultural products, or to ranch.” Further, the amendments to § 6-5-1503 established Colorado’s new requirements for equipment manufacturers which state, in part, that:

[Manufacturers] shall, with fair and reasonable terms and costs, make available to an independent repair provider or owner of the manufacturer’s equipment any documentation, parts, embedded software, embedded software for agricultural equipment, firmware, tools, or with owner authorization, data.

Authors have expressed concerns that federal legislation, particularly Senate Bill 3549, would not include protection for independent repair providers from “artificially inflate[d]” “fair and reasonable pricing” and from restrictions on repair based on trademarks, patents, and trade secrets. Copyright circumvention is not addressed in the House Bill, and the repairs or parts may, in some respects, be subject to federal preemption due to copyrights. While intellectual property may be greatly protected, manufacturers will not be able to refuse services, parts, or documentation solely on the grounds that they are trade secrets. Colorado’s solution does address concerns regarding “fair and reasonable”

24 Gambino, supra note 1, at 156.
25 Gambino, supra note 1, at 132 (citing Agriculture Right to Repair Act, S. 3549, 117th Cong. § 3(c) (2022)).
26 Gambino, supra note 1, at 145 (citing Preemption, LEGAL INFORMATION INSTITUTE (2021)).
prices by defining the terms. These amendments provide some statutory relief to consumers that otherwise languished under manufacturers’ monopoly on repair.

To effectively address concerns of inflated costs, the statute defines “fair and reasonable terms and costs.” Section 6-5-1502(5)(d) states that “parts shall be sold...under equitable terms for access to or receipt of any part pertaining to agricultural equipment...” Reasonableness requires the sale of parts to be in a manner that “[i]t is fair to both parties in light of any agreed-upon conditions, the promised quality, and the timeliness of delivery...” and “does not discourage or disincentivize repairs to be made by an owner or an independent repair provider.” Therefore, concerns about manufacturers artificially inflating the “reasonable” prices may be addressed by focusing on the preexisting deal between the parties and the presumption of equity. However, as the current language is broad, Colorado’s courts may request clarity from the legislature to avoid making tests to determine what could be considered unfair.

Terms, under all of Subsection 5, are fair if there is no “substantial obligation to use, or any restriction on the use of, a part, . . . embedded software for agricultural equipment, . . . including a condition that the owner or independent repair provider become an authorized repair provider of the manufacturer.” Additionally, there is no requirement that a part or software be “registered or paired with or approved by the manufacturer or an authorized repair provider” before the part or software is operational. Since there is no requirement for the software to be paired with the equipment prior to its operation, the new statute could be construed to mean that there is no requirement to use the manufacturer’s software in the farm equipment. However, this may run afoul of the requirements that the safety notification system remain activated and

30 The definition of “part” was not updated to include embedded software, so, assumedly, the manufacturer may disincentivize the modification of the software and may not require the sale of the software to be fair in light of the prior dealings. Colo. Rev. Stat. § 6-5-1502(5)(d); see Colo. Rev. Stat. § 6-5-1503(1)(a). Interestingly, the absence of “software” in the definition may be a departure from the software focus in the Federal right to repair solutions.
33 Gambino, supra note 1, at 156 (referencing Mr. Gambino’s fear of manufacturers “artificially inflat[ing] the “fair and reasonable” prices of their supporting equipment, tools, documentation, and software.”)
remain in compliance with the local, state, and federal laws. At the very least, equipment owners are now able to complete repairs with non-original equipment manufacturer parts.

The House Bill also included amendments regarding electronic security and exceptions to the general right to repair when trade secrets are implicated. If the equipment contained electronic security, the “manufacturer shall, with fair and reasonable terms and costs, make available to independent repair providers and owners…embedded software for agricultural equipment, firmware, or tools, with owner authorization, data needed to reset…function when disabled in the course of providing services.” The statutes exempt conduct that “would require the manufacturer to divulge a trade secret,” but the manufacturer is also barred from declining to give access to parts, software, or data on the ground that the assistance is itself a trade secret. The manufacturer may decline to grant access to information regarding its trade secrets if the usability of the part or tool is not diminished.

The “fair and reasonable” definition is adopted to modify the terms and costs of parts and not software. Therefore, End User License Agreements (“EULAs”) for software, if originally signed, may still control. Even with potential restrictions, this legislation broadens the availability of the replacement parts and access to software through the disallowance of bare trade secret claims. By disregarding the trade secret claims, focus may be shifted back to public-benefiting protection like patents and copyrights and helps to sever a “strand that makes up the [manufacturer’s] web of protection.”

The Colorado legislature outlined actions the state does not wish to condone in granting greater power to owners of agricultural equipment. If an owner or independent repair provider completes faulty repairs, the manufacturers and dealers are free from liability for the damage to the equipment that may result in the equipment’s reduced functionality.

---

appears that the state does not wish, in the granting of the consumer right to repair, to encourage the deactivation of safety systems; modification of machines outside of federal, state, or local emissions standards; evasion of copyright claims; or other illegal equipment modifications.\footnote{Colo. Rev. Stat. § 6-5-1504(1)(a.5) (2023).} All of the limitations appear to be a small price to pay for Colorado’s recognition that its citizens should have access to the tools and information needed to repair their equipment.

The language in the new statute appears to also reflect influence by The Repair Association\footnote{Gambino, supra note 1, at 154 (citing THE REPAIR ASSOCIATION, \url{https://www.repair.org/legislation} (last visited Oct. 18, 2022)) (focusing legislation promoting the availability of parts and information, on fair and reasonable terms, to permit the repair of equipment).} and may indicate that state legislatures are receptive to consumer’s complaints, contrary to potential manufacturing companies’ lobbyists’ sway.\footnote{See generally THE REPAIR ASSOCIATION, \url{https://www.repair.org/legislation} (last visited Oct. 26, 2023).} Colorado has adopted a new statute, § 6-5-1505, that would repeal the amendments if Congress enacts a federal legislation regarding “right to repair agricultural equipment.”\footnote{Colo. Rev. Stat. § 6-5-1505 (2023).} Colorado’s legislature may have contemplated the mess of enforcement that could occur under this legislation and deferred to the manufacturers to create a national memorandum of understanding that would be binding for all users of their brand of equipment, as long as the memorandum did not conflict with a state’s statute.\footnote{Colo. Rev. Stat. § 6-5-1504(2)(b) (2023) (potentially incorporating the preexisting Memorandum of Understanding between John Deere and American Farm Bureau Federation).}

Colorado’s enactment of such a bill highlights a desired change in the landscape of right to repair law and will likely—depending on the enforcement after January 1, 2024,\footnote{Section 6, H.B. 23-1011, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023).} when the law is effective—impact other jurisdictions’ drafting. Time will tell if costs to consumers will increase in Colorado, potentially dissuading others from adopting such statutes. Federal pressure on manufacturers of farm equipment will likely increase with the enactment of bills like Colorado’s if states see positive results in the near term, so practitioners should anxiously await the vote on the Senate Bill, and its potentially limited impact, as a bellwether for other Right to Repair legislation.

Both Deere’s MOU and Colorado’s right to repair law indicate that manufacturers and states understand that change is desired. MOUs, like Deere’s, could decrease the pressure on states or Congress to improve the right to repair laws as the MOUs provide a politically expedient partial

solution. If statutes like Colorado’s continue to be enacted, MOUs will likely continue to be a meaningful, albeit non-legally binding, solution for as long as local Farm Bureaus hold political power. All parties involved likely understand that the MOUs will eventually be challenged, and at that point, federal legislation will likely be needed to curtail disparate treatment of manufacturers across the states.