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The Sandbox Dilemma: Massachusetts Votes

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Who owns the stuff you buy?

This used to seem so easy. Of course you own the house, car, refrigerator, books, watch, shoes, pants and everything else you bought – we always thought so. But not anymore. The companies that sold you these things claim that they have rights in what you bought and can dictate how you can use it.

I am not talking about bank lendng here, where a finance company has a security interest in your items because you borrowed the money to buy them. I am talking about the things you buy outright.

We thought the intellectual property laws had settled this matter with something called the “First Sale Doctrine.” Also known as the exhaustion doctrine, this patent and trademark principle states that once a manufacturer sells an item that is subject to a patent and/or trademark, the manufacturer no longer has rights to enforce its intellectual property over the person or company who bought the item. The manufacturer can’t sue a legitimate buyer for infringing use of the patent or trademark by using the product, even if the patent/trademark holder doesn’t approve of the use, like buying something in order to sell it into a secondary market.

In other words, a patent or trademark holder has an exclusive right to sell products based on its invention or carrying its mark. But once those items are sold into commerce, those rights end (are “exhausted”), and the purchaser of the product may do what she likes with it. In reviewing this doctrine, the U.S. Supreme Court explained, “‘the authorized sale of an article which is capable of use only in practicing the patent is a relinquishment of the patent monopoly with respect to the article sold.”

Despite these restrictions in U.S. intellectual property law, manufacturers of products and platforms will always be driven by a desire to control the items they release out into the world. The motivations for this inclination are many, from the customer-centric drive for quality control and the reputation management nestled therein, to the simple desire to create a mini-monopoly in all aspects of the product cycle and the huge profits this can deliver. I have written in this space about how Apple fights to control all aspects of apps allowed on its products, at least in part because of the 30% revenue skim Apple takes from each sale of apps to Apple hardware customers – billions of dollars every year. Nice work if you can get it.

The “sell a razor and profit from ongoing blade sales” business model encourages companies to find ways to lock out other producers of supporting products. While hard-goods companies have been trying for years to force the rest of us to only use company-approved materials in their company-developed sandboxes – see HP/Xerox with copier toner and Kurig with coffee pods – the recent rise in software-driven products has made the strategy easier for producers.

Everything has software in it these days, from wearables to SUVs, which are essentially computers on wheels. And software is licensed to you, not sold. While many of these IoT items supplement the core functionality of the original product – car, refrigerator, cash register – some, like tablets, are little more than software parking garages. So companies can use license restrictions on software to limit how third parties can interact with your equipment. This expansion of restricted sandboxes has raised legal issues recently.

On the ballot today in Massachusetts is Question 1 which would expand their 2013 right-to-repair law to force auto manufactures to further open up the car’s wireless telematics – the intricate computer code monitoring modern vehicles – so that car owners can take those vehicles to independent repair shops. Right now, auto manufacturers are using the complexities of the proprietary telematics sandbox to force car owners to seek repairs from authorized dealers. There is lots of money in car repairs.

According to Wired, “If a majority of Massachusetts residents vote Yes on Question 1 this fall, carmakers would have to install standardized, open data-sharing platforms on any cars with telematics systems starting with model year 2022. “Owners of motor vehicles with telematics systems would get access to mechanical data through a mobile device application,” the ballot summary reads.”

With typical 2020 election hyperbole, Auto companies are fighting against Massachusetts Question 1 in commercials claiming the open auto standards will be used by stalkers, sexual predators and perpetrators of domestic violence. More realistic arguments by auto manufacturer and dealer groups claim that forcing open the manufacturer’s telematics would affect their ability to comply with best practices in cybersecurity. Those supporting passage of questions say it is only an issue of whether auto makers can force their own customers into spending repair money in the auto maker’s business ecosystems, or whether car owners have a right to find and support their own trusted repair shops.

This type of law could likely only pass by direct ballot initiative as car dealers have the most to lose if the initiative passes, and the dealer lobby is one of the most powerful political forces in most state legislatures. Your state legislators are unlikely to consider passing a law that harms them. Further, as observed in the New York Times changes affecting economics of the vehicle industry are difficult to pass, “that’s because major manufacturers sit on the panels that set guidelines for things like environmental impact. As a result … tougher standards can be difficult to achieve.”

We pay significant money to own a car, and voters in Massachusetts will have an opportunity to decide if owning a vehicle means that it belongs to you, or if manufacturers can build it in such a way as to dictate your choices about your own property. I will be writing more about this topic soon, but stay tuned to see how the voters in Mass will determine the fate of their own vehicles.

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