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# INDUSTRIAL DESIGN PROTECTION AND COMPETITION IN AUTOMOBILE REPLACEMENT PARTS—BACK TO MONOPOLY PROFITS?

James F. Fitzpatrick†

## I. INTRODUCTION

The central confrontation in the current debate over the enactment of industrial design legislation<sup>1</sup> is between the auto manufacturers and the automobile insurance industry allied with the consumer movement. That intense disagreement is based, as often is the case in important legislative proposals, on an underlying, high-stakes economic battle. Quite simply, the auto manufacturers want to secure intellectual property protection for the manufacture and sale of automobile replacement parts and thereby raise parts prices back to the stratospheric levels which existed when auto companies enjoyed a *de facto* monopoly over parts manufacture and sale. Although the designs of these parts today are largely in the public domain, until recently, for solely practical reasons, no potential competitors used those designs in manufacturing competitive auto body parts; that has now changed dramatically. The insurance industry—the largest purchaser of body parts used to repair automobiles—wants to retain the current level of competition and promote future competition in the sale of these parts. This competition has driven prices sharply lower and thereby reduced the costs of auto repair. Thus, this dispute, at its core, has little to do with intellectual property principles; it has much to do with the choice between monopoly and competition.

Intellectual property principles, however, weigh heavily in favor of the economic position of insurance companies and other consumers of replacement parts. Indeed, the Supreme Court has recently reaffirmed that patent law recognizes copying and imitation as an essential, positive element of a competitive economy. “From their inception, the federal patent laws have embodied a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy.”<sup>2</sup> The particular balance between protection and free imitation in the patent

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1. Three virtually identical industrial design rights bills were introduced during the 101st Congress: H.R. 902, 101st Cong., 1st Sess. (1989), H.R. 3017, 101st Cong., 1st Sess. (1989) and H.R. 3499, 101st Cong., 1st Sess. (1989). See *infra* text accompanying notes 81-138.

2. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989).

laws "depend[s] almost entirely on a backdrop of free competition in the exploitation of unpatented designs and innovations."<sup>3</sup> This reflects "a congressional understanding, implicit in the Patent Clause itself, that free exploitation of ideas will be the rule, to which the protection of a federal patent is the exception."<sup>4</sup>

The replacement parts dispute raises these fundamental questions concerning the degree of protection most conducive to innovation and competition. It involves the competitive status of "crash parts" and "hard parts" for auto replacement and repair. Crash parts are metal, plastic and glass components such as bumpers, fenders, hoods, door panels and windshields used in the repair of damaged automobiles.<sup>5</sup> Industry-wide, sheet metal and plastic parts are about an eight billion-dollar annual market; it is estimated that competitive crash parts account for approximately ten to thirteen percent of that total market.<sup>6</sup> Until the early 1980s, though, this market was under a virtual monopoly of the auto manufacturers. For example, the only place a repair shop could get a new fender to replace a General Motors, Ford or Toyota fender was from a General Motors, Ford or Toyota dealer; likewise, the only fenders manufactured or marketed were made by the auto manufacturers. The one major exception to the crash parts monopoly was in the production of replacement glass—windshields and side windows—which historically has been provided largely by aftermarket competitors, rather than the original equipment manufacturers (OEMs).<sup>7</sup>

The second category of auto replacement parts affected by the legislation is "hard parts"—spark plugs, oil filters, mufflers, shock absorbers, batteries, and similar mechanical parts. This market has been largely competitive for years.<sup>8</sup> A consumer generally can go to an auto service station to

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3. *Id.* at 151.

4. *Id.*

5. For a more complete definition of "crash parts," refer to the FTC complaint in the General Motors crash parts distribution case. *In re General Motors Corp.*, 99 F.T.C. 464, 465 (1982).

6. *Auto Insurance Companies Battle Restrictions on Replacement Parts*. The Detroit News, Jan. 4, 1989, § F, at 2, col. 1 [hereinafter *Replacement Parts*]; see also C. BARFIELD & C. BELTZ, *INDUSTRIAL DESIGN PROTECTION AND AUTOMOBILE REPAIR PARTS: BALANCING COMPETITION AND MONOPOLY AT HOME AND ABROAD 6-7* (1990) [hereinafter *BARFIELD REPORT*].

7. *The Industrial Innovation and Technology Act: Hearings on S. 791 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 162 (1987) [hereinafter *Senate Hearings*] (statement of Malcolm J. Romano, Patent Counsel, Lear Siegler, Inc.). The glass market provides a good model of healthy competition in the auto parts industry. OEMs choose to make their own original glass, buy original glass from outside companies and/or compete in the aftermarket for replacement glass. Similarly, independent glass manufacturers choose to compete in the aftermarket and/or supply auto manufacturers. *Id.*

8. See *id.* at 153-54 (statement of August Alcgi, Vice President and Deputy General Counsel of GEICO). William Crabtree, the Vice President and General Counsel of the Motor Vehicle Manufacturers Association (MVMA) simply claims that the industrial design bills would not provide design protection for hard parts such as "spark plugs, carburet-

have these parts replaced and choose among a variety of available competitive "hard parts."

The issue raised in the industrial design bills is whether these two vast markets—now infused with competition—will be transformed into a monopoly province for the auto manufacturers, leaving them "nearly unfettered pricing discretion."<sup>9</sup> Obviously, the insurer and consumer stake is to retain competition in the manufacture, distribution and sale of these parts.

The insurance industry argues, based on fundamental legal and economic principles, that auto owners should have a right to repair vehicles with parts that must be and are virtually identical to OEM parts, that design protection for crash parts cannot and will not spur OEM design creativity, and that auto manufacturers should compete both in the market for new autos, where design costs are captured in the sale of the original car, and in the market for parts.

The current debate over industrial design protection is the latest chapter in a long history of conflicts between auto manufacturers and the auto insurance industry, most of which have focused largely on improving auto safety and requiring better built, more crash-resistant cars. For example, the insurance industry was a major private sector protagonist for passive restraint systems—airbags and automatic seat belts—safety efforts that were opposed by the automobile companies until the mid-1980s.<sup>10</sup> Similarly, the insurance industry has also pressed for the five-mile-per-hour bumper, a device which significantly lessens damage in low-speed crashes.<sup>11</sup>

The current dispute over industrial design protection, however, takes this industry debate into a new and different forum. One cannot understand the broad dimensions of the confrontation over industrial design protection unless the full economic stakes are understood.

## II. THE ESSENTIALS OF THE ECONOMIC CONFRONTATION OVER AUTO CRASH PARTS

From the insurance perspective, there are two major cost components which constitute the largest portion of an auto insurer's expenses—personal injury expenses and property damage expenses. The personal injury cost component has increased markedly, largely because of rapidly escalating medical and hospital costs and an out-of-control tort reparations system.

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ors, mufflers, [and] glass." *Id.* at 83. However, the Register of Copyright does not agree; he believes the bills would cover hard parts. *Id.* at 240. Neither the sponsors of the bills nor the bills' language suggest that such parts are distinguishable from other car parts on any principled basis.

9. *General Motors*. In re 99 F.T.C. at 584 (monopoly in crash parts distribution creates this power).

10. The Supreme Court noted that the "automobile industry waged the regulatory equivalent of war against the airbag." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 49 (1983).

11. See *Center for Auto Safety v. Peck*, 751 F.2d 1336 (D.C. Cir. 1985).

Efforts to moderate tort damages, particularly within the justice system, have run into intransigent, and too often successful, opposition from trial lawyers. Escalating medical costs present a difficult problem; in response, the insurance industry staunchly supports medical cost containment measures.<sup>12</sup>

Cost containment initiatives have been much more successful on the property damage side. Stronger bumpers have eliminated pesky, unnecessary damage from low-speed crashes. Many insurers have insisted on competitive labor rates in auto repairs, and local conspiracies in setting labor repair rates have been challenged in antitrust suits.<sup>13</sup> Modern claims procedures have helped minimize costs. Additionally, there are now significant cost savings resulting from competition in the supply of crash parts.

For decades, notwithstanding the existence of the legal right of a potential competitor to manufacture crash parts, inasmuch as they were largely in the public domain and unprotected under existing design patent laws, in fact there was no competition in this country in crash parts due to economic and technical factors. Existing suppliers of crash parts who sub-contracted with OEMs were concerned with not-so-subtle pressures to stay in the good graces of their OEM parts purchasers. Also, auto manufacturers often retained the ownership of tools and dies from which subcontractors produced sheet metal parts. For these and other reasons, the manufacture, distribution and sale of crash parts remained under the sole control of the auto companies. In contrast, throughout that time period in the market for auto glass and hard parts, a flourishing competitive industry existed and the auto companies were fully acclimated to that marketplace reality.

As a result of this monopoly, in the mid-1970s through the early 1980s crash parts prices skyrocketed.<sup>14</sup> In the early 1980s, though, crash parts competition emerged, largely from the Far East. This evolved from a variety of factors—new technology which permitted exact replication of the original product; greater styling overlaps among car models; artificially inflated prices;<sup>15</sup> and, finally, a will to compete where others had previously shunned competition.

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12. See generally *Affordability and Availability of Automobile Insurance: Hearings Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 11-12 (1988) [hereinafter *Automobile Insurance Hearings*] (unpublished statement of C.A. Ingham, General Counsel, State Farm Insurance Companies) (describing State Farm's efforts to reduce auto insurance costs).
  13. See, e.g., *Washington v. Frank & Sons Auto Body*, No. C86-377-AAM (E.D. Wash. May 18, 1989) (defendant repair shops entered into a consent decree enjoining them from engaging in a variety of price-fixing activities with other repair shops for a period of ten years); *Nationwide Mut. Ins. Co. v. Automotive Serv. Councils of Del., Inc.*, 1980-81 Trade Cas. (CCH) ¶ 63,689 (D. Del. 1980) (defendant repair shops entered into a consent decree enjoining them from engaging in a variety of price-fixing activities for a period of five years).
  14. See *Senate Hearings*, *supra* note 7, at 97 (statement of Jean C. Hicstand, Vice President and General Counsel, State Farm Mutual Automobile Insurance Co.).
  15. See *id.* at 94-95 (statement of Jean C. Hicstand, Vice President and General Counsel, State Farm Mutual Automobile Insurance Co., noting these three factors).

The economic benefits of competition were profound. Overall, the crash parts indices which had been measuring a steady increase in crash parts costs turned down.<sup>16</sup> This reflected, of course, the fact that price competition had led to sharply lower prices for individual crash parts. For example, the price of an OEM 1983 Omni fender fell from \$140 in 1983 to \$76 in 1984-1986. A competitive aftermarket product was available in 1986 for \$67. Likewise, an OEM 1983 Aries fender cost \$221 in 1983, \$180 in 1984 (when competition was introduced) and \$87 in 1985-1986—less than half the original price. A competitive aftermarket product was available in 1986 for \$79.<sup>17</sup> Similarly, an OEM 1980 Accord fender cost \$151 in 1983 and \$93 in 1989. In 1989, the competitive aftermarket product cost \$80.<sup>18</sup> That experience with competition is replicated in part after part. In contrast, for crash parts for which there was no competitive aftermarket product, the prices remained constant or even increased; for example, the OEM 1977 Caprice front door cost \$267 in 1977, \$487 in 1982, \$630 in 1986 and \$671 in 1987.<sup>19</sup>

Consumers received added relief from inflated crash parts prices because auto manufacturers have reduced their prices on a nationwide basis once a competitive crash part has appeared in a local market, driving overall crash parts prices sharply downward.<sup>20</sup> To date, however, only a small fraction of the total number of crash parts are available on a competitive basis. Competing manufacturers have, naturally enough, turned first to high-volume parts which provide the most attractive competitive base, although over time more and more parts will be produced in the competitive aftermarket.

Two new dynamics are now emerging. First, crash parts production is now expanding from traditional sheet metal parts into plastic parts. The major manufacturers of these parts are in the United States and Canada. Second, the United States' sheet metal crash parts manufacturing industry is, many expect, on the verge of rapid development. Although most major suppliers of sheet metal crash parts today are in Europe and Asia, industry observers who support crash parts competition hope that, over time, the dominant location for the manufacture of these parts will shift substantially to the United States.<sup>21</sup> Of course, passage of any of the proposed industrial design bills would make that domestic economic expansion impossible.

The ultimate potential benefit of continuing, and expanding, price

16. *Id.* at 97.

17. See MITCHELL'S MANUALS ON COLLISION ESTIMATING GUIDES and KEYSTONE CRASH PARTS DIGEST.

18. *Id.*

19. *Senate Hearings*, *supra* note 7, at 96.

20. See *Automobile Insurance Hearings*, *supra* note 12, at 12 (unpublished statement of C.A. Ingham) (describing slashing of manufacturers' crash parts prices once a competitive product penetrates even a small part of a particular parts market).

21. See *Senate Hearings*, *supra* note 7, at 167, 171-72 (statements of Jean C. Hiestand and James F. Fitzpatrick).

competition in crash parts is immense. It offers a major opportunity for insurers and consumers to help keep insurance costs down. Literally hundreds of millions of dollars in automobile repair costs are at stake.<sup>22</sup> Automobile manufacturers, understandably, are anxious to reestablish their monopoly control over the crash parts market.<sup>23</sup> This monopoly control would directly benefit, in the form of supernormal monopoly profits, foreign as well as domestic auto manufacturers. Additionally, the increasingly complex structure of the United States automobile market will further boost the net economic benefits to foreign interests. For example, General Motors has equity arrangements, marketing arrangements, distribution arrangements, joint ventures, supply contracts, technology arrangements, and manufacturing arrangements with major foreign companies, such as Isuzu, Toyota, Nissan, Volvo, and Daewoo. As noted, this issue is powered largely by economics, not by intellectual property principles.

### III. RECURRING ISSUES IN THE CRASH PARTS DEBATE: RED HERRINGS CREATED BY THE AUTOMOBILE INDUSTRY

In attempting to regain their monopoly status through initiatives at the state and federal level, in the courts and legislatures, the auto companies have raised the following fundamental questions, none of which, for the reasons stated below, provides a basis to create design protection for crash parts: counterfeiting, safety, and quality.

#### A. *Is This a Question of "Palming Off" Competitive Crash Parts?*

Misrepresentation as to the source of crash parts is not a problem because such parts normally come in their own distinctive wrapping and boxes. Some of these parts also bear a distinctive imprint showing the manufacturer. Additionally, the parts are ordered, received and installed by repair shops; these repairers have knowledge of the source of the parts and understand exactly when they are using competitive parts. Thus, it seems unlikely that any question of palming off will occur from the repair shops' perspective.

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22. *Industrial Design Legislation: Hearings on H.R. 902, H.R. 3017, H.R. 3499 Before the Subcomm. on Courts, Intellectual Property and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990) [hereinafter *June 1990 House Hearings*] (unpublished statement of C.A. Ingham, General Counsel, State Farm Insurance Companies). Because of the enormous size of the market in crash parts, the savings provided even with a little competition is dramatic. Direct savings alone—in other words, those savings attributable solely to the purchase of competitive rather than auto makers' parts—is almost \$400 million annually. This figure does not include additional savings that result from the decreases in the prices of the auto makers' parts due to competition. And, it is a savings that has occurred when competitive parts have penetrated only roughly 13% of the market. Thus, the long-term potential price savings from this competition reaches billions of dollars. *Id.* at 7.

23. *See Replacements Parts*, *supra* note 6, at 2 ("The big auto makers—such as General Motors, Ford, Chrysler, Toyota and Nissan—have fought the rival parts industry since it began nibbling away at their monopoly on replacement parts.").

A consumer's knowledge that competitive crash parts are being used is a separate issue. That matter can be adequately resolved by consumer information legislation at the state level which requires that the consumer be informed of the use of competitive crash parts, legislation which the insurance industry supports.<sup>24</sup> To the extent that palming off issues arise, however, existing laws are perfectly adequate to deal with such matters and should, of course, be vigorously enforced.

*B. Do Competitive Crash Parts Fail to Meet Federal Safety Standards?*

Automobile manufacturers have raised concerns over whether competitive crash parts are safe.<sup>25</sup> Those concerns are unfounded, as has been made abundantly clear by the widely respected Insurance Institute for Highway Safety:

The source of the cosmetic parts used to repair cars has little to do with the possibility of injury in these cars after they have been repaired. With but one exception [lamps, reflective devices, and associated equipment], there are no federal standards for replacement parts because [there is] no reason to believe—let alone assume—that such parts significantly influence car crashworthiness.<sup>26</sup>

Brian O'Neill, the President of the Insurance Institute for Highway Safety, recently stated that auto manufacturers know quite well it has been proved that there is no safety problem with crash parts.<sup>27</sup> For example, an aftermarket hood was used in a recent thirty-mile-per-hour test crash. O'Neill noted that "[i]t buckled exactly the way it should have" because "buckle points designed into manufacturer's hoods are also designed into the copies."<sup>28</sup>

*C. Are Aftermarket Parts of Comparable Quality?*

As in any product market, quality may vary somewhat from manufacturer to manufacturer. No doubt some competitive crash parts are lower in quality than the manufacturer's original parts.<sup>29</sup> But many competitive crash parts are of a quality comparable to OEM parts and some are even

24. See *infra* text accompanying notes 62-70.

25. See *Senate Hearings*, *supra* note 7, at 78-79.

26. *Cosmetic Replacement Parts and Auto Repair Practices*, Insurance Institute for Highway Safety, Advisory 1 (Jan. 1987); *Senate Hearings*, *supra* note 7, at 105; see also *id.* at 106-17.

27. *Parts Isn't Parts*, *Californian* (Bakersfield), Dec. 5, 1988, at C1.

28. *Id.*

29. See *Senate Hearings*, *supra* note 7, at 70-72 (testimony of Gary Newton, Chief Patent Counsel, Chrysler Motor Corp., representing the MVMA). The insurance industry



better than original parts.<sup>30</sup> Significantly, major United States auto companies often use the same foreign manufacturers as subcontractors to supply OEM parts that they are now attacking for supplying aftermarket parts. For example, Ford Motor Company has given its highest quality award to Lio Ho, a Taiwanese company which is also a major aftermarket supplier.<sup>31</sup>

The quality issue is one that should continue to be resolved in the marketplace or through consumer information legislation. Ralph Oman, Register of Copyrights, commenting on the crash parts debate in the context of industrial design legislation, has emphatically asserted that issues of quality have no proper place in the congressional determination whether to enact new design protection laws.<sup>32</sup> He said that "product reliability concerns could be addressed in consumer products legislation rather than design legislation. Design protection gives a manufacturer a right to exclude *all* competing copies—superior parts as well as inferior ones."<sup>33</sup>

To deal with quality assurance questions, insurers have joined with body shops, consumer groups and aftermarket parts distributors to form a nonprofit organization—the Certified Automotive Parts Association (CAPA)—to establish, with the assistance of an acknowledged expert testing company in the field, appropriate quality standards for crash parts and to test parts against those standards.<sup>34</sup> Currently, CAPA has certified over 1,000 parts from seventeen manufacturers, including three manufacturers

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rejects the assertion that there are widespread problems with finding quality parts and supports industry-wide quality testing. Specifically, the MVMA complains loudly about the quality of non-OEM sheet metal parts. *Id.* However, as GEICO points out, Keystone Automobile Industries, a large supplier of non-OEM parts, guarantees its sheet metal parts for as long as the purchaser owns the car. *Id.* at 155.

30. *See id.* at 93-94, 132-34. At the Senate Hearings, the MVMA presented results of a comparison between a Chrysler-made replacement fender and two aftermarket fenders sold as replacements for the same original Chrysler fender. The Chrysler fender was superior. *Id.* at 77. During the same hearings, however, State Farm presented a comparison of a Chrysler-made fender and an aftermarket fender made by another non-OEM. *Id.* at 93. The aftermarket fender was superior. Further, unlike the auto companies, the insurance companies support quality standards that would apply to both OEM and non-OEM parts. *Id.* at 93-94.
31. 7 COLLISION PARTS J. 22 (Spring 1988).
32. *Senate Hearings, supra* note 7, at 241 (testimony of Ralph Oman, Register of Copyrights). The Register clearly rejects the Industrial Design Coalition's quality-based rationale for crash parts design protection.
33. *Id.* That Coalition urges passage of design protection legislation so that "[i]nferior copies of original sheet metal will not be forced upon customers having their cars repaired." *Id.* at 59, 241.
34. *June 1990 House Hearings, supra* note 22, at 21-22 (unpublished statement of C.A. Ingham); *see also Parts Isn't Parts, supra* note 27, at C1 (discussing formation of CAPA in 1987 and extent of CAPA's activity to date). The auto manufacturers in 1987 stated that they knew of no existing system in the insurance industry or by aftermarket suppliers to assure quality. *Senate Hearings, supra* note 7, at 82. Clearly, auto manufacturers are now well aware of CAPA's rigorous and successful testing and certification program. Auto manufacturers, as one might expect, would support such a group in order to maintain customer satisfaction, guarantee parts quality, and prevent palming off, all of which they suggest are problems.

in the United States (and one in Canada).<sup>35</sup> CAPA's rigorous certification procedures include initial and periodic on-site inspections of manufacturing plants by Detroit Testing Laboratory (an independent testing laboratory), and comprehensive form, fit, metallurgical and corrosion tests.<sup>36</sup> This program will help assure auto repairers, insurers and consumers of the quality of the competitive crash parts.

#### IV. AUTO MANUFACTURERS HAVE DECLARED WAR ON AFTER-MARKET COMPETITION AND HAVE MOBILIZED ON MANY FRONTS, INCLUDING INDUSTRIAL DESIGN LEGISLATION

In an effort to eliminate aftermarket crash parts competition, the auto manufacturers have undertaken a wide variety of initiatives: bringing design patent suits, attempting to use state mold laws to halt competition, using federal trademark reform legislation to limit aftermarket advertising, supporting the passage of onerous laws at the state level which would cripple aftermarket competition, and pressing for industrial design protection. All those efforts to date have proved fruitless, as discussed below.

One other initiative, which contributes to competition, is a vigorous, well-financed advertising campaign by auto manufacturers on radio, television, and in magazines and newspapers addressing the comparative quality of OEM and aftermarket parts.<sup>37</sup> This certainly is the appropriate forum in which the competitive issues should be debated and resolved; the marketplace, not the legislatures or the courts, will maximize consumer benefit from aftermarket competition.<sup>38</sup>

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35. CAPA, DIRECTORY OF CERTIFIED AFTERMARKET BODY PARTS (July 1990).

36. *Id.*

37. Competition also occurs between OEMs and manufacturers of hard parts. See, e.g., TIME, Jan. 16, 1989, at 66-67 (Ford advertisement stating that "Quality Care . . . [is] also Ford Motorcraft replacement parts, like filters, batteries, oil and spark plugs.").

38. Recently, the staff of the FTC Los Angeles Regional Office and the Bureau of Economics evaluated carefully the role of the marketplace in promoting fair crash parts competition. Letter from Marcy J.K. Tiffany, Director, FTC Los Angeles Regional Office, to Representative John L. O'Brien, Speaker Pro Tempore, House of Representatives, State of Washington (Feb. 26, 1990). In this letter, the FTC staff noted that General Motors and Ford are aggressively promoting their body parts, *id.* at 5 n.10, and an association of non-OEM parts suppliers (ABPA) is strongly recommending five-year limited warranties and has developed a rigorous certification program (CAPA). *Id.* at 6. With these and other market-driven private mechanisms for transmitting information, the FTC staff questioned the need for statutorily imposed disclosures, which, as they recognized, carry significant consumer costs that are greater than anticipated benefits. *Id.* at 5. Similarly, the staffs of the FTC Cleveland and Los Angeles Regional Offices evaluated a proposed Ohio disclosure bill. Letter from Mark D. Kindt, Director, FTC Cleveland Regional Office, and Marcy J.K. Tiffany, Director, FTC Los Angeles Regional Office, to Representative Joseph E. Haines, Ohio House of Representatives (Dec. 18, 1989). In this earlier letter, the FTC staff concluded that the disclosure bill "might substantially reduce competition" and "might unreasonably restrict consumer choice in the market for auto crash parts." *Id.* at 1, 10. The FTC staff strangely encouraged Ohio lawmakers to balance the costs of mandated disclosure against the "perceived benefits from it." *Id.* at

### A. *Design Patent Suits*

One way for the auto manufacturers to try to regain their monopoly status is to take advantage of *existing* provisions in the federal patent laws relating to the protection of designs.<sup>39</sup> A number of automobile companies have sought and secured design patent rights on individual auto parts. For example, Volvo has design patent rights on the front fenders of their familiar square back design.<sup>40</sup>

Other automobile manufacturers actively pursue design patents for distinctive automobile parts. For example, since 1972, over one hundred design patents for automobile parts—hoods, deflectors, fenders—and whole vehicle bodies were issued or assigned to major automobile manufacturers, including Chrysler, G.M.C., Ford, Daimler-Benz, Porsche, Saab, Volvo, Fiat, Alfa Romeo, Toyota, Nissan, and Honda.

Volvo apparently has been the most vigorous OEM in attempting to enforce its design patents. Over the years, a number of distributors of competitive crash parts, under enormous pressure from Volvo, have entered into uncontested consent decrees with Volvo stating that they would no longer sell aftermarket Volvo crash parts.<sup>41</sup> There have been only two litigated cases to date. In one case, Volvo sued Keystone Automotive Industries, a major California distributor of competitive automobile replacement parts, charging that Keystone's sale of competitive aftermarket fenders violated Volvo's design patent.<sup>42</sup> Keystone responded by challenging the validity of the Volvo patent, raising fundamental design patent issues—whether the Volvo fender was in fact a novel design or whether it had been anticipated by dozens of similarly shaped fenders, all of which existed in the prior art. Further, there was the critical legal question whether the shape and design of the Volvo fender were predominantly dictated by functional concerns— aerodynamics, crashworthiness, safety, corrosion resistance, and other aspects of performance—rather than prompted by matters of ornamentation

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1. See *FTC Assails Auto Parts Bill; Supports Insurers, Consumers*, *Journal of Commerce*, Dec. 29, 1989.

39. Under existing design patent law, "[w]hoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor, subject to the conditions and requirements of this title." 35 U.S.C. § 171 (1988).

40. Volvo Des. Pat. 276,332 (front fender panel with angle of headlight assembly scoop modified from previous fender design) (filed Oct. 20, 1980) (granted Nov. 13, 1984); Volvo Des. Pat. 240,914 (Volvo 262C front fender) (filed Dec. 20, 1974) (granted Aug. 10, 1976); see also Volvo Des. Pat. 280,399 (bumper extension) (filed June 30, 1982) (granted Sept. 3, 1985); Rengle Nationale des Usines Renault, Des. Pat. 246,708 (car front fender panel) (filed July 21, 1975) (granted Dec. 20, 1977).

41. See, e.g., *Volvo N. Am. Corp. v. Auto King*, M-86-734 (D. Md. filed Mar. 6, 1986) (joint motion for injunction by consent granted and judgment filed Dec. 5, 1986); *Volvo N. Am. Corp. v. Alternative Automotive, Inc.*, Civ. No. 84-0120-T (D. Mass. filed Jan. 17, 1984) (joint motion for injunction granted and judgment filed May 7, 1984).

42. *Volvo N. Am. Corp. v. Keystone Automotive Indus., Inc.*, CV86-8306 CBM (GX) (complaint filed Dec. 19, 1986) (Volvo claimed infringement of Des. Pat. 240,914).

and aesthetics. If the design was predominantly influenced by functional considerations, then the design patent is invalid.<sup>43</sup>

After extensive discovery, Volvo decided to drop its case. It voluntarily dismissed its complaint with prejudice.<sup>44</sup> "[T]he dismissal of the case by Volvo, together with its promise not to sue Keystone . . . is a clear admission by Volvo that the [240] patent is unenforceable."<sup>45</sup> Although Volvo has said that it would continue to exercise its patent privileges and enforce its patents vigorously,<sup>46</sup> it has not, to the author's knowledge, initiated additional design patent suits.

In a similar case, Chrysler recently charged that a manufacturer and a distributor of competitive replacement parts infringed the design patent on a Chrysler Dodge Dakota truck fender.<sup>47</sup> Chrysler moved for a preliminary injunction in federal district court to prevent further manufacture and sale of the competitive replacement truck fender. The district court denied Chrysler's preliminary injunction motion on the following rationale.

Defendants challenged the validity of Chrysler's 299,019 design patent. Thus, the central question was whether the fender design was new, original, nonobvious, and ornamental, as required by the design patent law, or whether it was an "obvious" design or predominantly dictated by functional considerations, with the consequence that the design patent would be invalid.

The court determined, based on an affidavit of a defendant's expert witness, that the fender design was an "obvious combination of previous well-known design features."<sup>48</sup> In denying a preliminary injunction, the court also concluded that the fender appeared to be "designed according to functional and performance considerations as opposed to aesthetic or ornamental considerations."<sup>49</sup> The court held that Chrysler had not shown a rea-

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43. See *Power Controls Corp. v. Hybrinetics, Inc.*, 806 F.2d 234, 238-39 (Fed. Cir. 1986) (preliminary injunction against alleged infringer vacated due to the primarily functional purpose of each feature of the patented article). The requirement that a design patent may be granted only for primarily ornamental designs derives from 35 U.S.C. § 171 (1988), which requires that a patent is obtainable for a "new, original and ornamental" design. See also *In re Carletti*, 328 F.2d 1020, 1022 (C.C.P.A. 1964) (affirming the refusal of a patent on grounds that design was functional and not ornamental in that it "was not created for the purpose of ornamenting").

44. See Joint Press Release of Volvo North America Corp. and Keystone Automotive Industries, Apr. 19, 1988.

45. See Keystone Press Release, Apr. 21, 1988.

46. See Barnes, *Volvo Drops Patent Suit on Auto Parts*, National Underwriter, May 2, 1988, at 1, 42.

47. *Chrysler Motors Corp. v. Auto Body Panels of Ohio*, 719 F. Supp. 622 (S.D. Ohio 1989) (order denying preliminary injunction) (Chrysler claimed infringement of Des. Pat. 299,019), *aff'd*, 908 F.2d 951 (Fed. Cir. 1990).

48. *Chrysler*, 719 F. Supp. at 624.

49. *Id.* Of note on the question of functionality is Chrysler's advertising claim with respect to its Dodge Dakota pickup. This advertising confirms that Chrysler products, in particular the Dakota parts, embody overall designs dictated primarily by functional consider-

sonable likelihood of success on the merits because "there is a serious question as to the validity of the Chrysler [fender] patent in that the Chrysler fender is not 'a new, original and ornamental design.'" <sup>50</sup>

The court also examined whether irreparable harm would result to Chrysler if a preliminary injunction were not granted. The court concluded that Chrysler's design patent was "probably invalid," that the issue of respective quality of the two fenders was contested, and that the packaging of the competitive fender minimized any possible confusion.<sup>51</sup> Thus, the court decided that Chrysler had not established the irreparable harm by reason of alleged infringement and that the balance of equities and the public interest favored Auto Body Parts of Ohio and its codefendant. This decision was recently affirmed by the United States Court of Appeals for the Federal Circuit.<sup>52</sup> The court held that Chrysler failed to satisfy the "likelihood of success" and "irreparable injury" requirements for obtaining a preliminary injunction.<sup>53</sup> The case on the merits of Chrysler's claim is still pending before the district court.

Volvo and Chrysler's inability to enforce existing design patents to date does not, of course, prove the need for Congress to create a new, expanded design right. Rather, it demonstrates only that auto manufacturers, seeking to protect ordinary crash parts, often cannot satisfy well-established design patent statutory standards of novelty, nonobviousness and nonfunctionality.

These established standards in the design patent law represent the proper societal balance between enhancing creativity and fostering competition. Certainly one can obtain a design patent and win an infringement suit.<sup>54</sup> Only a handful of the 5,000 or so design patents granted annually end up in court. Admittedly, two-thirds of those patents which were subject to judicial challenge did not pass muster once a court examined whether they met design patent standards,<sup>55</sup> but half of the utility patents subject to judicial challenge do not survive either, and no one is claiming that the established standards for mechanical patents should be relaxed simply because courts reject half of those patents.<sup>56</sup>

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ations, not aesthetic concerns. "Dodge built Dakota through experience. In the field, we learned what to build." *Trucks 1989: Midsize Dakota*, at 8.

50. *Chrysler*, 719 F. Supp. at 625.

51. *Id.*

52. *Chrysler Motors Corp. v. Auto Body Panels of Ohio*, 908 F.2d 951 (Fed. Cir. 1990).

53. *Id.* at 953-54.

54. Perry Saidman, a fellow participant in this conference, has noted the broadened opportunities for design protection afforded by the *Avia* case. See *Avia Group Int'l. Inc. v. L.A. Gear Cal., Inc.*, 853 F.2d 1557, 1562-66 (Fed. Cir. 1988).

55. *Protection of Industrial Designs of Useful Articles: Hearings on H.R. 1179 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 156-57 (1988) [hereinafter *1988 House Hearings*] (testimony of Prof. Ralph Brown, Professor of Law, Emeritus, Yale Law School).

56. *Id.*

### B. State Mold Laws

A second area that auto companies have addressed in their attempts to kill off aftermarket competition is the protection afforded by state mold laws. A number of states have declared that it is unfair competition to use an original part in making a "plug" or "pattern" from which copies are made. Many of these statutes prohibit only the copying of boat hulls—apparently, boat manufacturers in a number of states were particularly stung by competition and were able to get anticopying statutes enacted. These state statutes attempt to preclude the creation of a "plug" mold, made from an OEM part, into which fiberglass or other material would be injected to make replica parts.<sup>57</sup> Other state mold statutes go further and prohibit the use of an OEM part as a "pattern" in making copies; they apply broadly, and arguably crash parts could be included within their scope.<sup>58</sup>

Ford Motor Company charged, *inter alia*, that Keystone violated these state mold laws in Keystone's distribution of competitive Ford crash parts.<sup>59</sup> Among other defenses, Keystone asserted that state mold laws have been preempted by federal patent law under the doctrines announced in the *Sears, Roebuck & Co. v. Stiffel Co.*<sup>60</sup> and *Compco Corp. v. Day-Brite Lighting, Inc.*<sup>61</sup> decisions.

That issue has now been definitively resolved in the recent Supreme Court case of *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*<sup>62</sup> The Court held unanimously, in a decision written by Justice O'Connor, that state mold laws create patent-like protections in an area where the federal government has legislated comprehensively and thereby have been preempted by the federal patent laws.<sup>63</sup> Thus, based on *Bonito Boats*, Ford's challenge to aftermarket competition based on state mold laws was dismissed with prejudice on federal preemption grounds.<sup>64</sup> The auto manufacturers cannot look to these state laws to frustrate aftermarket competition.

57. See, e.g., *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 144-45, 163-64 (1989) (discussing antimold statute and mold procedure).

58. Twelve states have enacted "mold statutes" granting the original manufacturers of various products the right to prohibit others from copying the products by use of a "direct molding process" and/or selling such copies without the original manufacturer's consent. Although most of these statutes apply only to boat hulls and component parts, the statutes of three states—California, Michigan, and Tennessee—purportedly prohibit the use of a direct molding process to duplicate *any* manufactured item for commercial purposes. CAL. BUS. & PROF. CODE § 17300 (West 1987); MICH. COMP. LAWS § 445.622 (1988); TENN. CODE ANN. § 47-50-111(a) (1988).

59. *Ford Motor Co. v. Keystone Auto. Indus., Inc.*, No. 87-CV-1900-DT Civ. (filed E.D. Mich. 1987) (Ford claimed that Keystone's manufacture and sale of competitive crash parts violated the "direct molding process acts of the several states.").

60. 376 U.S. 225 (1964).

61. 376 U.S. 234 (1964).

62. 489 U.S. 141 (1989).

63. *Id.* at 168.

64. *Ford Motor Co. v. Keystone Auto. Indus., Inc.*, No. 87-CV-1900-DT Civ. (filed E.D. Mich. 1987) (mold claim dismissed July 5, 1989).

### C. Federal Trademark Reform

An additional sally in the aftermarket battle took place in connection with amendments to the Lanham Act considered and enacted by the Congress in 1988. As introduced, the proposed amendments would have added language to the Lanham Act that extended existing prohibitions against making affirmative misrepresentations to a new situation—the omission of material facts. That proposed amendment was supported by vehicle manufacturers. It raised the specter that an amended Lanham Act would provide a basis for auto manufacturers to charge that aftermarket competitors had “omitted” some relevant fact in connection with advertising their competitive parts. Using this proposal, a manufacturer might charge that the omission of the country of origin might have been material, or that failure to say it was produced under standards that allegedly differed from the OEM’s standards, or failure to say that the warranty terms might have been different were material omissions. After insurance interests joined other companies in noting their vigorous concerns with this proposed omissions language, it was dropped from the final text of the law.

### D. State Consumer Protection Laws

As the Register of Copyrights has indicated, the debate over the comparative quality of competitive and OEM parts is properly a matter for consumer information legislation, not for intellectual property law. Heated debate over appropriate consumer protection legislation has taken place in the various state legislatures. In the course of this debate, the National Association of Insurance Commissioners (NAIC) has released a draft model consumer protection regulation.<sup>65</sup> This regulation is directed to “prompt, fair and equitable [insurance] settlements” with regard to the use of aftermarket parts.<sup>66</sup> The NAIC model bill has an identification clause, disclosure component and a quality component. It requires that an insurer disclose to the insurance claimant either on its repair estimate or on a separate document that “*THIS ESTIMATE HAS BEEN PREPARED BASED ON THE USE OF AUTOMOBILE PARTS NOT MADE BY THE ORIGINAL MANUFACTURER.*”<sup>67</sup> Some insurers, such as State Farm Insurance Companies, are doing this as standard practice even without legislation.<sup>68</sup> Further, the requisite disclosure under the NAIC model bill must also reflect that aftermarket parts are “at least equal in like, kind, and quality to the original part in terms of fit, quality and performance.”<sup>69</sup> The insurance industry has in the

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65. See *Senate Hearings, supra* note 7, at 141-42 (NAIC Aftermarket Parts Model Regulation, Apr. 14, 1987).

66. *Id.* at 141.

67. *Id.* at 142 (emphasis added).

68. See *id.* at 132, 147 (every State Farm appraisal specifies if a non-OEM component is to be used). Similarly, GEICO discloses on every computer-generated estimate that the estimate may include non-OEM aftermarket parts. *Id.* at 155, 161.

69. *Id.* at 142.

past supported the NAIC model bill in those states where it became a legislative issue. On the other hand, the aftermarket industry and insurers—and most recently, in two instances, the FTC staff—strongly opposed the form of disclosure pressed by the auto manufacturers, which used language so inflammatory and extreme as to effectively direct consumers away from competitive aftermarket parts, rather than simply disclose their use in the repair process.<sup>70</sup> For example, several states have enacted legislation requiring, in addition to the NAIC-type clauses, that the auto owner grant special and prior consent to the installation of competitive alternative parts.

This state-by-state debate has been described as a “slugfest between insurance companies and automobile manufacturers.”<sup>71</sup> In 1988, six states added consumer information statutes,<sup>72</sup> and it appears that twenty-one states, as of mid-1989, had laws or regulations applicable to insurers or repair shops concerning the use of competitive auto parts. While debate between OEMs and insurance companies continued in 1989 at the state level, there are indications that the auto manufacturers and the insurance industry have reached a mutually acceptable compromise solution. Compromise legislation, first passed in Tennessee in 1988, was enacted in 1989 in Alabama, Georgia, Florida, Colorado, and Missouri and is pending in several other states. The Tennessee language has become the state legislative model for both OEMs and insurance companies.

In the interim, state officials have cautioned Congress not to intervene with industrial design legislation which would cripple the new crash parts competition. The President of NAIC has said that “[a]n absence of price competition in [the crash parts] market would result in attendant price increases for automobile repairs which can only put greater pressure on insurers and commissioners to deal with the problems of additional rate increases for automobile insurance.”<sup>73</sup>

### E. Marketplace Competition

One additional area in which the crash parts confrontation is taking place is in the domestic marketplace—certainly the appropriate forum for

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70. See *Replacement Parts*, *supra* note 6, at 2 (MVMA and Aftermarket Body Parts Association statements concerning proposed state consumer notification laws). Recently the FTC staff issued a letter and press release seriously questioning the need for the proposed Washington State disclosure law. FTC Press Release, Mar. 13, 1990; Letter from FTC to Representative O'Brien, Washington House of Representatives (Feb. 26, 1990). The FTC staff also recently issued 10 pages of detailed comments and a two-page press release opposing a proposed Ohio disclosure bill on the ground that “some of the bill’s provisions might injure consumer welfare by substantially reducing competition and consumer choice in the market for crash parts.” FTC Press Release, Dec. 27, 1989; Letter from FTC to Representative Haines, Ohio House of Representatives (Dec. 18, 1989).

71. *Replacement Parts*, *supra* note 6, at 2.

72. *Id.*

73. See *Senate Hearings*, *supra* note 7, at 131 (letter from Edward Muhl, President, NAIC, to Sen. DeConcini).



the public to sort through questions of quality, price and competition. Consumers see television advertisements by E.G. Marshall urging them to be sure that only "genuine GM parts" are used in the repair of their cars. On the other hand, insurance companies publish brochures indicating the significant cost savings from crash parts competition and their intent to use only quality competitive parts in auto repair. This advertising debate, part of an open and free commercial battle aimed at the minds and the pocket-books of American consumers and repair shops, is the appropriate way to determine the future of the crash parts industry—rather than by legislative or judicial fiat destroying the competitive market.<sup>74</sup>

Rather than relying on the marketplace, the auto manufacturers' final attempt—possibly its most serious threat—to eliminate aftermarket competition is to ask Congress to destroy it through the industrial design bill. That issue is considered in Part V, below.

#### F. *British Experience with Crash Parts: British Leyland and the 1988 Act*

It should be noted that the debate over the appropriate role of crash parts also extends abroad. In Great Britain, the House of Lords in the case of *British Leyland Motor Corp. v. Armstrong Patents Co.*, determined that car owners have "an inherent right to repair their cars in the most economical way possible and for that purpose to have access to a free market in spare parts."<sup>75</sup> That case involved a suit by an auto manufacturer that owned the design copyright to an automobile exhaust pipe; the auto company sued to enjoin the manufacturer of a competitive exhaust pipe. Notwithstanding the existence of a copyright in the exhaust pipe under British intellectual property laws, the House of Lords held that the consumer's right to repair his car must prevail over the auto manufacturer's copyright interest.<sup>76</sup>

*British Leyland* held that auto manufacturers are "not entitled to derogate from or interfere with [a consumer's right to repair] by asserting their copyright . . . against a person manufacturing parts solely for repair."<sup>77</sup> Lord Bridge framed the issue this way: "What the [auto] owner needs, if his right to repair is to be of value to him, is the freedom to acquire a previously

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74. Claims that aftermarket competitors are unscrupulous, immoral, free-riders, or pirates are unjustified. Copying an unpatented product is perfectly appropriate. As the Supreme Court said in *Bonito Boats*, "[a]ppending the conclusionary label 'unscrupulous' to such competitive behavior merely endorses a policy judgment which the patent laws do not leave the States free to make. Where an item in general circulation is unprotected by patent, '[r]eproduction of a functional attribute is legitimate competitive activity.'" *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 164 (1989) (quoting *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 863 (1982) (White, J., concurring in result)).

75. 1 App. Cas. 577, 578 (H.L. 1986). My fellow participant in this conference, Christine Fellner, provides a provocative discussion of *British Leyland*. See Fellner, *The New United Kingdom Industrial Design Law*, 19 U. BALT. L. REV. 369 (1989).

76. *British Leyland*, 1 App. Cas. at 578.

77. *Id.*

manufactured replacement exhaust system in an unrestricted market."<sup>78</sup> And he held that a consumer's right to repair his car must prevail over the automobile manufacturer's copyright interest. Auto manufacturers have "already enjoyed the primary benefit which their copyright protects" in the *original sale* of the car. To enforce auto manufacturers' copyrights and to thereby maintain their monopolies in the supply of repair parts is "to detract from the [car] owner's rights and, at least potentially, the value of their cars."<sup>79</sup>

The consumer's "right to repair" issue was carried forward into the debate in Parliament over the recently promulgated Copyright, Designs and Patents Act of 1988.<sup>80</sup> That Act creates a new unregistered design right in the shape or configuration of any article, including a purely functional, three-dimensional article. Two important exceptions in the law substantially curtail its application to aftermarket crash parts, however.

First, section 213(3)(b)(i) provides a "must-fit" exception; a design right does not subsist in a design configuration which "enables the article to be connected to, or placed in, around or against, another article so that either article may perform its function." This applies only to those specific design features of a fender or hood that permit it to fit with the adjacent parts of the car.<sup>81</sup> Second, section 213(3)(b)(ii) is a key "must-match" exception. The new British design right does not extend to design features which are "dependent upon appearance of another article of which the article is intended by the designer to form an integral part." This exception would exclude the design features of a fender or hood because it has been created as an integral part of the overall auto design. Together, these exceptions, which apparently were generated by the crash parts debate and *British Leyland*, make clear that very few crash parts, if any, will qualify for protection under the new British law, because they are excluded by the must-match exceptions.<sup>82</sup>

78. *Id.* at 625.

79. *Id.* at 627.

80. It is not clear how much of *British Leyland* survives under the 1988 Act. It is widely thought that *British Leyland* presents one of many copyright and design patent issues that the British government subsequently addressed in studies and the 1988 Act. Christine Fellner discusses this in detail. See Fellner, *supra* note 75.

81. H.R. 3017, 101st Cong., 1st Sess. (1989), one of the three industrial design rights bills recently considered by the House, contained a narrow "must-fit" exception. However, this exception applied to only those design elements necessary to permit mechanical interface with surrounding parts, such as the design of bolt-hole patterns or flanges. Thus, because replacement parts must be identical in appearance to original parts, this exception was virtually worthless as a commercial matter.

82. There is no legislative history of the Copyright, Designs and Patents Act of 1988 to confirm the coverage and intent of the "must-fit" and "must-match" provisions of section 213. However, it is uniformly understood that these provisions were crafted to address the spare parts problem. See Horton, *Designs, Shapes and Colours: A Comparison of Trade Mark Law in the United Kingdom and the United States*, 9 EIPR 311, 311 n.2 (1989) ("[t]o prevent any monopoly in spare parts arising, if the design of features of an object is dictated by the function the object is to perform, to make it able to fit with or match another article as part of an overall design, then those features will not be protected").

## V. CURRENT CONGRESSIONAL BATTLE OVER INDUSTRIAL DESIGN PROTECTION

The most recent threat to the continued viability of aftermarket crash parts competition came from three virtually identical industrial design copyright bills, recently introduced in the 101st Congress: H.R. 902 introduced by Representative Moorhead, H.R. 3017 introduced by Representative Gephardt and H.R. 3499 introduced by Representatives Moorhead and Kastenmeier by request of the Administration.<sup>83</sup> As drafted, their terms almost certainly would have extended to virtually all crash parts.<sup>84</sup> As the Register of Copyrights noted in regard to a previous, virtually identical bill (S. 791), the bills would have broadened the "subject matter coverage to all 'original designs' which are intended to be 'attractive' or 'distinct.'"<sup>85</sup> These recent bills would have eliminated any requirement of attractiveness or aesthetics from the criteria for protection; as the Register said, "some of the parts mentioned, such as fuel injector nozzles, are internal engine parts never seen by the purchaser of the vehicle."<sup>86</sup> The Register noted that "[b]roadly construed, [the design rights legislation] could extend a ten-year exclusive right to an OEM's entire inventory of spare parts."<sup>87</sup> Thus, the creation of a new industrial design right "will have a major impact on the way business is conducted in the United States. Potentially, millions of purely functional pistons and springs could be placed off-limits to competitive pricing."<sup>88</sup> The consequences of such a change are so far reaching that Register Oman urges Congress to "make a thorough economic analysis of the impact of design protection having such a broad sweep."<sup>89</sup>

When the design rights legislation before the 101st Congress was introduced earlier as S. 791 and H.R. 1179 in the 100th Congress, there was consideration of it on both the Senate and House sides. In the Senate, S. 791 was introduced by Senators DeConcini and Hatch, respectively the Patents Subcommittee Chairman and Ranking Minority Member.<sup>90</sup> However,

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83. See 135 CONG. REC. E337 (daily ed. Feb. 7, 1989) (introduction of H.R. 902 by Rep. Moorhead); 135 CONG. REC. H4352-53 (daily ed. July 26, 1989) (introduction of H.R. 3017 by Rep. Gephardt); 135 CONG. REC. H7291 (daily ed. Oct. 19, 1989) (introduction of H.R. 3499 by Rep. Moorhead). These bills are identical in relevant part to the industrial design bill considered in the 100th Congress discussed later in this Article. See *infra* text accompanying notes 86-90.

84. Under the proposed bills, designs which are not subject to protection include those "dictated solely by a utilitarian function" (emphasis added). H.R. 3017, 101st Cong., 2d Sess. § 1002(d). This exception would exclude virtually no designs of useful articles. Cf. Brown, *Design Protection: An Overview*, 34 UCLA L. REV. 1341, 1355-57 (1987) (discussing current design patent standards) [hereinafter Brown, *Design Protection*].

85. *Senate Hearings*, *supra* note 7, at 240.

86. *Id.* at 240-41.

87. *Id.* at 241.

88. *Id.*

89. *Id.*

90. *Id.* at 1-8 (opening statements of Senators DeConcini and Hatch).

Senator Hatch flagged the potential anticompetitive impact of the bill on aftermarket parts.<sup>91</sup> He said “[c]onsumers ought to continue to benefit from the extensive price competition that presently exists in the manufacture and sale of these crash parts” and Congress must be “careful not to preempt an area of marketplace competition and turn it into a monopoly.”<sup>92</sup>

Hearings were held before the Senate subcommittee, with both auto manufacturers and insurers testifying.<sup>93</sup> The bill was never brought to a vote before the subcommittee and it died at the end of the session. On the House side, the appropriate subcommittee of the Judiciary Committee held hearings on the industrial design bill (H.R. 1179) introduced by Representative Moorhead, but the bill did not make it past the subcommittee.

In the 101st Congress, three virtually identical industrial design bills were introduced. Each would have provided for a radical departure from established intellectual property principles by creating a new design copyright, based on a “zero creativity” standard, for the design of functional articles. On May 3, 1990, the House subcommittee held a hearing on the legislation. Consumer and retail interests testified in strong opposition to the legislation.<sup>94</sup> The House subcommittee held a second day of hearings on June 20, 1990. On the auto parts issue, the largest United States auto insurer, a major insurance association, auto parts manufacturers and retailers, auto parts rebuilders, auto repair shops, and the auto glass aftermarket manufacturers testified in strong opposition to the legislation. On the other side, two United States auto manufacturers and the auto manufacturers’ trade association testified in support of the legislation. In the 101st Congress, the House subcommittee took no action on this legislation.<sup>95</sup>

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91. *Id.* at 7.

92. *Id.*

93. Witnesses included Gary Newton, Chief Patent Counsel, Chrysler Motors Corp., representing MVMA; Jean C. Hiestand, General Counsel, State Farm Mutual Ins. Co.; and August Alegi, Vice President and Deputy General Counsel, GEICO, representing the National Association of Independent Insurers.

94. Witnesses in opposition included Clarence Ditlow, on behalf of the Center for Auto Safety and the Consumer Federation of America; Mark Silbergeld, on behalf of Consumers Union; and Rhonda Parish, on behalf of Wal-Mart Stores and the International Mass Retail Association. In support of the legislation, witnesses included Rep. Gephardt, House Majority Leader; Rep. Michel, House Minority Leader; Robert Johnston, on behalf of the Industrial Design Coalition; Robert Drobeck, on behalf of the Industrial Designers Society of America; and William Thompson, on behalf of the American Intellectual Property Law Association and the American Bar Association Section on Patent, Trademark and Copyright Law.

95. On June 20, 1990, witnesses in opposition to the legislation included C.A. Ingham, on behalf of State Farm Insurance Companies and the Coalition for Competitive Repair Parts; Claude Barfield, a trade policy expert; Roger Lawson, on behalf of the Alliance of American Insurers; Richard Turney, on behalf of the Automotive Service Industry Association and the Automobile Parts Rebuilding Association; Julian Morris, on behalf of the Automotive Parts and Accessories Association; and Don Randall, on behalf of the Automotive Service Association. In support of the legislation, the witnesses were William Cunningham, on behalf of the AFL-CIO; Kenneth Myers, on behalf of Ford Motor Com-

This new effort in the 101st Congress, and now in the 102d Congress as well, to press once again for industrial design legislation is being spear-headed by the Industrial Design Coalition, which is comprised of more than thirty companies and trade associations pressing for enactment of industrial design legislation.<sup>96</sup> In the legislative debate over industrial design legislation there are a number of policy, economic, and legal questions that should be addressed if the bills are to encompass aftermarket parts.

A. *What Would Be the Cost to Consumers of a Return to Monopoly Status for the Auto Makers?*

First, crash parts prices would skyrocket. If newly found competition brought down the price of an Omni fender from \$140 when it was a monopoly product to \$76 when it faced competition, one can reasonably expect that, once the monopoly is available again, the price would shoot back to \$140. The crash parts price index, which has been on a downward slope for a number of years with competition,<sup>97</sup> will return to an upward climb and replicate the experience in the monopoly period of the 1970s. There simply can be no doubt that the immediate consequence of the reinstatement of a crash parts monopoly will be sharply increased parts prices. Why else would the auto manufacturers be pressing so strongly to eliminate the competition?

B. *Will the Consumer Have any Choice in Determining What Kind of Crash Parts He Wants to Place on His Car?*

If a person has a four-year-old car involved in a "fender bender," he will not have the choice to buy an aftermarket fender appropriate for his auto. He will be forced to return to the manufacturer to buy *its* product at sharply inflated prices. Indeed, it was this concern that animated the House of Lords in the *British Leyland* case, which established an auto owner's "inherent right to repair" so as "to have access to a free market in spare parts."<sup>98</sup>

The Industrial Design Coalition has taken a contradictory and puzzling position on this issue.<sup>99</sup> It says that the "consumer should have the right to buy alternative replacement parts," but that that right should apply only to "repair and replacement parts (*other than* crash parts)."<sup>100</sup>

The impact on consumer choice and the general lack of a significant public benefit led the United States Department of Justice to oppose the

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pany and the Motor Vehicle Manufacturers Association; and David LeMay, on behalf of Tecumseh Products Company and the National Association of Manufacturers.

96. See *Senate Hearings*, *supra* note 7, at 39 (testimony of William Thompson, representing the Industrial Design Coalition).

97. See *supra* notes 17-20.

98. *British Leyland Motor Corp. v. Armstrong Patents Co.*, 1 App. Cas. 577, 578 (H.L. 1986).

99. *Senate Hearings*, *supra* note 7, at 59.

100. *Id.* at 58-59 (parenthetical in original, emphasis added):

creation of a new industrial design right in 1976 when Congress last seriously considered this matter.<sup>101</sup> The Department of Justice then opposed the bill on the grounds that design legislation "would create a new monopoly which has not been justified by showing that its benefits will outweigh the disadvantage of removing such designs from free public use."<sup>102</sup>

Because the disruption that the present bill will impose on established competitive patterns is so significant and the scope of the bill is so broad, encompassing virtually every man-made article except wearing apparel and semiconductor chips,<sup>103</sup> the Register has urged Congress to approach this bill very cautiously and to commission a thorough economic analysis of the impact of design protection.<sup>104</sup>

### C. *Is Expanded Design Protection Essential to Foster Innovation?*

One must start with the proposition that current protections in the design field—design patents, copyright protection, and Lanham Act provisions—appear to provide more than adequate protection and incentive for the creators of American design.<sup>105</sup> That side of the debate has been summarized by the Register of Copyrights as follows:

American ingenuity and creativity thrive under our existing intellectual property laws balanced by opportunities to compete through imitation of unprotected designs. For seventy years, a few groups have agitated for design legislation on the ground that added incentives to create innovative designs are required. During this time, the American economy has flourished and has out-performed the economies of other countries.<sup>106</sup>

In the context of auto designs, all available evidence suggests that OEMs have ample existing design incentives; additional incentives, via industrial design legislation, would be redundant and inefficient. For example, from 1985 through 1988, when significant aftermarket competition emerged, auto manufacturers reported impressive growth in research and development, sales and profits. Additionally, from 1980 through 1988 the number of new auto models increased dramatically.<sup>107</sup>

Most importantly, auto manufacturers are driven by design incentives created by the vigorously competitive new car market. Clearly, design investment is critical in the competition between domestic and foreign auto

101. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 47 (1976).

102. *Id.* at 50.

103. *Senate Hearings, supra* note 7, at 215 (analysis of Register Oman).

104. *Id.* at 241.

105. *Id.* at 100-02 (testimony of Jean C. Hiestand, Vice President and General Counsel, State Farm Mutual Automobile Insurance Company).

106. *Id.* at 233 (the Register was presenting the case against S. 791).

107. BARFIELD REPORT, *supra* note 6, at 10-11.

manufacturers to capture, maintain, or increase United States market shares.

Even if an intellectual property case could be made for added industrial design protection in the sale of the new automobile, that does not demonstrate that it should be extended to the replacement parts market, crash parts and otherwise. Replacement parts, whether OEM or not, are not separately designed; indeed, they must be identical to the original parts. Thus, there are no added design costs or design efforts in connection with replacement parts. One would not expect that a single additional penny would be expended by the car companies in the design of an automobile if crash parts were subject to new, expanded design rights. The MVMA has confirmed this: Even with aftermarket protection, "investment in the design and development of the exterior configuration of our vehicles would not necessarily increase."<sup>108</sup> Today, automobile companies spend significant dollar sums for design—but to create a car that is attractive competitively in the *original* sales market.<sup>109</sup> Killing aftermarket competition will not create any greater design incentives. General Motors will continue to spend a great deal of money to create new cars with an attractive overall design that will sell well in the competitive market against Ford, Honda, Chrysler, and other automobile manufacturers. That is the design incentive—to sell the car in the *original* market. There simply will be no added creativity if design rights apply to the repair market.

Furthermore, based on the example of Ford Motor Company Limited, Ford's wholly-owned United Kingdom subsidiary, research and development costs are not generally allocated by OEMs by vehicle, body part, or market (new or replacement); and the pricing of replacement parts is entirely unrelated to actual production costs.<sup>110</sup> On the first point, the United Kingdom Monopolies and Mergers Commission explained that:

No allocation of R&D [research and development] costs is specifically made to body parts or to vehicles. Therefore standard costs for body parts do not include any element of the costs of R&D, such costs being treated as part of general overheads. We were also told by Ford that it did not have a policy whereby R&D costs, or any other costs, were included as specific elements

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108. *Senate Hearings, supra* note 7, at 82.

109. MVMA claims, without any backup documentation, that the total design costs for a fender is \$4.5 to \$10 million. *Id.* There are no indications that those design expenditures have decreased in the last few years with the advent of aftermarket competition and no evidence of allocation of these costs to the sale of this part in the replacement market.

110. THE MONOPOLIES AND MERGERS COMMISSION, FORD MOTOR COMPANY LIMITED: A REPORT ON THE POLICY AND PRACTICE OF THE FORD MOTOR COMPANY LIMITED OF NOT GRANTING LICENSES TO MANUFACTURE OR SELL IN THE UNITED KINGDOM CERTAIN REPLACEMENT PARTS FOR FORD VEHICLES, (Her Majesty's Stationary Office, 1985) at 13, 19 [hereinafter MONOPOLIES AND MERGERS COMMISSION REPORT].

of the selling price calculated to recover such costs within a specific volume of sales or period of time.<sup>111</sup>

Second, Ford admitted that its pricing policy for replacement parts was governed by several factors which did not include costs. The factors were: Ford parts should be competitive with comparable OEM parts to parts in such countries; identical Ford parts should be priced comparably in different countries; Ford parts should be competitive with non-OEM competitive parts; and, lastly, Ford parts should contribute to overall profitability.<sup>112</sup>

Additionally, Ford admitted that it could not allocate investment costs or profitability to replacement parts.<sup>113</sup> This evidence, unrebutted by OEMs testifying on this issue, completely undermines arguments that OEMs need industrial design protection to recoup R&D design costs.

Last, the size of the replacement parts market is minuscule compared to the size of the new car market; OEMs have a two- to three-year lead time advantage over competitive suppliers; and independent suppliers face significant production costs and demand uncertainty. These are additional reasons why increased design protections for replacement parts would create redundant design incentives.

The failure to demonstrate that there is any intellectual property benefit at the margin fatally wounds the auto makers' case to extend design rights to the aftermarket, even if they were able to prevail on the proposition that the overall design of their cars should be protected against a competitor selling a replica of the car in the original market. Competition in the original sales market conceivably could have an impact on the incentive to create more inventive and attractive designs, but creating a design right for crash parts clearly will not.

#### *D. Are New Intellectual Property Protections Essential to Auto Company Profitability?*

As noted, the costs of designs are not insignificant. However, those design costs go to producing the design of the car to be sold in the original market. Even if it were possible to fully allocate costs to the replacement market, the allocated costs would be only a fraction of the total design costs. And certainly manufacturers must recover essentially all their design costs in the original sale of the car.

It is, of course, likely that the recent, vigorous crash parts price competition may have squeezed some monopoly profits out of aftermarket sales. Auto companies have dropped aftermarket prices quite significantly. However, they still must be selling above costs. If they are not, and indeed are selling these parts below cost in an attempt to drive out competitors and

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111. *Id.* at 13.

112. *Id.*

113. *Id.* at 19.



regain their monopoly status, they would be creating a significant antitrust problem. One must presume that the auto companies would not be incurring such risks in their pricing policy.

In any event, the auto manufacturers' desire to make more money in a monopoly market, rather than less in a competitive market, is not itself a rationale for creating a new intellectual property right. As Representative Kastenmeier stated in identifying the appropriate political tests to determine whether a new intellectual property right should be created:

the costs and benefits of the proposed [intellectual property] legislation [must be presented]. . . . Since we live in a society of winners and losers, the proponent must also candidly identify the groups that will bear the adverse consequences of the proposal and explain why they should bear those losses. The argument that a particular interest group will make more money and therefore be more creative does not satisfy this threshold standard or the constitutional requirements of the intellectual property clause.<sup>114</sup>

*E. What About the Potential Economic Disruption for Established United States Manufacturers Who Today Are Creating and Selling Glass and Hard Parts in the Competitive Aftermarket?*

It is certain that the proposed bills would encompass dozens, and possibly hundreds or thousands, of United States manufacturers who today make a wide variety of hard parts and glass for the competitive aftermarket. These companies could all be put out of business by a new industrial design bill. The auto manufacturers, however, have indicated that they may be willing to "exempt" windshields and other glass products, as well as "hard parts," from the scope of the design bills.<sup>115</sup>

But is there any principled basis, as a matter of intellectual property theory, to exclude those products from the law? Certainly they are included squarely within the bills' definitions. Windshields have a design shape in their contour and are integrated and graceful components of the overall design of the automobile. They have functional and safety qualities as well as design features. Their design is not dictated "solely" by functional considerations and thus does not meet the criteria for the bills' exemption from design protection. Thus, their design components are completely analogous to those of a fender or hood.<sup>116</sup>

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114. Kastenmeier and Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?*, 70 MINN. L. REV. 417, 441 (1985) [hereinafter *The Semiconductor Chip Protection Act*] (footnote omitted).

115. *Senate Hearings*, *supra* note 7, at 55; see also *June 1990 House Hearings*, *supra* note 22, at 2 (unpublished testimony of Kenneth W. Myers, Marketing Manager, Parts and Services Division, Ford Motor Company).

116. The position of the Industrial Design Coalition to the contrary is simply wrong. *Id.* They claim, "[w]ithin the perimeter of [a windshield], automobile glass has no distinc-

The only difference between glass and other aftermarket parts is an economic one—over the years, automobile companies have become accustomed to dealing competitively with replacement glass in the competitive aftermarket; in contrast, only today are auto companies coming to grips with vigorous crash parts competition. The auto companies' unwillingness to compete, however, is not a rational basis to take the design of an item from the public domain and place it under the monopoly control of the manufacturer.

In sum, for years crash parts design rights have been almost universally in the public domain. There have been limited exceptions where auto manufacturers have sought design patent protection for individual parts. However, by and large, designs of individual parts have been available for the public to copy. The failure of a competitive aftermarket to develop all those years was much more a matter of practical economics, rather than a legal impediment. Only now, when a competitive market has developed, have the auto manufacturers attempted to withdraw these designs from the public domain and insure that they have a monopoly over these products.

*F. Would the Imposition of Design Rights on Replacement Parts Be Proconsumer?*

The Industrial Design Coalition claims that design legislation is pro-consumer<sup>117</sup> and will encourage new designs which "produce . . . choices, not copies, for America's consumers."<sup>118</sup> But as noted above, extending design rights to the aftermarket will not encourage new and better product design. Replacement parts will be the same design as original parts;<sup>119</sup> there simply is no marginal benefit for the consumer to give the manufacturer monopoly design rights, thereby denying the consumer a choice to buy an inexpensive, competitive replacement part and forcing him to buy an expensive replacement part from the OEM.

The major consumer groups vehemently oppose the proposed industrial design rights legislation on the grounds that it is profoundly anti-consumer. For example, in 1987 Consumers Union and the Consumer Federation of America opposed the granting of design protections because of the "profound, negative effect on competition in manufactured goods industries [such that] . . . the registrant [of a design right] would realize monopoly profits and consumers would foot the bill."<sup>120</sup>

tive shape." A look at contemporary windshields illustrates that this is not the case.

117. *Senate Hearings*, *supra* note 7, at 58-59.

118. *1988 House Hearings*, *supra* note 55, at 83 (testimony of Bruce Lehman on behalf of the Industrial Design Coalition).

119. The Industrial Design Coalition concedes this. *Senate Hearings*, *supra* note 7, at 59.

120. Letter from Mark Silbergeld, Director, Washington Office, Consumers Union and Gene Kimmelman, Legislative Director, Consumer Federation of America, to Sen. DeConcini, Chairman, Subcommittee on Patents, Copyrights and Trademarks (July 30, 1987). Likewise, in the international trade context, Consumers Union recently reiterated that it opposes the creation of industrial design rights in the United States based on

At the May 3, 1990 hearing before the House Subcommittee, Consumers Union, the Consumer Federation of America, and the Center for Auto Safety urged the Subcommittee to reject the pending industrial design legislation. Consumers Union testified that the legislation, if enacted, "could stifle existing competition in many consumer product markets."<sup>121</sup> Consumers Union testified that the legislation would serve "no public benefit" but instead "would serve the end of private profit maximization by penalizing useful imitation of ordinary objects, at the consumer's expense."<sup>122</sup> Similarly, the Consumer Federation of America, the largest consumer interest group in the United States, and the Center for Auto Safety, an organization dedicated to protecting the economic and safety interests of consumers who purchase and drive automobiles, testified that the "proposed design rights bills are bad legislation, which will needlessly saddle the American consumer with higher prices and fewer product choices without justification."<sup>123</sup>

Furthermore, the National Association of Insurance Commissioners strongly opposed the industrial design rights legislation in 1987, as it applied to crash parts, out of its deeply held concerns for controlling the cost of automobile insurance.<sup>124</sup> Thus, consumer groups, and those committed to policyholders' interests, recognize unequivocally that industrial design legislation that applies to crash parts is anticompetitive and anticonsumer.

Auto manufacturers simply have no credible claims that industrial design rights resolution is proconsumer. Quite clearly, design rights legislation will benefit enormously, through supernormal monopoly profits, foreign and domestic auto manufacturers of replacement parts at the expense of United States consumers, automobile insurance policyholders and third-party interests, such as insurance companies.

*G. Does the United States Lag Behind the World in the Area of Design Protection?*

There has been considerable emphasis placed on the fact that many foreign countries have separate industrial design laws, while the United States does not.

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the hundreds of millions of dollars of savings to consumers brought about by competition by independent manufacturers of replacement parts. Letter from Mark Silbergeld, Director, Washington Office, Consumers Union, to Ambassador Carla A. Hills, United States Trade Representative (September 1, 1989).

121. *Hearings on H.R. 902, H.R. 3017, H.R. 3499, Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 1 (1990) (unpublished testimony of Mark Silbergeld, Director, Washington Office, Consumers Union).

122. *Id.* at 6.

123. *Id.* at 20 (unpublished testimony of Clarence Ditlow, Executive Director, Center for Auto Safety).

124. *Senate Hearings*, *supra* note 7, at 131 (letter from Edward Muhl, President, NAIC, to Sen. DeConcini (Mar. 26, 1987)).

That point, however, is only the beginning of the analysis. The Register of Copyrights has made it clear that the foreign design laws referred to by proponents of design legislation provide no clear precedent for United States design protection. The Register notes that comparative analysis of foreign laws is difficult for a number of reasons. "The various foreign industrial design laws tend to vary more than laws concerning other intellectual property, such as patents or trademarks."<sup>125</sup> Moreover, although some countries have a national "design registration system . . . the [actual] registrability of a design is governed by internal administrative practices not readily apparent from a reading of the statute."<sup>126</sup> Further, the Register points out that the European laws are distinct and heterogeneous. The French rely more on their copyright law than on the French design statute, and the level of artistry and creativity required under the copyright law exceeds American copyright standards. The Italian design law involves a novelty test which is not as strict as that applied by the United States Patent Office, but well exceeds the virtually nonexistent standard in current United States industrial design bills. The Japanese law is quite different. It is often cited by proponents of United States industrial design legislation, but it provides in many instances design protection where copyright protection would be available in this country.<sup>127</sup> As the Register states, "of the 30,000 designs registered annually in Japan, many cover items receiving copyright protection in the United States."<sup>128</sup> The Japanese law, in addition, requires a significantly higher level of creativity than the qualifying test under the United States industrial design bill.

Similarly, Professor Reichman has stated that many European Community laws

tend to allow designers no novelty grace period in which to test-market their output. Hence, those laws invalidate far more designs for lack of novelty than occurs under United States patent law, where a one-year grace period benefits designs in commerce. Moreover, the requirements of registration and deposit under foreign law, though less onerous than in the United States, remain too costly and burdensome for most foreign designers to make regular use of these laws. Finally, both the qualitative originality standard, and with some notable exceptions, the functionality standard that most foreign design laws impose in one form or another tend to exclude the bulk of the designs they are nominally *supposed* to protect.<sup>129</sup>

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125. *Id.* at 235-36 (citation omitted).

126. *Id.* at 236.

127. *See id.* at 238.

128. *Id.*

129. *See Industrial Design Legislation: Hearings on H.R. 902, H.R. 3017, H.R. 3499 Before the Subcomm. on Courts, Intellectual Property and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 6-7 (1990) (unpublished testimony of J.H. Reichman, Professor of Law, Vanderbilt University, Sept., 1990).*

Beyond the letter of law, the fact is that for years many auto crash parts have been widely available in Europe.<sup>130</sup> In some cases, no manufacturers bothered to secure and enforce industrial design protection; in other cases, as a practical matter, European laws simply are considered irrelevant to the crash parts problem.<sup>131</sup> Either alternative detracts from the argument that they are a model for United States legislation affecting crash parts competition.

These issues are not settled in the European or international arenas. For example, as discussed above, in the United Kingdom the new copyright and design law effectively *excludes* crash parts from the scope of design protection.<sup>132</sup> Other countries have not directly confronted this issue and protect designs generally in a variety of ways, as discussed above.

Thus, industrial design legislation abroad provides a varied picture; but even if a number of other countries have created industrial design protection, that does not answer the question of how to maximize public benefit through intellectual property laws and balance creativity and competition. Enacting an industrial design rights bill which would kill aftermarket competition clearly does not serve the public interest.

#### H. *Is This Bill Necessary to Protect United States Jobs?*

Clearly, the intellectual property debate over design protection should not be the vehicle to try to formulate national trade policy. As described by Professor Ralph Brown, the industrial design bill "is a bald piece of protectionism, aimed of course at the Japanese and other competitors in the replacement parts market."<sup>133</sup> This issue, however, is much more

130. *Senate Hearings*, *supra* note 7, at 143.

131. "[U]ntil 1981, in Great Britain, Ford simply chose to accept [aftermarket] competition in England 'by not asserting property rights against independent suppliers of replacement panels.'" *Id.* at 144 (citing MONOPOLIES AND MERGERS COMMISSION REPORT, *supra* note 110).

132. MONOPOLIES AND MERGERS COMMISSION REPORT, *supra* note 110. This Commission reached the following conclusions:

(1) "Ford has chosen since 1981 to seek to carry on the body panel section of its business as a monopolist." *Id.* at 33.

(2) This "course of conduct followed by Ford is anti-competitive" in its effect of preventing competition by independent replacement parts. *Id.* at 37.

(3) "The competition of the independent" manufacturers reduced replacement parts' prices directly, by offering "a cheaper but equivalent [body] panel," and "led Ford to reduce the price of a [body] panel or to limit a price increase." *Id.* at 37-38.

(4) "Competition in the sale of new cars, in which the price of spares may play a small role, is therefore not an adequate substitute for competition in the sale of spare parts themselves." *Id.* at 39.

(5) "[I]n the absence of competition, prices of replacement panels would be likely to rise. Elimination of the independents' competition is therefore against the public interest." *Id.* at 40.

Ultimately, the Commission recommended a variety of changes in the United Kingdom intellectual property laws to preserve competition in the market for auto replacement parts. *Id.* at 46.

133. Brown, *Design Protection*, *supra* note 84, at 1399.

complicated than simply the protection of United States jobs from foreign competition. For example, increasing numbers of crash parts are projected to be manufactured in the United States. Jobs entailed in producing such parts would be lost if the industrial design bill passes.<sup>134</sup> In addition, an entire importation, warehousing and distribution network for competitive parts has been established in the United States; these jobs would be lost.<sup>135</sup> Virtually all replacement glass, which would be covered by the industrial design law,<sup>136</sup> is manufactured in the United States; these jobs would be lost.<sup>137</sup> Competitive hard parts are manufactured and distributed in the United States; these jobs would all be lost.<sup>138</sup> Indeed, domestic auto companies are rather cheeky to raise the issue of United States jobs when they have turned increasingly to foreign sources of manufacture for their automobiles, with massive loss of jobs in this country.<sup>139</sup> Most importantly, industrial design legislation would cost these United States jobs and, ironically, provide significant benefits to foreign auto makers.<sup>140</sup>

In 1988, almost forty percent of new cars sold in the United States were manufactured by foreign companies. Thus, roughly forty percent of the economic benefits of this proposed legislative monopoly—jobs and profits—would go directly to foreign companies. Further, growing foreign

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134. The Industrial Design Coalition has conceded that the design bill could not be limited to provide design protection against only foreign products. *Senate Hearings, supra* note 7, at 55-56. In fact, Caterpillar notes that 50% of parts competing with Caterpillar parts are made in the United States. *Id.* at 56.

135. The number of United States workers in these activities is estimated at 3,300. *Senate Hearings, supra* note 7, at 117.

136. *Cf. id.* at 55 (view that glass would be excluded).

137. It has been estimated that 20,000 jobs relating to the aftermarket glass industry might be lost by OEM monopolies in this area. *See June 1990 House Hearings, supra* note 22, at 2 (unpublished statement of Philip J. James, Chief Executive Officer, National Glass Association).

138. If competition in crash parts is eliminated, State Farm's counsel suggested that a total of 21,400 United States jobs might be lost. *Id.*

139. *See generally Senate Hearings, supra* note 7, at 171-72 (discussion between Sen. DeConcini and witnesses alluding to this phenomenon).

140. Evidence that foreign auto manufacturers would take full advantage of broad industrial design legislation to monopolize the manufacture and sale of crash parts exists throughout their marketing and sales campaigns. For example, advertisements in trade journals display aggressive attempts by foreign manufacturers to maintain their hold on the aftermarket. *See, e.g., HAMMER & DOLLY, Sept. 1989, at 11* (publication for Washington, D.C. area repair shops) (advertisement stating that "Toyota sheet metal can save you fits . . . [b]ecause there is nothing like the real thing. The same is hard to say for imitations."); *HAMMER & DOLLY, Feb. 1989, at 6* (advertisement stating that "You have the right to demand proof that imitation parts equal the quality of Genuine Honda Body Parts."); *HAMMER & DOLLY, Sept. 1989, at 15* (Subaru advertisement claiming that "[t]he time it takes to read this headline is longer than the warranty on many imitation parts."); *NEWSWEEK, Jan. 29, 1990, at 77* ("If your Toyota is ever in the body shop for collision repair, make sure you specify using only Genuine Toyota Sheet Metal . . . insurance appraisers often specify using imitation replacement parts. And that's just not good enough, since many imitation body parts simply do not meet Toyota's high quality standards . . .").

overstocking of parts by United States manufacturers, importation of whole product lines, and webs of marketing and arrangements between United States and foreign auto makers would shift abroad an even greater percentage of the monopoly profits at stake.

The Register of Copyrights cogently asserts that the industrial design law is simply not a proper vehicle to make trade policy. He said in 1988 House hearings:

[T]he argument was often made that design protection would prevent the marketing of foreign manufactured spare parts, perhaps of inferior quality in workmanship and materials. The Copyright Office believes that the quality of spare parts is a legitimate congressional concern. Clearly, parts purchased by the American consumer should perform the function for which they were purchased. The Copyright Office suggests, however, that product reliability concerns could be addressed in consumer products legislation rather than design legislation. Design protection gives a manufacturer a right to exclude *all* competing copies—superior parts as well as inferior ones. Moreover, competing American firms are excluded from the field as well as foreign firms. And without the pressures of competition, the quality of the parts made by the original manufacturer could start to deteriorate. *So design protection would be best evaluated on its own merits of advancing the public good by fostering the creation of new and valuable industrial designs rather than as a trade-inspired effort to protect a specific industry.*<sup>141</sup>

Indeed, Register Oman points out that a design protection law could ultimately *disadvantage* United States manufacturers of crash parts vis-a-vis foreign OEMs:

[in] light of the growing percentage of foreign-made automobiles in the United States[,] [w]e could be freezing United States manufacturers out of the potentially profitable parts market for this huge fleet of automobiles. As the dollar falls in relation to foreign currencies, we could again be extremely competitive in this market.<sup>142</sup>

Thus, even as a matter of trade policy, design protection for crash parts is shortsighted and counterproductive.

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141. *1988 House Hearings*, *supra* note 55, at 60 (statement of Ralph Oman, Register of Copyrights) (emphasis added).

142. *Id.*

### I. Potential Impact of GATT Negotiations on Aftermarket Competition

The Uruguay Round of negotiations of the General Agreement on Tariffs and Trade (GATT) currently underway, but suspended temporarily, poses an enormously serious threat to crash parts competition in the United States. On April 8, 1989, preliminary negotiating texts on trade-related intellectual property rights (TRIPS) were ratified in Geneva by the United States and other GATT Members.<sup>143</sup> These negotiating texts paved the way for the TRIPS negotiations within the Uruguay Round of GATT sessions.

Some GATT member countries favor the inclusion of strong industrial design rights protection within a negotiated TRIPS agreement. Although it is clearly in the national interest to negotiate a comprehensive TRIPS agreement embodying adequate and effective protections and enforcement mechanisms for United States-recognized intellectual property rights, such as copyrights, trademarks, patents, and trade secrets, such is not the case for broad industrial design rights not recognized by United States law.

The United States negotiators should resist pressures from abroad to agree to industrial design right protections for three reasons. First, Congress has refused steadfastly for three decades to create broad intellectual property protections for designs of manufactured articles. Recognizing this, the United States negotiators should not adopt or accept a position squarely inconsistent with United States policy and law.

Second, as Register Oman pointed out in Congress, the creation of a new industrial design right could have a major impact on business in the United States.<sup>144</sup> Neither Congress nor proponents of the legislation have conducted a thorough economic study of the impact of sweepingly broad design protections. International obligations requiring the United States to create and enforce broad design rights could have severe and largely undetermined effects on the United States economy.

Third, consistent with its constitutional mandate, Congress should determine the scope of any new industrial design protections. Most designs of industrial products and parts do not meet the traditional patent or copyright tests and have never been protectable under United States intellectual property laws. Congress should make the determination whether a radical

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143. *Hearings on Oversight of the Uruguay Round of Multilateral Trade Negotiations Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 101st Cong., 1st Sess. 2-10, 50-60 (testimony of Ambassador Carla A. Hills, United States Trade Representative, Apr. 20, 1989). See generally *Results of the GATT Ministerial Meeting Held in Punta del Este, Uruguay: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 99th Cong., 2d Sess. 3, 12-15 (1986) (statement of Clayton Yeutter); *EC's Intellectual Property Proposal Debated in Uruguay Round Session*, Daily Report for Executives (BNA) at A-9, col. 1 (July 11, 1989). As of late 1990, GATT negotiations for industrial design rights were still under way. *Int'l Trade Rep.* (BNA) 1368 (Sept. 12, 1990).

144. See BARFIELD REPORT, *supra* note 6, at 52.



departure from existing United States law is necessary; the United States negotiators should not preempt that consideration.

## VI. RATIONALE FOR DRAWING THE LINE AT REPLACEMENT PARTS

The insurance industry suggests that any new industrial design legislation considered by Congress should draw a principled distinction between the first sale of an overall article—such as an automobile—and the subsequent sale of replacement and repair parts necessary to maintain the overall article. Even if the proponents of increased design protection carry their burden of demonstrating the public benefits of *sui generis* protection generally for some realm of industrial designs, such protection should be limited to the first sale in a competitive market of an overall object embodying that design; it should not be extended to the aftermarkets for facsimile replacement parts. In the context of the current legislation, the appropriate vehicle for this distinction is a “Consumer Right to Repair” amendment.

Quite simply, this “Consumer Right to Repair” amendment would incorporate into any new industrial design law the principle, already embedded in our intellectual property traditions, that the owner of an object—even if that object is patented—enjoys the right to repair and maintain that object with parts of choice. This right to repair, as recognized in *British Leyland*, necessarily embraces the right to manufacture and supply competitive replacement parts.<sup>145</sup>

As a practical matter, the “Consumer Right to Repair” amendment would allow auto manufacturers to protect the designs of new automobiles and of parts within new automobiles (subject to the enumerated standards) sold as part of the new automobiles. In this respect, one auto manufacturer would be prohibited from copying the protected design of another auto manufacturer for use in a competing new auto or part of a new auto. However, no protection would attach to parts sold as replacement or repair parts for automobiles (unless such parts meet existing design patent or copyright standards). Thus, competition would be preserved in the markets for replacement shock absorbers, mufflers, batteries, fenders, windshields and hoods.

The “Consumer Right to Repair” amendment reflects a principled approach to achieving balance in industrial design legislation based on long-standing legal doctrines grounded in patent, copyright, antitrust and warranty law. In traditional patent law, the rights owned by the holder of a patent are “exhausted” upon the first sale of the patented object.<sup>146</sup> The “exhaustion” of a patent holder’s rights means that the purchaser of the patented object may enjoy the full use of the object without restrictions

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145. See *supra* notes 98-104 and accompanying text.

146. See *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 549 (1852).

imposed by the patent owner.<sup>147</sup> In effect, the purchaser receives an implied license to use the object. In turn, the implied license to use an object entails a broad right to maintain and repair the patented article.<sup>148</sup>

The right to maintain and repair is limited by the principle that the owner of the object may replace damaged or worn (or even undamaged) parts, provided that the owner does not actually reconstruct the patented article.<sup>149</sup> The Supreme Court has stated that the replacement of parts, "whether of the same part repeatedly or different parts successively, is no more than the lawful right of the owner to repair his property."<sup>150</sup> Furthermore, the Supreme Court embraced the principle that authorizing the purchase of competitive replacement parts necessarily entails allowing the commercial and competitive supply of such parts.<sup>151</sup>

Like its counterpart "exhaustion" doctrine in patent law, the "first sale" doctrine ingrained in copyright law supports a principled distinction between the sale of a new product and the sale of replacement parts. The "first sale" doctrine, like the "exhaustion" doctrine, rests on the common law's hostility toward restraints on alienation of personal or real property, and allows the owner of a copyrighted article to use fully and resell the article.<sup>152</sup> Based on nineteenth century antecedents,<sup>153</sup> early this century the Supreme Court clarified and Congress codified the "first sale" doctrine.<sup>154</sup> The doctrine appears now in the 1976 Copyright Act in the following form: "the owner of a particular copy or phonorecord lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."<sup>155</sup>

147. See *Adams v. Burke*, 84 U.S. (17 Wall.) 453, 456 (1873); see also *United States v. Univis Lens Co.*, 316 U.S. 241, 250 (1942) (patentee exhausts the monopoly in an article once he sells it and he may not thereafter control the use or disposition of it).

148. See *Wilson v. Simpson*, 50 U.S. (9 How.) 109, 123 (1850).

149. See *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 346 (1961).

150. *Id.*

151. *Id.* at 340-42, 346.

152. A recent discussion of this doctrine is contained in Kastenmeier, *Copyright in an Era of Technological Change: A Political Perspective*, 14 COLUM.-VLA J.L. & ARTS 1 (speech given at Columbia Law School on Mar. 30, 1989). Representative Kastenmeier explained that based on the first sale doctrine, "Congress should proceed cautiously in considering further inroads [in addition to the Record Rental Amendment Act] on the public's existing and well-considered privilege to redistribute legitimately acquired copies, once the copyright owner authorizes an initial sale." *Id.* at 17.

153. See *Harrison v. Maynard, Merrill & Co.*, 61 F. 689, 690-91 (2d Cir. 1894); *Stevens v. Gladding*, 58 U.S. (17 How.) 447, 452 (1855); *Stephens v. Cady*, 55 U.S. (14 How.) 528 (1853).

154. In 1908, the Supreme Court declared clearly that: [O]ne who has sold a copyrighted article, without restriction, has parted with all right to control the sale of it." *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908). The "first sale" doctrine was first codified in the 1909 Copyright Act. Act of Mar. 4, 1909, ch. 320, § 41, 35 Stat. 1075, 1084.

155. 17 U.S.C. § 109(a) (1988). Congress departed from this doctrine once; it did so to carve out a narrow exception regarding phonorecord rentals. 17 U.S.C. § 109(b) (1988) (Record Rental Amendment of 1983) (prohibiting the owners of records from

Congress has recognized that the "first sale" doctrine is deeply rooted in Anglo-American law<sup>156</sup> and the Register of Copyrights regards as "[b]eyond cavil, [that] elements of the first sale doctrine represent fundamental principles of copyright law."<sup>157</sup>

In addition to the intellectual property laws, antitrust law supports the need to draw a line in industrial design legislation between the initial sale of an auto and the sale of replacement parts for it. Federal antitrust law<sup>158</sup> prohibits certain tying arrangements<sup>159</sup> on the ground that competition is thereby restrained by "deny[ing] competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power of leverage in another market."<sup>160</sup>

Tying arrangements are illegal per se if they involve (1) a tie-in between two separate and distinct products, (2) a seller with sufficient market power in the tying product to coerce buyer acceptance of the tied product, and (3) a "not insubstantial" amount of interstate commerce in the tied product market.<sup>161</sup> In the absence of a per se violation, tying arrangements may be illegal as unreasonable restraints of trade under the rule of reason analysis if actual anticompetitive effect is demonstrated.<sup>162</sup>

If auto manufacturers attempted to tie the sale of new autos with the sale of crash parts, clearly the first (two distinct products) and third (interstate commerce) prongs of the per se test would be met. The critical factor, then, would be the market shares associated with the auto manufacturers in the new car market. Although case law is not particularly instructive in defining precisely the relevant product and geographic markets for auto and

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renting records for commercial gain). The 101st Congress considered carving out a second exception for computer software rentals.

156. H.R. REP. NO. 987, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2988, 2989.
157. *Audio and Video Rental: Hearing on S. 32 and S. 33 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 25 (1983) (statement of David Ladd, Register of Copyrights and Assistant Librarian for Copyright Services, Library of Congress).
158. The applicable federal laws are section 1 of the Sherman Act, section 3 of the Clayton Act, and section 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 1, 14, 45(a)(1) (1988).
159. A tying arrangement is the sale of one item, the tying product, on the condition that the purchaser obtain a second item, the tied product, from the same source. *See* Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958).
160. *Id.* at 6; *see also* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984).
161. *See, e.g.,* Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors, 850 F.2d 803, 814 (1st Cir.), *cert. denied*, 489 U.S. 955 (1988); Mozart Co. v. Mercedes-Benz of N. Am., Inc., 833 F.2d 1342, 1345 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988); Tic-X-Press, Inc. v. Omni Promotions Co., 815 F.2d 1407, 1414 (11th Cir. 1987). Courts have recognized a business justification defense to otherwise illegal tying arrangements. *See, e.g.,* Mozart, 833 F.2d at 1348-49.
162. *See* Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1503 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986).

light trucks, there is powerful evidence that certain domestic auto makers—no matter how the market is defined—possess sufficient market power in the tying product market (autos) that a tie-in between the sale of cars and the sale of crash parts would raise serious antitrust concerns.

Similarly, when evaluated as a possible unreasonable restraint on trade, it is highly likely that tying arrangements by auto manufacturers would impede competition to the extent that actual anticompetitive effects<sup>163</sup> could trigger antitrust liability. Thus, under either approach, tying arrangements by auto manufacturers, even if they were achievable as a practical matter,<sup>164</sup> likely would run afoul of longstanding antitrust doctrine. Recognizing that certain auto manufacturers currently cannot create tying arrangements between autos and crash parts without serious antitrust implications and tremendous practical obstacles, Congress should resist allowing all OEMs to use industrial design legislation to eliminate competition for replacement and repair parts. The “Consumer Right to Repair” amendment, on the other hand, would “untie” the sale of autos from the sale of replacement and repair parts.

The industrial design legislation subverts the goals of federal warranty law. Federal law explicitly preserves consumer access to a competitive market in repair parts and services. Specifically, the Magnuson-Moss Federal Trade Commission Improvement Act expressly bars sellers from conditioning warranties on the purchase of specific parts or services.<sup>165</sup> Even when the manufacturer provides a warranty for the product, this federal law bars it from requiring consumers to purchase repair or replacement parts solely from it.

The industrial design legislation would permit OEMs to require consumers to purchase repair parts from them, contrary to federal warranty law and policy. The “Consumer Right to Repair” amendment, in contrast, is

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163. These effects could be creating barriers to entry of new competitors in the tied product market, facilitating price discrimination or impairing the consumer's ability to evaluate the true cost of each of the products when they are available only as a package. See *Jefferson Parish*, 466 U.S. at 14-15. If consumers are prohibited from purchasing lower priced or higher quality products in the tied products market due to the tying arrangement, then an actual anticompetitive impact is proven. *Id.* at 30.

164. Even if auto manufacturers did not face antitrust concerns in creating tying arrangements for crash parts, they would be tied with enormous practical difficulties in creating appropriate contractual and warranty arrangements and enforcing them.

165. Section 102(c) of this Act provides:

No warrantor of a consumer product may condition his written or implied warranty of such product on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name; except that the prohibition of this subsection may be waived by the Commission if—(1) the warrantor satisfies the Commission that the warranted product will function properly only if the article or service so identified is used in connection with the warranted product, and (2) the Commission finds that such a waiver is in the public interest.  
15 U.S.C. § 2302(c) (1988).

consistent with the goal of federal warranty law; both are designed to preserve consumer access to a competitive repair market.

Representative Kastenmeier, the long-time Chairman of the House subcommittee with jurisdiction over intellectual property issues, had explained that Congress ought to apply certain tests before adopting any new intellectual property legislation.<sup>166</sup> One of these tests is that "the proponent of a new interest ought to show that the interest can fit harmoniously within the existing legal framework without violating existing principles or basic concepts."<sup>167</sup> The industrial design legislation fails this fundamental test.

First, the legislation violates existing principles and basic concepts by completely abolishing the design patent standards for novelty, ornamentality and nonobviousness and the copyright standard for separability. Second, the industrial design legislation violates the existing principles and basic concepts of "exhaustion" under patent law, of the "first sale" doctrine in copyright law, of tying prohibitions under antitrust law and of warranty provisions under federal trade law. The "Consumer Right to Repair" amendment, in contrast, embraces these legal doctrines in drawing the line between protectable designs of overall new products and unprotectable designs of replacement and repair parts sold as such.

## VII. CONCLUSION

The basic issue in considering the application of the industrial design bill to the aftermarket industry is whether any case at all exists for disturbing the public domain and the vigorous competition in replacement parts which has afforded consumers such significant benefits. No real foundation has been laid—legally, economically, or equitably—to extend auto manufacturers' rights beyond the existing standards of the design patent laws.<sup>168</sup> State counterfeiting and palming off statutes adequately protect consumers against deceptive marketing practices. Independent testing helps assure the quality of both OEM and non-OEM parts. Finally, consumer information laws will ensure that the ultimate purchaser of repair parts is knowledgeable about the subject.

The congeries of federal and state statutory protections are quite sufficient to draw an appropriate balance between creativity and

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166. See *The Semiconductor Chip Protection Act*, *supra* note 114, at 438-44.

167. *Id.* at 440; see also Kastenmeier, *supra* note 152, at 23 (stating that "[p]roponents of new copyright interests must show that their proposed changes will fit harmoniously within the existing legal framework without degrading or diluting existing principles and concepts").

168. The justification for excluding crash parts from the reach of the bill is clearly firmly grounded, unlike the origin of the decision to exempt clothing. It is reported that in the 1950s House Speaker McCormack said he could "get your bill passed for you if you'll except the ladies undergarment manufacturers in New England because that's where I come from." *Senate Hearings*, *supra* note 7, at 29 (statement of Judge Rich, representing the National Council of Patent Law Associations) (that exemption continues in the present bills).

competition; the utter lack of any justification for change, beyond the auto companies' hope for the economic exploitation of a monopoly, leads one inexorably to the conclusion that replacement parts should be excluded from any new industrial design protection.

Certainly, the general debate over design legislation will continue to be lively. If Congress determines that it wants to enact such added design protections, it should exclude across-the-board the replacement and repair market—not just automobile parts but other repair parts as well. That would be consistent with appropriate legal, intellectual property, and economic considerations.

*First*, excluding replacement parts and permitting a competitive market to continue to flourish are consistent with the right of a buyer to do what he wants with his product. He bought his car or other product in a competitive market; when it comes time to repair it, the law should not push that buyer back to a monopoly market to buy a replacement or repair part. A buyer should have the right to repair his product in any way he wants.

This principle is, of course, consistent with the *British Leyland* decision, which established an auto owner's inherent right to repair. That outcome seems to have been codified in the new British Copyright Law. It is also consistent with the well-established "exhaustion" and "first sale" doctrines and federal antitrust and warranty laws.

*Second*, as a matter of intellectual property principles, proponents have no credible claim or evidence that providing an industrial design monopoly over aftermarket parts will increase the quantum, or the quality, of creativity in the development of the overall design of the product. Manufacturers design a product for its original sale. There simply will be no added creative effort directed solely to the design for the replacement parts market. Thus, an auto manufacturer has all the intellectual property incentive it needs in designing an attractive car for original sale.

*Third*, as an economic matter, it is better policy to require that an auto company attempt to recover its costs in a competitive market rather than in a monopoly market. The elimination of monopoly power in the aftermarket has no doubt increased pressures on auto companies to raise prices on their original models. But auto companies *compete* in the sale of new cars. Society will get the most efficient results, with the lowest prices, when auto company profits have to be realized in the competitive marketplace. Societal interests clearly are not optimized when a significant portion of a manufacturer's profits are realized pursuant to monopoly power in a sheltered market.

The industrial design debate is likely the last major opportunity for auto manufacturers to kill, in a single stroke, aftermarket competition and regain their monopoly hold on crash parts. The stakes are simply too great for consumers and competition to let that happen. Possibly, free competition

in the marketplace will ultimately reject competitive crash parts. But unless that happens, there is no basis—in terms of economics or intellectual property law—for Congress to intervene and destroy that competition.