



Right to Repair: Legal Nightmare or Movement to Liberate the People¹

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¹ This article is written by the authors listed herein, and is not intended to represent, in any way, the views, opinions, policies, or practices of the government, regulatory, and corporate representatives who are panelists speaking at a presentation of this topic at the 2022 DRI Product Liability Conference.

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Some millennials may remember a time when they could bring their broken Razor flip phone to a corner repair shop and walk away a few hours later with a fully functioning mobile device. Generation Z, on the other hand, is unlikely to even consider a local repair shop. This generation is accustomed to relying on national retailers, like Apple or Microsoft, to ship damaged devices to centralized repair facilities for repairs, or just to trade in their damaged devices for the latest model. The generational shift in experiences is in large measure to technological advancements and increasingly complex products that require specialized equipment usually not found at a local repair shop.

While some millennials have adapted this newer strategy, their parents and grandparents have grown frustrated by limited and costly repair options. Thus, a "right to repair" movement is gaining momentum across the country, relying on a model that permits choice of local repair options with varying price points and varying skill sets.

What is the "Right to Repair" Movement?

The 'right to repair' is founded on the concept that each consumer should have the "freedom" to decide who should maintain and repair the technological devices they own. This perspective maintains that owners of technological equipment should have an array of available options to allow them to make repair decisions based on convenience and cost. The Repair Association, a right-to-repair advocacy group, describes the argument:

"[w]hen manufacturers own the only repair shop around, prices go up and quality goes down. Competition is better for customers, but mom and pop repair shops are struggling with unfair practices by multinational corporations. Consumers and repair pros are starting to fight back."

See The Repair Association, A Competitive Repair Market is Vital to the Economy.

From consumer devices (such as cell phones, laptops, and printers) to industrial grade machinery, medical devices, and jet engines, a wide range of manufacturers are facing a challenge to ensure their products are maintained and repaired properly and perform as intended.

2021 was a watershed year for the 'right to repair' movement. The Federal Trade Commission was tasked by Congressional directive to review "how manufacturers - in particular mobile phone and car manufacturers - may limit repairs by consumers and repair shops, and how those limitations may increase costs, limit choice, and impact consumers'

rights under the Magnuson-Moss Warranty Act.” The FTC’s report, issued in May 2021, provided a comprehensive summary of the issues and concluded that it will “pursue appropriate law enforcement and regulatory options, as well as consumer education, consistent with our statutory authority.” [Nixing the Fix: An FTC Report to Congress on Repair Restrictions.](#)

On July 9, 2021 President Biden signed Executive Order 14036 that now tasks the Federal Trade Commission with exercising its rulemaking authority to “address persistent and recurrent practices that inhibit competition.” The stated intention of the Executive Order is to rescind “unfair anticompetitive restrictions on third-party repair or self-repair of items, such as the restrictions imposed by powerful manufacturers that prevent [consumers] from repairing their own equipment.” See Exec. Order No. 14036, 86 Fed. Reg. 132 (Jul. 9, 2021). The FTC’s work to develop those new repair regulations for a variety of products is just beginning.

The Legal Nightmare

In the land of the free, why shouldn’t consumers have the right to determine the destiny of the products they purchase and own? Greater repair and maintenance options leads to competition amongst providers. Doesn’t competition lead to better prices and improved services?

Using this argument, grass roots consumer advocates and organized trade groups have sponsored ballot initiatives to enact or enhance existing Motor Vehicle Right to Repair legislation in states across the country. In 2020, voters in Massachusetts – by a 74.9% margin – passed SD645, the “Right to Repair Law Vehicle Data Access Requirements Initiative,” known as Question 1 on the Massachusetts November 2020 ballot. As an addition to the Massachusetts Motor Vehicle Owners’ Right to Repair Act, this new ballot-initiated law requires motor vehicle manufacturers to share telematics information collected wirelessly about their vehicles’ mechanical health.² That gathered information prompts drivers to schedule maintenance at dealer service centers among other connected features. With the passage of Question 1, that data must not only be made available to drivers, but it also must be accessible in an open access mobile app platform that can be shared with independent shops.

Those in favor of Question 1 argued that it would give “independent [auto] repair shops important access to wireless mechanical data, enabling them to do some repairs on newer vehicles that might otherwise only go to authorized dealerships.” See John Chesto, *Auto Manufacturers Sue To Block State’s New Right-To-Repair Law, After Voters Approved It*, BOSTON GLOBE (Nov. 21, 2020), www.bostonglobe.com.business. In all, the independent shops would have access to the same diagnostic data as any authorized dealer.

² While the concept of a “right to repair” is not new, this 2012 Massachusetts Motor Vehicle Owners’ Right to Repair Act is the only currently existing legislation enacted in the United States. As originally drafted, the Right to Repair Act requires a car manufacturer to make available to all purchasers of its vehicles the same diagnostic and repair information that is given to its own dealers.

Opponents of this initiative and corollary Right to Repair legislation urged voters and legislators to recognize that mandating wide availability of proprietary diagnostic and repair equipment to unvetted, untrained repair people will leave consumers vulnerable to potentially dangerous circumstances where technological devices malfunction, are inoperable or do not work as intended. The industry trade group TechNet cautioned that “[a]llowing unvetted third parties with access to sensitive diagnostic information, software, tools, and parts would jeopardize the safety of consumers’ computers, tablets, and devices and put them at risk for fraud and data theft.” See TechNet, *TechNet Statement on Executive Order on Promoting Competition in the American Economy*, Jul. 9, 2021.

The National Highway Traffic Safety Administration expressed cybersecurity concerns about the Massachusetts ballot initiative’s requirement to create a secure platform for the data, including the possibility of a software vulnerability being used by malicious actors to cause a crash or incident. With the passage of Question 1, the work begins to determine how an access data platform can be developed, what data would be included, who would have access to that platform, and how that massive data set can be protected.

The Alliance for Automotive Innovation, a manufacturers’ trade group (“AAI”), took to filing an action in federal court against the Massachusetts Attorney General seeking to declare the Question 1 ballot vote – as implemented in the Data Access Law – unenforceable because it violated “various federal laws such as those pertaining to cybersecurity and intellectual property,” See docket no. 1 at *Alliance for Automotive Innovation v. Maura Healey, Attorney General of the Commonwealth of Massachusetts*, Civil Action No. 1:20-cv-1209, [CM/ECF - USDC Massachusetts - AAI v. Healey](#). A 5-day bench trial was heard in July 2021 before Judge Woodlock. The court intended to issue a decision by November 2, 2021 until a filing on October 22, 2021 by the Massachusetts Attorney General sought to reopen trial evidence. The Attorney General’s motion argued that additional evidence must be submitted for the Court’s consideration regarding the feasibility for a manufacturer to disable its vehicle’s telematics systems for Massachusetts residents or businesses.

The plaintiff, AAI, has opposed the motion to reopen evidence, arguing that disabling a vehicle’s telematics system does not amount to compliance with the new law. As the AAI stated, the requirements of the Data Access Law, at § 2, “concern creating standardized access to on-board diagnostic systems and vehicle networks.” The feasibility of disabling those data devices has never been in dispute. *Id.* at docket no. 264. A hearing on that motion is now set for February 2, 2022.

In the meanwhile, Subaru and Kia already announced their decision to disable their telematics systems for vehicles sold in or to residents of Massachusetts. In making those announcements, Subaru and Kia note that compliance with the Data Access Law is impossible because the open access platform does not currently exist. See Hiawatha Bray, *Kia Shuts Off New Car Tech in Massachusetts*, BOSTON GLOBE (Jan. 21, 2022), www.bostonglobe.com.business. The carmakers also note that shutting off telematic systems also renders inoperable the systems that may car owners find useful – such as

receiving updates about the status of the vehicle's mechanical systems and enabling it to automatically call for help if it detects an accident.

Tech for Thought

Momentum continues to build across the country to enact Right to Repair legislation. More states are considering ballot initiatives like Massachusetts Question 1 while state legislators are filing more legislation requiring data and repair equipment become more broadly available. While nearly half of all U.S. states are considering or working on such legislation, the focus and scope of each effort is varied. For example, Texas legislation is directed to the repair of medical equipment. *See* H.B. 2541 (Tex. 2021). Kansas legislatures have their eye on the repair of agriculture equipment. *See* H.B. 2309 (Kan. 2021). In Washington, legislative efforts are directed at consumer devices. *See* H.B. 1212 (Wash. 2021).

In Las Vegas, Assemblywoman Selena Torres introduced legislation focused more broadly on digital electronic equipment with a wholesale value of \$5,000 or less, rather than a specific industry or technology. AB 221 would have required manufacturers of digital electronic equipment to make “documentation, parts and tools available to owners and providers of services related to the diagnosis, maintenance and repair of such equipment.” In addition, it would make “violations of provisions relating to the availability of such documentation, parts and tools is a deceptive trade practice.”

Assemblywoman Torres's proposal specifically excluded agricultural and automotive goods while applying to some small electronic such as computers, laptops, cell phones, and printers. With the proposed duty to “generate documentation, spare parts, and tools,” a manufacturer would need to supply its repair diagrams, manuals, replacement parts and tools, and support information to third party repairers.

The legislation attracted significant support from a range of groups. The Sierra Club, which viewed the legislation as a means of reducing the environmental burden that consumer electronic devices can impose. Trade groups representing independent repair shops saw the legislation as a possible boon to business.

Assemblywoman Torres' bill also attracted significant opposition from manufacturers, trade associations, and safety organizations. These groups viewed the legislation as permitting unqualified third-party repairers to work on products that could result in poor quality repairs leading to underperforming and malfunctioning products. Manufacturers also expressed concerned that third-party technicians may not possess the knowledge and skills required to properly repair their products. Moreover, they argued, faulty repairs could lead to reputational damage, a new form of product liability litigation, and create significant logistical challenges in making at-cost replacement parts and tools, documentation, and software upgrade widely available as required.

Is the right to repair movement designed to “liberate” the consumer, enabling them to choose who will fix their broken technology and at what cost? Or are these initiatives an

attempt to exploit manufacturers' proprietary designs, tools, parts, and documentation? The answer to this question requires consideration of the type of technology that the legislation is designed to regulate.

Both supporters and opponents of the Right to Repair movement have made arguments that overlook the nuances, conflate the concept, and ignore the most significant delineation – the *type* of electronic equipment that is sought to be regulated. Consider the possibilities, from airplane engines to refrigerators and from smartphones to life-saving ventilators. Trying to evaluate and control such a range of electronic devices collectively confuses voters while also frustrating champions and critics of the movement.

In response to this movement, Apple announced “Self Service Repair,” a program that allows customers to repair their Apple products by accessing authentic Apple parts and tools. *See* Press Release, Apple, Newsroom, Apple Announces Self Service Repair (Nov. 17, 2021), www.apple.com/newsroom. When considering the relatively low cost of personal computing equipment and the ability to store data in the cloud, a consumer who experiences a botched repair who can potentially resort to purchasing a new product. Arguably, the risks associated with repairing a relatively low-cost consumer product at a nonauthorized service provider is far less consequential than the risks associated with making repairs to lifesaving medical equipment or more inherently dangerous products such as motor vehicles and heavy equipment.

Without a doubt, the consequences become far more serious when unlicensed, untrained, and unvetted technicians repair hospital equipment, transportation, and fire safety devices. When public safety is concerned, measures must be taken to ensure technology is fully functional according to design specifications. Otherwise, the results could be catastrophic.

We also must focus on the most important consideration – personal safety. Medical professionals who use lifesaving devices such as MRI machines, ultrasound, CT scanners, ventilators, and PET systems must rely and depend on the full functionality of the equipment they use, confident and that it meets precise design specifications. Imagine the consequences if doctors and medical technicians are unable to rely on the steady performance of any one of these devices? On the spot medical judgements should not include consideration that results may have been compromised because of inadequate, incomplete repair and maintenance.

“Right to Repair” legislation and ballot initiatives elicit strong debate from both sides. Success or failure may ultimately hinge on the type of equipment at issue, the means of bringing forward new regulations, or the passage of laws in other parts of the country or the world. France, for example, has passed regulations that require the disclosure of repairability levels as a factor for consumers to evaluate the purchase of a new product.

The growing complexity of consumer, medical, professional and industrial equipment, juxtaposed with the costs associated with repairs, as well as the potential for independent repair shops and technicians to sizably increase their business, ensures that this movement will be part of our conversations for many years to come.

