

Testimony regarding “Right to Repair” from the Digital Right to Repair Coalition

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About the Digital Right to Repair Coalition:

Founded in July of 2013, the Coalition broadly represents the many interests of the secondary market that need to be able to repair products for their business and charitable purposes. Our members include retailers seeking help with managing returns, providers of depot repair and subcontract services for manufacturers and distributors, providing field technicians on behalf of manufacturers, as well as independent repair businesses, charitable organizations doing reuse and refurbishing of used electronics, and wholesalers of used equipment.

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Goals of “Digital Right to Repair” legislation

“Right to Repair” is about restoring competition to the business of repair. We should be able to repair “Our Stuff” in any way we choose – because it is “Our Stuff” and the manufacturer no longer owns it. Just as with buying a house – the former owner doesn’t get to tell you how to mow your lawn, make your bed, or load your dishwasher.

It is also the case that if you do illegal things using your owned equipment – such as making illegal copies of copyrighted software – you are also responsible. If you do unsafe things to your property – you are the one at risk. Nothing changes about existing laws covering safety, personal injury law, physical security or cyber security. The only change is to restore the option of competition to the marketplace for repair.

Basics of Repair

We often hear that electronics products are so complex, only the manufacturer is capable of repairing them. Not true. Repair is simple – even when products are complex - because manufacturers that engage in repairing things for customers have a business interest in making repairs as cheaply and efficiently as possible. Labor is the biggest variable in the costs of making repairs – in warranty or not. Service materials are designed to be used by minimally trained technicians and validated easily before being turned over to the customer. We know from warranty tracking services that most technology manufacturers withhold 5% of the gross revenue for purposes of warranty service. 5% of \$1000 is only \$50 – so repairs really have to be easy or the manufacturer will be reporting the loss in their financial statements.

Repairing a thing with a digital electronic part requires the same suite of service materials regardless of shape, size, price or application. Fixing things requires enough documentation and diagnostic information to identify a hardware problem. The broken part has to be removed and replaced by a fully functional spare. Before a repair is considered complete – the standard is to re-run the diagnostic tools to confirm the repair is complete. Anything outside of these steps may be offered as a service, but that work is not “repair”.

It has been common for opposition lobbyists to conflate repair with software modding or hacking. Physical repair is neither. Replacing a broken part with the same part has to be complete before the product boots up. Whatever happens next is not “repair” and is not addressed by “right to repair” legislation.

Legal Considerations

The bills we have promoted are firmly grounded in existing laws. We began looking at options for litigation, regulations, standards and legislation starting in 2010. Ultimately we determined that following the example set for automotive right to repair as passed in 2012 would be the best form to follow.

We filed our first bill in 2014 and since that time nearly identical versions of legislation have been filed in 48 states across over 270 bills. 5 states now have statutes on the books for Right to Repair across various industries. More legislation is underway to expand and clarify the scope of bills. We are seeing some of the biggest in the world take active steps to comply.

Ownership and Responsibility

Right to Repair is based on the existing rights of owners to control their property. It doesn't matter if that former owner is the original equipment manufacturer (“OEM”), a dealership, a used equipment

dealer, or your brother in law. All the rights and responsibilities of ownership are now yours. All the contracts that backstop the sale of equipment both new and used are required to put all their disclaimers and limitations of liability in CAPS to reinforce that manufacturers are not responsible for your mistakes. If an OEM representative tells you they are responsible for your mistakes – they aren't reading their own contracts.

Safety and Security

Manufacturers are charged with making products that are safe to use, or the product should be withdrawn from marketing. There have been large recalls of unsafe technology – ranging from 6 million power cords recalled by HP, to the famous Samsung Galaxy Note 7 which was withdrawn from marketing for a tendency to catch fire. It was noted just this week that there is a huge security vulnerability in the Apple M1 chip – that cannot be patched.¹ These flaws are the responsibility of the manufacturer to correct entirely outside of the business of repair.

Cyber Security claims abound as excuses to block users from repairing their purchases. These claims are illogical and don't hold up. If a manufacturer sells a product with great security features – they will also have had to make sure that those security features are not impacted when their own service technicians perform a repair. The same service documentation in the hands of a customer or an independent repair technician is not providing any secrets or back doors.

Lack of cyber security is a huge problem for all of us – but it is not a problem of repair. Manufacturers would not want to make repair tools that are unsafe to use for the same reason. We've heard an argument recently that a replacement glass screen for a cell phone has to be calibrated using a "laser", but if that laser is unsafe for an independent repair technician to use – that same laser would be dangerous for the authorized technician as well. When it comes to allegations of unsafe repairs being made by independent technicians – we should be asking "How?"

General Business Law

Right to Repair type legislation is not about any particular technology, but about unfair and deceptive marketing by manufacturers. We have had a full generation of marketing geniuses telling us we are incompetent to decide how we want to fix our stuff. We're told we will hurt ourselves, destroy the environment, expose our bank accounts to hackers, burn down our houses, and help the Chinese steal valuable IP.

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<https://arstechnica.com/security/2024/03/hackers-can-extract-secret-encryption-keys-from-apples-mac-chips/#:~:text=A%20newly%20discovered%20vulnerability%20baked,in%20a%20paper%20published%20Thursday.>

None of this list of horrors is the result of enabling competition for repair of devices. We all competently hire auto mechanics, plumbers and electricians without being micromanaged by manufacturers. We've been fixing our computers safely and securely since the dawn of the computer age. Putting a computer chip in a toothbrush doesn't make it something other than a toothbrush (yes - there is a bluetooth enabled toothbrush on the market and you can't replace the battery).

Statutes governing Unfair and Deceptive Acts and Practices ("UDAP") have proven effective for Right to Repair legislation. The automotive industry passed the first "Right to Repair" law for automobiles in 2012 based on UDAP laws. We copied the framework of the automotive law for our own efforts because it was solidly formed. Manufacturers have yet to explain how they should continue to be allowed to sell products unfairly or deceptively. If you buy something - it's yours unless you agree otherwise in a contract. But if the contract itself is unfairly presented, is not negotiable, and modifies the original intent of the sale in hidden ways - UDAP statutes can be used to protect consumers from deals that are essentially "bait and switch".

Proprietary Rights: Copyrights, Patents and Trade Secrets

We already have the "right" to repair our things in federal law. We have the right under copyright law to fix our things including specific provisions for making legal backup copies of software for purposes of repair. Under copyright law - we cannot distribute copies of manuals or schematics - so if the manufacturer doesn't provide us with a legal copy of their service documentation and diagnostic software, we cannot fix our stuff.

We have the right under patent law to fix our things - we just cannot go into business making patented parts without permission of the patent holder. If we cannot buy a part from the manufacturer, and cannot utilize an existing part harvested from another machine - or even use a legally created alternative, we cannot fix our stuff. Many manufacturers are trying to have their cake and eat it too - they refuse to sell authentic parts and then complain that consumers are seeking alternatives.

Trade Secrets are useless for making repairs. We disclaim any need for secrets as manufacturers would lose the protections of the Uniform Trade Secrets Act if they distribute service materials even in a limited way. A classic example is the recipe for Meow Mix - which is a secret - but a repair technician fixing the mixer that extrudes the kibble doesn't need the recipe.

There is nothing in repair documentation that is not already known overseas. Manufacturers in Asia already have all the details of how products are assembled because they do the assembly. They make the parts. In many cases the products themselves are designed to be built for US customers. We have heard that some manufacturers do not even have a schematic diagram to share - despite

their name on the product. They can simply ask for the information because it's almost surely in circulation on the streets of Shenzhen.

Antitrust Law

Antitrust laws dating back over a century already prohibit tying of repair services to the original purchase and prohibit exclusive dealing. Manufacturers arguing against Right to Repair legislation are already on the wrong side of antitrust law as well as on the wrong side of UDAP laws. Just a few days ago the US DOJ along with XX States Attorneys General filed an antitrust action against Apple. There is a class action lawsuit against John Deere which is proceeding.

Our problem with antitrust is not the concept but the details of enforcement. Only one manufacturer can be addressed at a time. Cases take decades to wind their way through the courts and cost untold millions. The deterrent effect is poor when the DOJ captures one big fish and the others swim away unaffected.

While we've lacked enforcement for a generation – antitrust law remains intact. It is illegal for manufacturers to tie the sale of the product (“first sale”) to the requirement to buy a second product of service, such as repair, in order to use the purchased item. Manufacturers do not have the rights they claim to be the only provider of repair for “their” products under both antitrust laws against tying and another related antitrust concept known as “exclusive dealing”. Even if you feel that manufacturers are the best source of repair services, they are not entitled to be the only source of repair services.

Contracts and Accounting Standards

As you consider legislation – you can test your concerns and ideas against this one notion – “Who Owns the Equipment”.

When we go to the store – we become the owner from the point of purchase. The purchase is supposed to be a complete transaction – meaning both the complete transfer of ownership from the manufacturer to the buy and also reflects that the manufacturer was paid in full for all their costs of doing business. If they make money or not – they don't get to charge more for something else in compensation for anything. Contracts that include additional strings – as in a side letter or an End User License Agreement – aren't well formed.

Ownership is intimately tied to how jurisdictions control sales tax, use tax or personal property tax for individuals and businesses. Businesses that buy, and not rent, equipment, put their purchases on their books and depreciate their assets. Limitations on repair and maintenance interfere with accounting standards in important ways. The value of used assets is diminished – often to the point of scrap electronics – if there are limitations on keeping that equipment in use as fully functional

equipment. If contracts, such as in EULA, limit the sale of equipment in the used market, the asset value is impaired. Banks and leasing companies are always worried about lending against collateral that they do not fully own if there is a default on payments. Many lenders will charge a premium for the added risk if they lend at all.

The lack of options for competition for leasing is a direct consequence of impairments to ownership. One of the key reasons that manufacturer - controlled leasing companies (John Deere Finance, HP Finance, IBM Global Credit) are so expensive is that independent lenders cannot compete when only the manufacturer can allow a used market transaction to occur. This is another form of monopolization that will be addressed as a consequence of allowing competition for repair services.

Why Pennsylvania?

Other states have passed statutes that will tangentially benefit Pennsylvanians, but buying parts and tools and repair services out of state will pull economic activity away from Pennsylvanians. It will take additional time and expense to ship parts and tools that are available even in neighboring states for use in PA without any benefit to residents.

Both the FTC and the DOJ have been helping state legislators advocate for Right to Repair in states because federal alternative solutions do not exist. The Copyright Office controls copyright law, but cannot require the sale of any products. Both the FTC and DOJ are charged with enforcement of antitrust law and warranty law, but have no authority to tell states how to require service materials from manufacturers.

We expect that over time, there will be enough laws on the books in states that manufacturers will comply nationally rather than create a crazy quilt of their own making by offering different repair solutions in different states. We are already seeing manufacturers focus on compliance and not opposition. Our goal is to keep pushing legislation until everyone can fix all of their stuff regardless of where it is purchased. I look forward to working with you all to make competition for repair a reality in the Keystone State.

About the Author:

Gay Gordon-Byrne is one of the founders of the Digital Right to Repair Coalition. Her previous experience includes having bought, sold, and leased equipment as a direct employee of StorageTek (now Oracle), as an authorized business partner for IBM, HP, EMC and CISCO. As an independent lessor she became expert in the contracts that underpin the value of equipment in the secondary market and offered that experience in her textbook "Buying Software, Hardware and Maintenance – and IT Managers Guide to Controlling the Product Lifecycle."

