

Is It Broke? The “Right to Repair” — Implications for Product Distribution and the Supply Chain

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I. Introduction and Overview

A. Case Study: The Equipment Industry

1. Many state franchise and dealer laws reflect an “us versus them” view of franchise, distribution, and supply chain relationships.
2. “Right to repair” laws reflect a different political dynamic.
3. Many proposals have focused on the equipment industry, which has presented a united front—in opposition.

B. Current Status and Implications of Legislation and Regulation

1. What is their stated rationale?
2. Regardless of the merits, state equipment dealer statutes often reflect MVDL (motor vehicle dealer law) “creep,” *i.e.*, MVDL law changes often end up in state equipment dealer laws.
3. Is the Massachusetts Data Law, which is applicable only to the auto industry, the shape of things to come?
4. More generally, what are the implications of the July 9, 2021 Executive Order and recent statements by the Federal Trade Commission?

II. The Merits of “Right to Repair” — PRO and CON

A. The Stated Rationale

1. **Requiring repairs to be made by OEMS and their authorized dealers increases costs for consumers and is anti-competitive.**
2. **The concerns raised by manufacturers that unauthorized repairs can result in liability to them and harm their reputations are not documented and are exaggerated.**
3. **By allowing third parties access to electronic data about consumers, the equipment that they own, and their whereabouts, right to repair legislation does not expose consumers to hacking or threaten their privacy.**
4. **Third party access to embedded software and data does not threaten manufacturers’ copyrights, trade secrets, and other IP.**
5. **Sources:**
 - a. Londoño, Juan, “The Debate on Right to Repair: A Primer,” American Action Forum (July 22, 2021) (<https://www.americanactionforum.org/insight/the-debate-on-right-to-repair-a-primer/>).
 - b. Mirr, Nicholas A., “Defending the Right to Repair: An Argument for Federal Legislation Guaranteeing the Right to Repair,” 105 *IOWA L. REV.* 2393 (2020) (<https://ilr.law.uiowa.edu/print/volume-105-issue-5/defending-the-right-to-repair-an-argument-for-federal-legislation-guaranteeing-the-right-to-repair/>).
 - c. O’Reilly, Kevin, “Deere in the Headlights: How software that farmers can’t access has become necessary to tractor repair,” U.S. Public Interest Research Group (2021) (<https://uspirg.org/feature/usp/deere-headlights>).
 - d. Proctor, Nathan, “Deere in the Headlights as 21 states consider Right to Repair,” U.S. Public Interest Research Group (March 1, 2021) (<https://uspirg.org/blogs/blog/usp/deere-headlights-21-states-consider-right-repair>).
 - e. “We Have the Right to Repair Everything We Own,” The Repair Association (<https://www.repair.org/>).

B. The Equipment Industry Response

1. **On February 1, 2018, the Association of Equipment Manufacturers (AEM) and the Equipment Dealers Association (EDA) issued a joint statement regarding the risks of “overly broad” right to repair laws (<https://www.aem.org/news/aem-eda-announce-statement-of-principles-on-right-to-repair>).**
 - a. These risks fall in the following three categories: (1) safety; (2) sustainability; and (3) innovation, as follows.
 - b. **Safety:** Allowing access to source code would risk allowing a user to override safety features required as part of modern farm equipment.
 - c. **Sustainability:** Farm equipment must comply with environmental and emissions standards, which could be jeopardized by granting access to source code.
 - d. **Innovation:** Manufacturers and dealers invest considerable resources in developing cutting-edge technology to help create better farming equipment; granting access to source code would jeopardize manufacturers’ intellectual property and stifle innovation.
2. **AEM and EDA have also established a website, “Right to Repair Solutions” (<https://www.r2rsolutions.org/>), that also contains a “statement of principles” and extensive background about right to repair legislation.**
3. **The AEM-EDA joint statement committed that manufacturers and dealers would make the following available “to empower farmers and ranchers to perform basic service, maintenance and repairs on their equipment” by 2021:**
 - a. Manuals (operator, parts, service);
 - b. Product guides;
 - c. Product service demonstrations, training, seminars, or clinics;
 - d. Fleet management information;
 - e. On-board diagnostics via diagnostics port or wireless interface;
 - f. Electronic field diagnostic service tools, and training on how to use them; and
 - g. Other publications with information on service, parts, operation, and safety.

4. Sources:

- a. “AEM, EDA Address Right to Repair,” OPE Business (July 20, 2021) (<https://opebusiness.com/2021/07/20/aem-eda-address-right-to-repair/15024/>).
- b. “EDA Response to Biden’s Executive Order,” Equipment Dealers Association (July 7, 2021) (<https://www.equipmentdealer.org/news/article/eda-response-to-bidens-executive-order/>).

C. Manufacturers’ Concerns

1. **Manufacturers stand behind their products with warranties based on the assumption that repairs will be performed by trained, authorized repair centers using genuine OEM parts**
2. **Manufacturers face potential liability and injury to reputation for repair work done by service providers that are not trained or controlled by the company and may not use genuine parts**
3. **These concerns are heightened when parts are electronic or contain imbedded software—in which case third party access may jeopardize copyright, trade secret, and other IP rights.**
4. **Controlling the quality of parts and service is essential to protecting the manufacturer’s brand (and indeed for any “franchise” or branded distribution system), as the federal courts have long recognized.**
 - a. “[T]he cornerstone of a franchise system must be the trademark or trade name of a product.” *Susser v. Carvel Corp.*, 206 F. Supp. 636, 640 (S.D.N.Y 1962), *aff’d*, 332 F.2d 505 (2d Cir. 1964).
 - b. “[U]niformity of product and control of its quality and distribution . . . causes the public to turn to franchise stores for the product.” *Id.*

III. State Equipment Dealer Statutes and MVDL “Creep”

A. Overview

1. State statutes have historically focused on “relationship” issues (termination, non-renewal, amendment, “substantial change in competitive circumstances,” inventory repurchase).
2. Warranty reimbursement, however, has become an increasing focus of state dealer statutes.
3. At least 33 states have been considering “right to repair” legislation in various industries, including agricultural equipment.
4. Proposed New York legislation did not pass.
5. The Massachusetts “Data Law” aimed at the automotive industry passed on ballot initiative, but its implementation has been enjoined pending a trade association and manufacturer court challenge.

B. New York Digital Fair Repair Act

1. Senate Bill 4104 passed the New York Senate in June 2021 but was not enacted this legislative session.
2. It would require OEMs to make diagnostic and repair information for digital electronic parts and equipment (including updates to information and embedded software) available to independent repair providers and consumers.
3. The legislation specifically would not require disclosure of trade secrets or alter OEM contracts with authorized repair providers (including warranty and recall work).
4. It states that it excludes motor vehicles and medical devices.
5. Sources:
 - a. Hughes, Matthew, “New York State Senate first to pass landmark right-to-repair bill – but don’t go popping the Champagne just yet,” The Register.com (June 11, 2021) (https://www.theregister.com/2021/06/11/new_york_senate_advances_landmark/).
 - b. New York Senate Bill 4104 Text (2021-22 General Assembly Session) (<https://legiscan.com/NY/text/S04104/id/2270725>)

C. New Hampshire Senate Bill 326

1. **This repealed the state’s pre-existing equipment dealer statute and amended its MVDL.**
2. **“Motor vehicles” were defined to include equipment:**
 - a. Tractors and farm implements;
 - b. Construction, industrial, and forestry equipment;
 - c. Lawn and garden equipment
3. **“Motor vehicles” need not have a motor: Do wheelbarrows, fertilizer spreaders, and edgers qualify?**
4. **Warranty reimbursement was a major focus of the legislation.**

D. North Dakota Senate Bill 289

1. **This was triggered by amended form of a farm equipment dealership agreement to which North Dakota Implement Dealers Association (“NDIDA”) objected**
2. **NDIDA’s President and CEO was also President and CEO of Automobile Dealers Association.**
3. **The statute was drafted by a law firm that specializes in representing motor vehicle dealers nationwide.**
4. **The legislative purpose, according to its sponsors, to give a “level playing field to our implement dealers”**
5. **The Association of Equipment Manufacturers and four manufacturers of agricultural equipment obtained summary judgment on claim that retroactive application of amendments (including warranty reimbursement provisions) violated Contract Clause of U.S. Constitution.**
 - a. *Ass’n of Equip. Mfrs. v. Burgum*, 932 F.3d 727 (8th Cir. 2019), *aff’ing* 2017 U.S. Dist. LEXIS 229630 (D.N.D. Dec. 14, 2017) (North Dakota farm equipment dealer statute violated Contract Clause).
 - b. *Ass’n of Equip. Mfrs. v. Burgum*, No. 1:17-cv-151, 2020 U.S. Dist. LEXIS 192856 (Oct. 19, 2020) (granting summary judgment in favor of manufacturers on Contract Clause claim).

E. Massachusetts SD645 (“Data Law”)

1. SD645:

- a. Applies to any “Telematic System,” defined as “any system in a vehicle that collects and stores information generated by the operation of the vehicle utilizing wireless communications to transfer that information electronically,” including “motor vehicle remote diagnostics, automatic airbag deployment and crash notification, navigation, stolen vehicle location, remote door unlock, transmitting emergency and vehicle location information to public safety answering points and any other service integrating vehicle location technology and wireless communications;” and
- b. Requires “open access” to vehicle on-board diagnostic systems and telematics systems.

2. Trade association lawsuit in federal court in Boston claims that Massachusetts SD645 is:

- a. Preempted by federal law: NHTSA motor vehicle safety standards, Clean Air Act (emissions control systems), Copyright Act, Defend Trade Secrets Act, Computer Fraud and Abuse Act, Digital Millennium Copyright Act; and
- b. Unconstitutional under the Takings Clause because it requires manufacturers to abandon access controls on on-board diagnostic systems and develop “open access” platforms to read, modify, and write new data to manufacturers’ vehicle systems

3. Enforcement of statute delayed enjoined pending outcome of litigation, which went to trial this summer and is awaiting a decision by the district court judge who heard the case.

4. Regardless of the timing and substance of the decision, it will undoubtedly be appealed

5. Sources:

- a. *Alliance for Automotive Innovation v. Healey*, Case No. 1:20-cv-12090 (D. Mass. Nov. 20, 2020) (<https://www.law360.com/dockets/documents/5fb8348ab2cf0400d711f72a>).
- b. Roberts, Paul, “Court Decision Looms On Auto Right to Repair. A Lawyer Explains What It’s All About,” *Fight to Repair Weekly* (August 18, 2021) (<https://securerepairs.org/court-decision-looms-on-auto-right-to-repair-a-lawyer-explains-what-its-all-about/>).

IV. Developments at the Federal Level

A. July 9, 2021 Executive Order

1. **Fact sheet stated intention to “[m]ake it easier and cheaper to repair items you own by limiting manufacturers from barring self-repairs or third-party repairs of their products” and called out “[p]owerful equipment manufacturers” that “use proprietary repair tools, software, and diagnostics to prevent third-parties from performing repairs.”**
2. **Executive Order directs FTC Chair to exercise rulemaking authority under FTC Act Section 5 to remedy “unfair anticompetitive restrictions on third-party repair or self-repair of items, such as the restrictions imposed by powerful manufacturers that prevent farmers from repairing their own equipment.”**
3. **Sources:**
 - a. “Executive Order on Promoting Competition in the American Economy” (July 9, 2021) (<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>).
 - b. “Fact Sheet: Executive Order on Promoting Competition in the American Economy” (July 9, 2021) (<https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>).
 - c. “President Biden’s Executive Order on Competition Could Mean Broad Changes Across a Range of Industries,” *Legal News: Antitrust*, Foley & Lardner LLP (July 14, 2021) (<https://www.foley.com/en/insights/publications/2021/07/biden-executive-order-competition-broad-changes>).

B. FTC May 2021 Report to Congress

1. **“Scant evidence to support manufacturers’ justifications for repair restrictions.”**
2. **Dismissed manufacturers’ concerns about copyright, trade secret, patent rights:**
“A full discussion of the interplay between intellectual property and repair is beyond the scope of this notice.”
3. **Rejected as lacking specific evidence manufacturers’ concerns about safety and security risks of certain consumer repairs, especially in case of embedded software.**
4. **Noted that it asked for data and research to support manufacturers’ argument that unauthorized repairs may result in liability and reputational harm but received none.**
5. **Sources:**
 - a. **“Nixing the Fix: An FTC Report to Congress on Repair Restrictions,”** Federal Trade Commission (May 2021) (https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf).
 - b. **“Prepared Remarks of Commissioner Rohit Chopra Regarding a Motion to Adopt a Policy Statement on Repair Restrictions Imposed by Manufacturers and Sellers,”** Federal Trade Commission (July 21, 2021) (<https://www.ftc.gov/public-statements/2021/07/commissioner-chopra-remarks-regarding-repair-restrictions>).
 - c. **“Remarks of Chair Lina M. Khan Regarding the Proposed Policy Statement on Right to Repair,”** Federal Trade Commission (July 21, 2021) (<https://www.ftc.gov/public-statements/2021/07/remarks-chair-lina-m-khan-regarding-proposed-policy-statement-right-repair>).

C. Potential Implications of FTC Action

- 1. Assuming that the FTC declares repair restrictions to be an “unfair method of competition” and/or an “unfair or deceptive act or practice” in violation of FTC Act Section 5, the consequences of violation can include:**
 - a. “Cease and desist” orders, injunctions;
 - b. Contracts rescinded or reformed;
 - c. Refunds, damages, public notices; and
 - d. Civil penalties

- 2. No private right of action but state “little FTC Acts” may allow compensatory, punitive, or treble damages plus costs and attorneys’ fees for conduct that violates FTC Act Section 5.**

V. Implications for Manufacturers

- A. Dealer agreements and repair policies need to emphasize the value of the manufacturer’s brand and the importance of using genuine OEM parts and trained service personnel.**
- B. Agreements with end-users and authorized dealers need to emphasize the fact that the equipment contain embedded software and other technology in which the company owns copyrights, trade secrets, patents, other IP.**
- C. Dealer agreements and repair policies need to emphasize the privacy, safety, and other issues raised by third party access.**
- D. Manufacturers should be active in industry comments to the FTC and state legislatures.**



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