

Latent Ambiguities in New York's Digital Fair Repair Act as Finally Enacted

August 15, 2023

New York is the first state to pass right to repair legislation for digital electronic devices, revolutionizing the right to repair legal landscape across the country. On December 28, 2023, Governor Hochul signed the Digital Fair Repair Act (DFRA) with an approval memorandum providing for certain changes.^[1] In January 2023, the New York Senate published chapter amendments to the DFRA,^[2] and on March 3, 2023, Governor Hochul signed and approved the chapter amendments. The final version of the DFRA was made available online on March 10, 2023.^[3] Although some provisions of the DFRA have been clarified as compared to earlier drafts of the bill, there remain unanswered questions regarding interpretation and applicability.

The importance of attending to compliance with right to repair legislation and principles was highlighted recently, as another state, Minnesota, passed its own Digital Fair Repair Act, which similarly requires OEMs to make available to independent repair shops and individuals all replacement parts, tools, and documentation for digital electronic devices that are made available to authorized repair providers. The Minnesota law becomes effective on July 1, 2024.^[4]

Updated DFRA Refresher

Under New York's final enacted DFRA, original equipment manufacturers (OEMs) must make replacement parts, tools, and documentation for "digital electronic equipment" that is available to authorized repair providers similarly available to independent repair shops and individuals on "fair and reasonable terms." The DFRA defines:

- Digital electronic equipment as (i) any hardware or product manufactured for the first time, and first sold or used in New York on or after July 1, 2023, (ii) that depends in whole or part on digital electronics embedded in or attached to the product, (iii) for which OEMs make available replacement parts, tools, and documentation to authorized repair providers, (iv) except any product sold under a specific business-to-business or business-to-government contract that is not offered for sale directly by a retailer.
- Fair and reasonable terms as providing replacement parts, tools, and documentation free of charge to independent repair shops and individuals except for the reasonable and actual costs of any such replacement parts, tools, or documentation. OEMs cannot impose any substantial obligations or restrictions on independent repair shops and individuals for the use and operation of the replacement parts, tools, and documentation.

Essentially, OEMs must apply the same terms under which replacement parts, tools, and documentation are made available to authorized repair providers to independent repair shops and individuals who request the same.

However, the DFRA specifically limits the terms of its applicability so that OEMs are not required to divulge any trade secret or license any intellectual property to any independent repair shop or individual. The DFRA also states that it does not alter the terms of any arrangement between an OEM and authorized repair provider, such as the performance of warranty or recall work by an authorized repair provider on behalf of the OEM.

Notably, OEMs and authorized repair providers are provided protection under the DFRA such that they shall not be liable for any damage or injury caused to digital electronic equipment, persons, or property that is the result of any diagnosis, maintenance, or repair by an independent repair shop or individual. That includes injury caused by any loss of data, privacy or profits, or the inability to use or reduced functionality of any such digital electronic equipment.

Additionally, the DFRA has several other major carveouts. OEMs do not need to make replacement parts, tools, and documentation available for the diagnosis, maintenance, or repair of certain types of digital electronic equipment, including: (i) public safety communications equipment for emergency response or prevention, (ii) gaming and entertainment consoles, or (iii) components that may cause a heightened safety risk if installed improperly, such as integrated batteries. Nor is an OEM required to provide special replacement parts, tools, and documentation that would disable or override anti-theft security measures set by the owner of any such digital electronic equipment.

In addition, the DFRA specifically excludes certain products and providers that use embedded digital electronics as a significant part of their products, including: (i) motor vehicle manufacturers, (ii) medical devices, (iii) manufacturers and dealers of off-road equipment such as farming equipment, (iv) commercial and industrial electronic equipment, and (v) electronic bicycle manufacturers.

The New York Attorney General has the authority to enforce the DFRA, with violations of the DFRA resulting in liability for businesses and individuals by a civil penalty of up to \$500 for each violation. There is no private right of action.

Open Questions on the Interpretation of the DFRA's Applicability

One major question about the DFRA's applicability centers on how to interpret the phrase in the definition of "digital electronic equipment" that reads "any hardware or product manufactured for the first time, and first sold or used in New York on or after" July 1, 2023. While the DFRA becomes effective on December 28, 2023, there is a lookback period that starts on July 1, 2023. Exactly how this lookback period applies is unclear.

Several interpretations are possible as a matter of English language construction. It is unclear whether the DFRA applies to digital electronic equipment first manufactured anywhere that is either first sold or first used within the jurisdictional limits of New York State after July 1, or whether it applies only to digital electronic equipment first manufactured within the jurisdictional limits of New York State after July 1. The latter meaning would cause the DFRA to only be applicable to digital electronic equipment that is first manufactured in New York, meaning any New Yorkers who purchase new digital electronic equipment from OEMs operating and located outside of New York would not be given the benefit of the DFRA for the digital electronic equipment that they first buy or first use within New York State (and OEMs who manufacture the product outside New York need not comply). On the other hand, the former meaning would make the DFRA applicable to new digital electronic equipment that is purchased or used by New Yorkers for the first time after July 1 such that OEMs operating and located outside of New York would have to consider on a case-by-case basis each sale of digital electronic equipment in light of the location of each purchaser.

Additional ambiguity comes from the application of the clause "manufactured for the first time" – does this clause limit the application of the DFRA only to newly manufactured models of hardware or products, or is this clause intended to mean that the DFRA applies to existing models of hardware and products that are already in the stream of commerce for sale by retailers or awaiting distribution and sale in a storage facility? Moreover, when is hardware or a product considered to be "manufactured," and does the method, duration, and process of production affect the determination of when hardware or a product is "manufactured?"

The clause "first sold or used in New York" is also open to interpretation about when hardware or products are "first" sold or used. Namely, what is required for hardware or products to be considered "first" sold or used? Moreover, what limitations are added by the use of the word "first" to modify "sold or used?"

Hopefully, before the DFRA becomes effective this December, the New York Attorney General will provide some guidance on these questions. Regardless, OEMs should consider their current policies and procedures on providing replacement parts, tools, and documentation to independent repair shops and individuals and prepare to comply with the DFRA. Likewise, independent repair shops and individuals can start to consider how their repair options will be expanded by receiving previously unavailable replacement parts, tools, and documentation.

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[1] Digital Fair Repair Act, A7006, 2021-2022 Legis. Sess. (N.Y. 2022) (Add §399-nn, Gen Bus L); S4104A, 2021-2022 Legis. Sess. (N.Y. 2022) (Add §399-nn, Gen Bus L).

[2] Digital Fair Repair Act, A1285, 2023-2024 Legis. Sess. (N.Y. 2023) (Add §399-nn, Gen Bus L); S1320, 2023-2024 Legis. Sess. (N.Y. 2023) (Add §399-nn, Gen Bus L).

[3] Digital Fair Repair Act, N.Y. Gen. Bus. § 399-nn (last visited August 9, 2023), <https://www.nysenate.gov/legislation/laws/GBS/399-NN>.

[4] Digital Fair Repair Act, SF 2744 2023-2024 Legis. Sess. (Minn. 2023) (Sec. 11. 325E.72 Digital Fair Repair).

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