

Right-to-Repair Legislation Advances in New York and Elsewhere

December 17, 2021

As digital electronics and equipment become more complicated to fix and spare parts harder to source, New York is on track to become the first U.S. state to pass right-to-repair legislation for devices such as smartphones, tablets, and laptops. The Digital Fair Repair Act (DFRA) was passed by the New York State Senate by a large margin and is currently in committee in the New York State Assembly. If the DFRA is enacted, New York will be the first state to require original equipment manufacturers (OEMs) to provide diagnostic and repair information for digital electronic equipment to independent repair providers and consumers.

The purpose of right to repair legislation is to increase competition, decrease the cost of repairing equipment, protect consumers, and reduce electronic equipment waste, which is the fastest-growing waste stream internationally and accounts for 70% of all toxic waste in U.S. landfills. Right to repair legislation for electronic equipment has been introduced in 25 States as of 2021, but the New York Senate is the first legislative body in the U.S. to approve right to repair legislation for digital electronics. The DFRA is stalled in committee in the Assembly but could speed to approval if supporters come together to approve it and it is signed by Governor Hochul. If enacted, the DFRA will amend the General Business Law by adding §399-nn Sale of Digital Electronic Equipment.

In addition, there is a right to repair bill currently in the New York Senate Consumer Protection Committee directed toward motor vehicles as well as other purposes. This bill establishes the right to repair of consumers to diagnose, service, maintain, and repair motor vehicles and requires OEMs to make equipment available to independent repair providers under fair and reasonable terms.

Companies in the business of providing repairs, or selling electronic items that may need repair later in their lifecycles, would be advised to monitor legislative developments in New York and other states.

Right to Repair Legislation Attempts to Balance OEM Concerns and Copyright Law with Consumer Benefits

Manufacturers of digital electronic parts and equipment, ranging from smartphones to large farming equipment such as tractors, have argued that providing parts and repair information to independent repair providers and consumers will violate the proprietary and intellectual property rights of OEMs. However, in December 2016, the U.S. Copyright Office concluded that the complicated interpretation of copyright law has led to confusion around right to repair, because copyright law, properly understood, does not restrict repair, tinkering, security research, or resale of property. The Copyright Office concluded that because the same controls for firmware settings that are essential to repair are likewise essential to improve device security, users should be able to modify their firmware to perform security research, improve security, and detach devices from default passwords.

Effective on October 28, 2021, the U.S. Copyright Office restricted OEMs from using the Digital Millennium Copyright Act (DMCA) as an argument to prevent consumers from repairing their software-enabled devices. The U.S. Copyright Office enacted exemptions to Section 1201 of the DMCA, which prevents circumvention of technological protection measures. It determined that, among many other exemptions, the prohibition against the circumvention of technological measures that effectively control access to copyrighted works do not apply to persons

engaged in non-infringing uses of computer programs relating to the function of a device primarily designed for use by consumers to allow diagnosis, maintenance, or repair of such device.

Historically, contracts, such as End User License Agreements (EULAs), have also served as an obstacle and limitation to the repair industry. The DFRA would prohibit restrictions in EULAs that prevent independent repair shops and consumers from accessing electronic devices for repair. EULAs are contracts between users and software developers or vendors that impose restrictive terms on the use of the software of which some software-enabled consumer products are accompanied by a EULA. When software is sold subject to a EULA, the EULA cannot be negotiated by the consumer and prevents ownership of the software from transferring to the consumer who purchased it. For example, a EULA might state, "This product is licensed, not sold." This term is thought to deter customers from repairing or modifying their devices as well as prevent third parties from developing diagnostic equipment that enables customers to fix their own devices. The DFRA as well as other proposed right to repair legislation aims to amend general business law so that EULAs cannot be used to restrict consumer repair rights that are not otherwise restricted by copyright law.

The DFRA requires OEMs to make diagnostic and repair information for digital electronic parts and equipment available to independent repair providers and consumers if those parts and information are available to OEM authorized repair advisors. The right to repair does not impact warranties because manufacturers will still offer warranty support, as required by law, and as part of their marketing. The DFRA will not conflict with warranty obligations and will not alter existing legislation relating to liability for harmful defects in design and manufacturing. New York's DFRA also includes protections for OEM copyrights, patents, and trade secrets. Under the DFRA, OEMs are not required to provide owners or independent repair providers access to information other than what is provided to authorized repair providers. For example, licensed software products and media backups can be restored only after repairs are completed, so the intellectual property in this software and content will not be affected. Embedded firmware code, another area of intellectual property rights, can be restored in ways that will not infringe any rights. It can be restored as part of the purchase without infringing patent rights. Under copyright law, it is expressly permitted to backup and restore software for the purposes of repair. Thus, state right-to-repair legislation, such as the DRFA, is intended to not conflict with federal intellectual property law.

On November 17, 2021, perhaps recognizing the trend in the law, Apple announced its Self Service Repair program by which individual consumers would be able to access Apple parts, tools, and manuals for iPhone models 12 and 13 to complete their own repairs beginning in early 2022. Initially, the program will allow consumers to repair the iPhone display, battery, and camera, with additional repairs becoming available later in 2022 for other iPhone functions and Mac computers. Apple's products will be capable of being serviced with genuine parts by Apple, Apple Authorized Service Providers, independent repair providers, and consumers. Customers first must review the Repair Manual to ensure they can safely perform a repair, then customers place an order for Apple genuine parts and tools using Apple's Self Service Repair Online Store, with returned used parts for recycling earning customers credit toward their next purchase.

Europe is Moving Forward with Right to Repair Legislation

This year, the European Parliament introduced right-to-repair rules that require manufacturers to make spare parts available to independent repair providers and consumers for electrical appliances, including washing machines, dishwashers, and televisions. Additionally, the European Parliament voted overwhelmingly in favor of a proposal for right-to-repair rules similar to the DFRA that make it easier for independent repair providers and consumers to repair devices like cellphones, tablets, and laptops as part of a larger effort to eliminate e-waste and achieve climate-neutrality. Although the proposals are not yet passed into law, European Commissioners are asked to introduce a labelling system to help consumers understand the repairability of products. The stated purpose of the European electronics repair rules is to stop companies from intentionally planning obsolescence of their products by updating design software and discontinuing support for older models. Over 75% of European citizens are in favor of right to repair rules.

In contrast to the DFRA, the European electronic repair rules require only that manufacturers must make the majority of spare parts and repair manuals available to professional repairers, not consumers. In addition, the European rules allow OEMs 15 working days to provide spare parts, and manufacturers retain exclusive rights to repair within the first two years of a product's lifespan. In response to the European electronic repair rules, manufacturers have argued they will incur additional expenses in order to buy, produce, distribute and store more materials. As part of the European proposals for electronics repair rules, the European Parliament intends to introduce mandatory repair scores for consumer electronics sold in the EU. Repairability scores are essentially grades or ratings assigned to electronic devices that indicate how difficult it will be to repair that specific electronic device, with lower scores indicating a more difficult and more expensive repair process. Apple has already added repairability scores to its online Apple store website that sells electronics in France, and other manufacturers have until the end of 2021 to do the same. Under the repair score guidelines, manufacturers can calculate their own scores and gain points with measures such as providing more information about a software update.

Opposition and Legal Challenges to Right to Repair Legislation

As right-to-repair legislation increases, so too will legal challenges—primarily from OEMs and the manufacturing sector.

OEMs are aggressively opposing the DFRA and want to preserve their current position in the repair market. Historically, companies like Apple, Samsung, Microsoft, Google, and other manufacturers argue that their opposition to the DFRA is for the purpose of maintaining a device's integrity so that independent repairs do not undermine product functionality. So far, companies cumulatively worth \$10.7 trillion, including Apple, Microsoft, Amazon, Google, and Facebook, have been actively lobbying against right-to-repair bills in New York and elsewhere.

Legal challenges to repair legislation focused on automotive technology are instructive. In November of 2020, Massachusetts voters voted in favor of extending their current standard automotive right-to-repair law to encompass repair and maintenance data transmitted via the vehicle's telematics system, which contains car data stored outside of vehicles such as navigation, GPS, and mobile internet. Starting with model year 2022 vehicles, manufacturers would be required to provide access to telematics systems data in vehicles sold in Massachusetts for independent repair shops and individual consumers to fix their own vehicles. Immediately, the automotive industry sued to block implementation of the law, arguing that Massachusetts voters illegally preempted federal guidelines for vehicle safety and put drivers at risk. The Alliance for Automotive Innovation, which represents GM and Fiat Chrysler, spearheaded the legal bid to block implementation, with support from the National Highway Traffic Safety Administration (NHTSA). Manufacturers argue that modern vehicles are highly-computerized, contain sensitive intellectual property and proprietary systems, and were built upon research and development that reflect significant investments by manufacturers in those technologies. In reply, the Massachusetts Attorney General argued that federal regulations do not preempt a validly adopted ballot initiative.

Manufacturers also contend that right-to-repair bills create cybersecurity risks that lead to hacks, data theft, and other undesirable outcomes. However, many cybersecurity experts disagree that cyber threats and hacking are more likely and instead say that the right-to-repair and work on technology is essential to keeping technology secure from hacking. Cyber experts further argue that allowing consumers to work with third parties will better protect consumers from cyberattacks when issues are reported and disclosed, and collaboration on cyber issues will advance cybersecurity and the technology industry.

In July of 2021, President Biden signed an executive order for the FTC to establish rules that permit farmers to repair their own farming equipment as well as bar unfair methods of competition, including restrictions that prevent independent repair providers from repairing cell phones, game consoles, and other electronic equipment. John Deere opposed the executive order, stating that permitting farmers to repair their own farming equipment posed a safety risk.

Conclusion

The right-to-repair movement is increasingly gaining support from individuals and governmental entities, notwithstanding continued opposition from companies and manufacturers. Looking forward, as New York may become the first state to pass digital right-to-repair legislation with the DFRA, persons or companies that may be affected (such as consumers, independent repair providers, OEMs and authorized repair advisors) should monitor developments and seek advice from counsel.

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related professionals

John M. Griem, Jr. / Partner

D 212-238-8659

griem@clm.com

Matthew D. Dunn / Partner

D 212-238-8706

mdunn@clm.com

Jennifer "Jenny" Frank / Associate

D 212-238-8650

frank@clm.com