

# THE TIME HAS COME TO RECOGNIZE THE RIGHT TO REPAIR



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# CPI ANTITRUST CHRONICLE

## December 2023

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The right to choose who fixes your stuff has existed for millenia, inherent in what ownership means. But that right has been undermined. As an increasing number of products depend for their functioning on electronics, some product manufacturers have taken unfair advantage to interfere with that right. They are designing products to make diagnosis and repair complicated and difficult, and then blocking access to parts, tools, and basic technical information. Sometimes they go further, and rig the product so it cannot be easily opened without either breaking it, or rendering it dysfunctional unless a secret software code is applied to restore functionality. By blocking competition in the repair aftermarket, they can charge more for repairs, limit their availability, or even refuse to make them, turning the product into junk. Policymakers are making headway at the state and federal level to secure a Right to Repair for consumers, by requiring fair access to parts, tools, and information. With their success, needless electronic waste will be reduced. Independent repair shops will have a fair opportunity to compete. And consumers will enjoy the benefits of meaningful choice that competition provides – lower prices, greater convenience, and more satisfaction.

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CPI Antitrust Chronicle December 2023

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Policymakers are increasingly recognizing the importance for consumers to have an effective right to choose where to get their electronics-enabled products repaired, and for independent repair shops to have a right to a fair opportunity to compete to provide their services to consumers. And policymakers are working to secure those rights.

Securing this Right to Repair is on the agenda in numerous state legislatures, in Congress, and at the Federal Trade Commission. It is featured in the President's July 2021 Executive Order on Competition.<sup>2</sup> The effort has made considerable headway, and momentum appears to be strengthening.

The rights of ownership have been recognized in law for many centuries, as far back as the ancient civilizations of Rome, Athens, Israel, Egypt, and Mesopotamia. These rights have given individuals dominion and control over what they own – including the right to protect and prolong a product's usefulness, by having it fixed where and how they want, or fixing it themselves.

For example, a dress purchased from a clothier could be re-hemmed or mended by a neighborhood seamstress, or even at home. A wagon with a broken wheel could be repaired by a local blacksmith or carpenter.

The Right to Repair continued to be inherent in ownership during the Industrial Age. For example, independent auto repair shops became widespread, in every community, and many car owners worked on their own car at home in their garage.

In the U.S., this right is protected and buttressed by the Magnuson-Moss Warranty Act, 15 U.S.C. §2302(c), which generally prohibits manufacturers from conditioning a warranty on the consumer having to use parts and repair services sold by the manufacturer. When manufacturers have failed to comply with this prohibition, the Federal Trade Commission has issued warnings to remind manufacturers of their obligations,<sup>3</sup> and has brought legal action to enforce compliance.<sup>4</sup>

With technological advances, this right is being undermined. An increasing number of products now depend for their functioning on electronics that are embedded in or attached to the product. This has given manufacturers additional means to block competition and monopolize the maintenance and repair aftermarket for their products.

Manufacturers can design the electronics to make repairs more difficult, such as with uniquely configured physical and software tools that are not made available to owners and independent repair technicians. Manufacturers can refuse to make diagnostic manuals and other basic technical information available. They can engineer special parts and refuse to make them available. They can booby-trap the product with locks that cannot be easily opened without breaking the product, or that when opened render the product dysfunctional unless a secret software code is applied to restore functionality. These and other anticompetitive, anti-consumer practices were illuminated in a workshop the Federal Trade Commission held in July 2019, and are described in its May 2021 report, "Nixing the Fix."<sup>5</sup>

When manufacturers are able to block competition in the repair aftermarket, they can prioritize their own interests, and downplay or disregard the interests of their consumers. They can charge more for repairs. They can limit the number of repair providers, to maximize their own profits, resulting in longer waiting periods and other inconveniences for consumers. They can decide which repairs they will make, and when it's more profitable for them to make their consumers toss out the product and replace it. Too often, that's what has been happening.

Consumer groups and digital rights groups, including U.S. PIRG, Consumer Reports, and my organization, the Center for Democracy & Technology ("CDT"), along with others, have joined with groups representing independent repair shops, including iFixit and the Repair Association, to remove these impediments. Environmental groups are also supporting the Right to Repair for its potential to significantly reduce electronic waste.<sup>6</sup>

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2 Executive Order on Promoting Competition in the American Economy, July 9, 2021, sec. 5(h)(ii), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

3 <https://www.ftc.gov/news-events/news/press-releases/2018/04/ftc-staff-warns-companies-it-illegal-condition-warranty-coverage-use-specified-parts-or-services>.

4 <https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-takes-action-against-weber-illegally-restricting-customers-right-repair>.

5 [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](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).

6 <https://wasteadvantagemag.com/commentary-empowering-consumers-the-right-to-repair-and-e-waste-reduction/>; <https://environmentamerica.org/campaigns/right-to-repair/>; <https://pirg.org/california/updates/49-environmental-organizations-sign-letter-to-support-right-to-repair/>.

This issue is being addressed in numerous state legislatures around the country,<sup>7</sup> and several Right-to-Repair bills have recently been enacted. Last December, New York Governor Hochul signed the Digital Fair Repair Act.<sup>8</sup> Minnesota followed suit in May with its own Digital Fair Repair Act.<sup>9</sup> And this October, California’s Right to Repair Act became law.<sup>10</sup>

There is also federal legislation, the Fair Repair Act.<sup>11</sup> It was introduced in the last Congress in the House by Representative Joseph Morelle of New York, who had earlier sponsored the original Right-to-Repair bill in the New York State Assembly, and in the Senate by Senator Ben Ray Lujan of New Mexico.<sup>12</sup> It is awaiting re-introduction in the near future.

At the foundation of all these bills and laws is a simple proposition of fair access: that whatever the most favorable costs and terms on which a manufacturer of a device that runs on digital electronics is providing parts, tools, and technical information for repairing the device to its selected authorized repair service providers, the manufacturer is required to provide on equivalent costs and terms to independent repair service providers. (The authorized repair providers include the manufacturer itself, when it performs repairs.)

This “equivalent costs and terms” requirement is found in the Model Act, which I helped lead the drafting of, along with others, when I was at Consumer Reports.<sup>13</sup> The new laws noted above, and the bills being considered in state legislatures around the country, are based on the Model Act. Many of them include additional specifications of what is required in the way of “fair and reasonable terms” for providing access to parts, tools, and information, as do more recent versions of the Model Act. For example, when information and tools are provided electronically, requiring that they be provided at no charge, since the marginal cost to the manufacturer is essentially zero. But they all contain the core “equivalent costs and terms” requirement.

The “fair and reasonable terms” requirement – including “equivalent costs and terms” – also applies to owners of the electronics-enabled device. Many owners will be capable of opening their device to replace a battery or perform other simple tasks. Some may have more technical skill and be able to engage in more sophisticated diagnosis, maintenance, and repair. As with automobiles going back many decades, those who choose to repair their own electronics-enabled devices should be free to do so, without the manufacturer arbitrarily blocking access to what they need.

There is no technological impediment to providing this access. Manufacturers are already providing it – to their hand-picked service providers. The impediment is the desire, on the part of some manufacturers and hand-picked service providers, to preserve the inflated profit stream that comes from keeping the repair aftermarket as closed off from competition as they can.

Over the course of the efforts to secure the Right to Repair, various associations representing manufacturers of electronics-enabled consumer products have proffered concerns that permitting this access to enable repairs would somehow jeopardize privacy and security. Protecting privacy and security throughout the digital ecosystem has been among CDT’s top goals since our founding more than 25 years ago, and remains so today. But those concerns are not materially implicated by ensuring consumers a Right to Repair. The access needed for maintenance and repair of these products does not involve revealing core software that protects the privacy and security of user data. Nor does it involve exposing the product to infringement of intellectual property. It simply gives independent repair providers, and product owners, the same access to parts, tools, and information needed to repair the product that the manufacturer is already giving its own hand-picked repair providers. These concerns have been satisfactorily answered by digital safety and security experts.<sup>14</sup>

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7 <https://pirg.org/campaigns/right-to-repair/>; <https://www.repair.org/legislation>.

8 [https://nyassembly.gov/leg/?default\\_fld=&leg\\_video=&bn=S04104&term=2021&Actions=Y&Text=Y](https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S04104&term=2021&Actions=Y&Text=Y).

9 [https://www.revisor.mn.gov/bills/text.php?number=SF2744&version=latest&session=ls93&session\\_year=2023&session\\_number=0](https://www.revisor.mn.gov/bills/text.php?number=SF2744&version=latest&session=ls93&session_year=2023&session_number=0) (section 11).

10 [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=202320240SB244](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB244).

11 <https://www.congress.gov/117/bills/hr4006/BILLS-117hr4006ih.pdf>.

12 <https://www.congress.gov/bills/117th-congress/senate-bill/3830/text?s=1&r=1>.

13 The most recent version of the Model Act published by Consumer Reports, as updated in December 2021, is found here: <https://advocacy.consumerreports.org/wp-content/uploads/2021/12/R2R-Model-Act-updated-Dec-2021.pdf>. A version as updated in December 2023 is found on the Repair Association’s website at <https://www.repair.org/legislation> (at the “DOWNLOAD OUR LEGISLATIVE TEMPLATE” button).

14 E.g. Testimony of Paul Roberts before Subcommittee on Courts, Intellectual Property, and the Internet, Committee on the Judiciary, July 18, 2023, <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/roberts-testimony-sm.pdf>.

Manufacturers have also voiced concerns about quality of repairs by independents. Quality of repairs has always been an issue, for as long as there have been products to repair. But with equivalent access, independent repair providers and tech-savvy product owners are fully capable of performing quality repairs. And importantly, in a free marketplace, those judgments are left to consumers, to weigh against cost and convenience and other considerations. Those judgments are not for the manufacturer to dictate and thereby deny consumers the benefits of competition that are at the heart of a free marketplace.

More recently, as Right-to-Repair efforts have gained increasing public awareness and support, some manufacturers are coming around and softening their resistance. For example, Apple announced its support for the California bill as it was being finalized in the Legislature this summer.<sup>15</sup>

Meanwhile, the Federal Trade Commission is stepping up investigation and enforcement under the FTC Act,<sup>16</sup> and is considering rulemaking to further clarify its approach.<sup>17</sup>

These developments bode well for reviving for the Electronic Age one of the fundamental rights of ownership consumers have enjoyed through prior Ages. Unleashing the healthy forces of competition provides consumers the leverage of choice – the ability to look elsewhere for a better deal – which tends to bring them lower prices, more convenience, and greater satisfaction. This fundamental free-market principle applies in the repair aftermarket for consumer products that run on digital electronics no less than it applies throughout the economy.

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15 <https://www.cnn.com/2023/08/24/apple-backs-california-right-to-repair-bill-in-major-policy-shift.html>.

16 <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-ramp-law-enforcement-against-illegal-repair-restrictions>.

17 [https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement\\_3084\\_FTC.pdf](https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf). (p. 2).



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