repair.org

March 20, 2023

Support for SB 73 from the Digital Right to Repair Coalition

On behalf of Repair.org, the premier repair trade organization, we write in support of SB 73.

Our trade association represents the full spectrum of the business of repair – including companies that distribute repair materials for manufacturers, companies that perform in-warranty repair on behalf of manufacturers, independent repair providers, resellers of used equipment, and both for-profit and nonprofit groups handling high-tech equipment from cradle to grave. We are commonly called upon to provide expert testimony as experts in the electronics repair industry by organizations as diverse as the FTC, US Copyright Office, Congress and a wide variety of professional conferences.

SB 73 will help consumers and businesses who currently lack access to parts, tools, and documentation necessary for repair.

The bill before you will resolve a fundamental problem that has emerged over the past twenty years. Manufacturers have stopped selling some or all of the service materials necessary to make repairs. Without access to parts, tools, and documentation, no one can fix their stuff. Consumers can't make repairs themselves, and independent repair shops (including many of our members) can't stay in business and offer competitive options for repair services.

Without the opportunity of repair, manufacturers easily control how long products can stay in use, and then use that control to force increasingly short replacement purchase cycles. It is clearly in their financial interests to control repairs, block the functioning of used markets, and thereby increase new product sales.

Businesses and industry in Ohio need to use their tech-enabled equipment as long as possible to control their operating costs. Keeping equipment up and running after it is fully depreciated is known as "sweating" one's assets. When equipment is no longer repairable due to manufacturer intransigence, the option to sweat assets goes away, which hurts American businesses' competitiveness in a worldwide market.

Schools already have chronic budget problems providing students with functional computers, tablets, and laptops. It behooves us as taxpayers to make sure that our schools aren't forced to buy replacements until absolutely necessary. Most 5-year-old technology is more than adequate for student use, at a fraction of the cost of new. This bill will allow schools to deploy tech assets for as long as they see fit.

Government offices from state to town are big users of computers and related tech. They too have budget limitations which impact taxpayers. Not fixing things is expensive.

General Business Law and UDAP Statutes Apply

We already have the "right" to fix our stuff under current law, but if we sign an End User License Agreement ("EULA") that is required in order to turn on our purchases, that EULA inevitably changes the deal so that we are forced to agree that we won't fix our stuff.

These kinds of post-purchase contract changes exist only to remove rights to repair, customize, and even resell our purchases. Because these contracts are inherently unfair and deceptive, states can intervene to make sure that manufacturers do not monopolize repair.

Repair monopolies are beginning to face challenges via relevant antitrust law

Manufacturer created limitations on repair are actual monopolies, particularly as illegal tying agreements. It is illegal for manufacturers to tie the purchase of a second product (such as parts) or service (such as repair) to enable continued functionality of the original purchase. Litigation along these lines is percolating, drawing on relevant antitrust laws including the Sherman and Clayton Acts. Litigation is very limited to one-at-a-time actions, so a far more efficient method of blocking the general trend of repair monopolization is through legislation.

The bill before you is solidly grounded in both antitrust and consumer protection law. Opposition lobbyists will claim the priority of hidden licenses, when those licenses are not separable, not negotiable, and contain terms and conditions in conflict with the very nature of a sale and not a rental. When manufacturers sell their products on the face, and then use unfair and deceptive acts and practices to "un-sell" those products, consumers are being harmed.
SB 73 is addressing the unfair business practice problem regardless of specific technology.

The most common form of unfair and deceptive agreement is the "End User License Agreement". At best, a EULA will reiterate existing law, but I have yet to see a EULA that doesn't also use the contract to remove existing federally legal rights such as the right to research, customize, explore, remove, repair and resell the purchased property.

Legally, there are no good reasons to block repair, only excuses. Repairing our things is fully legal under copyright law and patent law and is a key value of being an owner and not a renter. OEMs that want the control of equipment post-purchase do not have to see it. They can remain the owner and rent or license their product. These are business model choices unrelated to the specific technology.

Copyright law defends repair, and the Copyright Office has repeatedly ruled in its favor

Copyright law already allows for repair, and also allows for customization and tinkering for nearly everything. Congress has requested two studies (by Senators Leahy and Grassly) from

the Copyright Office related to repair. Both affirm that copyright law isn't broken, but that repair is being blocked by unsubstantiated claims of copyright infringement. [1]

The US Copyright Office controls which repairs can be made legally (almost everything) and also which products that can be legally unlocked legally (almost everything). Section 1201 of the Digital Millennium Copyright Act has historically prohibited some forms of repair activity, but every three years since 2015, the USCO has passed exemptions for repair for a wide variety of products, ranging from smartphones to appliances to video game consoles. The most recent round of exemptions [2] includes most everything that is commonly repaired, with the continued exception of video game consoles. Ohio law will not alter these limitation.

Legal Principles in SB 73

SB 73 is a very light touch on manufacturers. It requires manufacturers to provide legal copies (or internet access) of the same repair materials that already exist for their authorized or subcontracted repair providers so that consumers and repair businesses do not face copyright peril from making copies. OEMS must also offer the same parts and tools they have been providing to their authorized or subcontracted repair relationships on the same terms and conditions to owners and independent contractors. Refusal to sell parts and tools is also a form of "Exclusive dealing" illegal under antitrust law. If an OEM runs out of parts, they don't have to go make more.

There are no design requirements. There are no limitations on how documentation is to be provided including allowing for paper copies. There are no requests for provision of any source code. The only "code" that is needed is whatever the OEM already provides on to their repair providers. We're often asked to include prohibitions on adhesives or battery technology or other functional problems, but we have chosen to focus first on restoring the very ordinary option of repair. Those are also worthy goals, but they aren't in SB 73.

The information written as service documentation is intended for purposes of repair, so it's written to be used and cannot be claimed as a trade secret. Consumers and repair businesses just need to be able to buy the manuals that already exist or access the internet version. Schematic diagrams fall into the same category – the diagram is made to aid in diagnosis and repair, but if the OEM won't provide the diagram, it's illegal to make a copy.

Diagnostic software is also protected by copyright law, and cannot be copied, but the software was created for distribution and use for purposes of repair, which also eliminates a trade secret claim. Diagnostics are often referenced by lobbyists as being "sensitive" without any

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[1] https://www.copyright.gov/policy/software/ and https://www.copyright.gov/policy/1201/

[2] https://www.federalregister.gov/documents/2021/10/28/2021-23311/exemption-to-prohibition-on-circumvention-of-copyright-protection-systems-for-access-control

description. The word “sensitive” implies secrecy – but diagnostic software or hardware tools are testing electrical connectivity, heat, humidity and other conditions that are necessary for problem diagnosis. If these tools are “sensitive,” it’s only in the sense of a thermometer being sensitive to heat.

Trade secrets are irrelevant to the business of repair and are disclaimed. As an example, the recipe for Coca-Cola is a genuine trade secret which is kept secret and has great economic value. However a repair tech for a beverage dispenser does not need the recipe to fix a broken valve. Similarly, Apple does not need to share a secret about how its Taptic engine works, just make the part available for repair. The consumer has already paid for all the IP in the original purchase and is simply making an identical replacement. No secrets are exposed.

Patents for product manufacturing are already public in exchange for a literal monopoly on production. When US companies decide to manufacture in Asia, where patents are widely ignored, they will face illegal copying having nothing to do with repair. Fixing things is not a problem of patents.

Warranty law also defends repair

Federal law, the Magnuson-Moss Warranty Act of 1975, has been so widely ignored for decades that most consumers believe they will lose their warranties if they so much as open the case to look at the insides. This is a myth. Even though the Federal Trade Commission “FTC” has been more aggressive in enforcement, we continue to hear lobbyists proclaim consumers will face warranty loss if they use an independent provider. Those that make these statements are either lying or totally ignorant of the law.

Starting in 2019 – the FTC conducted an extensive study of repair limitations in their “Nixing the Fix” Study and Workshop. [3] Their final non-partisan unanimous report to Congress in 2021 is the definitive exploration of claims made by OEMS in opposition to the right to repair, and the near total lack of evidence supporting repair monopolies. It is literally the case that no evidence was provided to support OEM claims of consumer cyber risk, data privacy risk, litigation risk or damage to brand image, nor violations of copyright, patent or trade secret law. The only evidence of any harm was related to a single consumer-cell phone battery fire dating back to 2011 in Australia. Thus the Executive Summary uses the phrase “Scant Evidence” in their report.

Warranties are promises of support under limited circumstances to the buyer – and are marketing tools and not requirements. Federal Law – the Magnuson-Moss Warranty Act of 1975 provides that if there is a warranty, it cannot be voided if the owner does their own repairs,

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3 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

hires an independent, or even uses non-OEM original parts. For the vast majority of repairs, consumers seek independent repair only after the warranty is no longer useful or cost-effective.

Cybersecurity and Physical Security

We are told, without evidence, that fixing things will expose us to new cybersecurity threats, new physical security risks, and terrible horrible very bad things will happen. Experience from the auto and commercial truck industries dating back to 2012 do not support this contention. OEMs have not claimed harm and have not sought to litigate the national MOU that was agreed in 2014. If there had been actual risk, we are confident there would be ample evidence in support of harm.

Opposition lobbyists will never bring up the FTC study, never bring up the major studies conducted by the US Copyright Office related to repair, nor mention their failure to provide evidence of harm. They continue to proclaim, without any evidence whatsoever, that their IP is at risk, that consumers will lose control of their data, privacy and safety, and that only authorized repair providers “vet” “train” or “supervise” their employees. All of the above was evaluated and dismissed by the FTC and found lacking.

Relevant findings from the FTC’s Bi-Partisan “Nixing the Fix” (2021) Report

Safety: Manufacturers repeatedly failed to provide the FTC with empirical evidence, despite two years of requests, indicating serious safety risks in repair. The FTC study reported that OEM and independent technicians have equivalent safety records. Furthermore, OEMs are responsible for providing products that are safe to use, or be subject to safety recalls. Repair is an important aspect of use. A product that is unsafe to repair is unsafe for everyone, including OEM-hired technicians.

Batteries: Products using unsafe designs are going to be unsafe regardless of repair. Again, there is no evidence that restricting repair to manufacturer-authorized service centers reduces the risk of battery fires. The FTC report repeatedly pointed out that manufacturers could design products with battery removal in mind, which would be a far more effective path to reducing risk than restricting repair.

The larger problem of battery fires is happening when batteries are discarded into the solid waste stream and then are pierced by industrial crushing or shredding operations. Access to complete schematic diagrams would allow these processes to more easily de-manufacture and remove these parts.

Liability: OEMs protect themselves from frivolous liability claims in contracts, which are always limited by state law, and then pretend they are responsible for consumer safety post-purchase having vociferously proclaimed the opposite in writing. By their own contracts they are not responsible for “loss of limb, loss of life, loss of profits, loss of crops” etc. They emphatically do not want any responsibility for customer mistakes.

Security: OEMS design cyber security into their products, or not. Thousands of products have little or no security whatsoever. Cyber risk is determined by OEM design choices including choices related to online software connections. Any OEM that puts security back doors in service documentation will have opened that back door to the world in a nanosecond.

Data Security: Consumers are vulnerable to having their data stolen or shared illegally when they turn over their devices for service, maintenance or repair. The FTC reviewed claims of data security and found no evidence that independent repair shops are less diligent in protecting consumer data than OEMs. Factually, a factory repair shop located in Asia is less likely to care about their reputation than a shop in one's local community where reputational harm would be valuable.

Innovation: There are no requirements in the Fair Repair Act that mandate any design changes of any kind. Innovation is not thwarted and manufacturers remain free to design products that are impossible or impractical to repair. We are strong believers in the power of the free market to reward good designs and high quality. Allowing competition is completely consistent with innovation.

We urge your passage of SB 73 this year.

Regards,

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