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Right to Repair & Telematics Data Access

There is a growing trend in support of “right to repair” laws requiring manufacturers to make their products more easily repairable, both by the product’s owners and independent repair facilities. These types of laws have been introduced by lawmakers in more than twenty statehouses, and the [European Commission has announced plans for right to repair rules that would cover phones, tablets and laptops by 2021](#). However, right to repair is not limited to consumer products like phones and laptops. Indeed, its most significant impact has likely been in the automotive industry, where [Massachusetts passed a law in 2013](#) requiring vehicle manufacturers to make the same diagnostic and repair tools and information available to independent repair shops as they did to their dealers. The automotive industry also indicates how the right to repair movement may develop, and what impacts it may have on manufacturers’ (and their licensors’) intellectual property, as Massachusetts recently passed a ballot measure expanding its right to repair law and bringing these issues to the fore.

Last November, the right to repair movement achieved what is arguably its greatest success when [Massachusetts voters approved a ballot measure requiring vehicle telematics data and ability to send commands to in-vehicle components be made available via an open access platform](#). Prior to the ballot measure, Massachusetts’ right to repair law explicitly exempted telematics from the data manufacturers would have to make available. It also did not require that the diagnostic and repair tools the manufacturers would have to make available would need the ability to send commands to in-vehicle components, merely that they would have the same “diagnostic, repair and wireless capabilities” made available to dealers. The ballot matter changed this by, among other things, removing the telematics data exemption, and mandating that manufacturers equip vehicles with an open access platform which would:

- Be standardized across all the manufacturer's makes and models;
- Allow a vehicle owner to access all mechanical data emanating from the vehicle, including telematics data, through a mobile application;
- Allow a vehicle owner to authorize independent repair shops to directly access this data for the purpose of maintaining, diagnosing, or repairing the owner's vehicle; and
- Allow independent repair shops to send commands to in-vehicle components as part of this access if needed for purposes of maintenance, diagnostics, and repair.

Under the ballot measure, the requirement for an open access platform commences in model year 2022, and applies to all manufacturers of motor vehicles sold in Massachusetts, including heavy duty vehicles having a gross vehicle weight of more than 14,000 pounds, provided that such vehicles use a telematics system.

The requirements of the new right to repair law present significant challenges for vehicle manufacturers. From a technical standpoint, developing and deploying an access platform which is standardized across all of a manufacturer's makes and models is a daunting challenge, especially given the short timeframe (model year 2022) for implementation. Additionally, the new law significantly changes the landscape regarding measures that manufacturers can take to protect the intellectual property incorporated into their vehicles. Under prior law, manufacturers had to make diagnostic, repair and maintenance tools and data available to independent repair shops, but they could still impose conditions on that availability so long as the terms provided to the independent repair shops were fair and reasonable. However, under the new law, access to a vehicle's on-board diagnostic systems must be provided to vehicle owners and independent repair shops without requiring any type of authorization from the manufacturer, unless the authorization is via a system that is administered by an entity unaffiliated with the manufacturer, thereby rendering existing methods of protection through licensing inoperative. Similarly, prior to the new law, circumvention of technical protection mechanisms, such as

encryption and password protection, used by manufacturers to prevent unauthorized access to their software and data, would be prohibited under the digital millennium copyright act. However, under the new law, manufacturers are not allowed to condition access on authorization, thereby rendering existing methods of protection through technological measures moot. Thus, the right to repair presents both technical challenges with compliance and legal challenges for taking measures to prevent that compliance from operating as a *de facto* surrender of all intellectual property rights in automotive data and software.

Due to a legal challenge by the automotive industry, the future of the Massachusetts law is unclear. [On November 20, the Alliance for Automotive Innovation filed suit seeking a declaration that the expanded law is unenforceable.](#) According to the Alliance's complaint, the obstacles to maintaining intellectual property protection posed by the law meant that it conflicts with or serves as an obstacle to the purposes of, and is therefore preempted by, copyright law, the anti-circumvention provisions of the [Digital Millennium Copyright Act](#), and the [Federal Defend Trade Secrets Act](#). The Alliance's complaint also argued that, because third parties could potentially make changes to a vehicle's on-board software through the required open access platform, the law was also inconsistent with, and therefore preempted by, the Motor Vehicle Safety Act, Federal Motor Vehicle Safety Standards, the Clean Air Act, and the Computer Fraud and Abuse act. The Massachusetts attorney general has responded by moving to have the suit dismissed. However, the attorney general has also agreed not to take any enforcement action prior to August 1, 2021. No decision has been issued on the motion to dismiss, and a trial date has been set for June 14. Accordingly, it is possible that the expansion will be nullified before it ever has any real effect.

The Massachusetts right to repair law represents a significant challenge to the automotive industry and, to the extent its validity is upheld, will no doubt impact arrangements between automotive manufacturers and third party providers of telematics, software and/or data solutions. Additionally, even if the challenge to Massachusetts' law is successful, the underlying right to repair movement will continue, and so the issues raised by the law are

likely to continue being significant, both in Massachusetts and other jurisdictions in the U.S. and around the world.

Questions? Contact [William Morris](#) of Frost Brown Todd's [Technology](#) and [Mobility & Transportation](#) industry teams.

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