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States of Disrepair – Recent Developments in the ‘Right to Repair’ Movement

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For manufacturers, the growing traction in the U.S. “Right to Repair” movement and the changes in the state and federal laws could have serious implications.

“Right to Repair” generally refers to the growing movement allowing end users, consumers, or third-party servicers greater access to tools, manuals, diagnostic information, or other parts/components needed to freely repair products or equipment in the event the products fail. Consumers in support of the movement have become increasingly vocal, leading to an increase in legislative and administrative efforts. These efforts, which are detailed below, will likely benefit consumers in the long-run. On the other hand, manufacturers have resisted the movement, citing their strong interest in keeping proprietary information and trade secrets confidential, while also making sure repairs are completed correctly.

According to [repair.org](#), approximately 40 states have introduced “Right to Repair” legislation in their respective legislative chambers. Most of these bills generally center on one of three industries – agriculture equipment, medical devices, or consumer digital electronics.

‘Right to Repair’ on the National Scale

At the national level, the [Fair Repair Act of 2022](#) has been introduced in Congress. However, no progress has been made on the bill. Other bills have also been introduced into Congress at the federal level, but they have all faltered. Like the New York law, the current text of the Fair Repair Act of 2022 applies to digital electronic equipment.

The Federal Trade Commission (FTC) has taken administrative efforts that align with the “Right to Repair” movement. For example,

in July 2021, the FTC issued a [formal policy statement](#) indicating its intention to investigate what it believes to be unfair or anti-competitive repair restrictions. In accordance with this policy statement, the FTC, in July 2022, [announced](#) that it has taken three enforcement actions based on repair restrictions. In doing so, the FTC targeted three prominent American manufacturers; Weber-Stephens Products LLC, Harley-Davidson Motor Company Group, LLC, and MWE Investments, LLC. All three of these actions were based on violations of the Magnuson-Moss Act for warranty violations. Specifically, the FTC enforced the “anti-tying” section of the act which generally prohibits warranty provisions that provide that a consumer will lose warranty coverage if the consumer does not use specifically branded parts and/or services unless the manufacturer also provides those parts and/or services free of charge.

There have also been a small number of bills introduced targeting consumer products at large. Nevertheless, to date, almost all these bills have been rejected.

Current Status of State Level Legislation

The most notable development came in June when New York became the first state to pass a comprehensive consumer “Right to Repair” law. [The bill](#), in relevant part, requires an original manufacturer to make available, on fair and reasonable terms, any documentation, parts, and tools required for the maintenance or repair of digital electronic equipment to independent repair providers and consumers. The bill takes a broad definition of digital electronic equipment, defining it as any product that’s functioning is dependent on embedded digital electronics and has a value of at least ten dollars. To narrow its scope, the bill contains several exclusions, including for motor vehicles, agricultural equipment, medical devices, construction equipment, power tools, and appliances. The bill is currently awaiting signature from the Governor and will become law one-year after being signed.

Currently, there are anywhere from 15 to 20 states with proposed “Right to Repair” legislation. Colorado (power wheelchairs) and

Massachusetts (motor vehicles) have passed limited “Right to Repair” laws that are industry specific and have largely been displaced by self-regulation.

Impacts on the Manufacturing Industry

The progression of the “Right to Repair” movement, coupled with the successful passing of the New York law, will have practical effects on the manufacturing industry. As an initial matter, manufacturers will undoubtedly be stuck with the difficult task of navigating how to comply with the law. The New York bill, like many of its proposed counterparts, does little to address exactly to who, and to what extent, a manufacturer must provide access to tools, parts, and other repair-related materials. The New York bill does state that it does not require a manufacturer to divulge any trade secrets, nor does it require a manufacturer to make parts and tools available on the same terms as the manufacturer might have with an authorized or affiliated repair provider. Beyond that, these compliance issues are unresolved.

Impacts on OEM

Moreover, the “Right to Repair” movement may impact the manufacturing industry in different ways. Practically speaking, Original Equipment Manufacturers (OEM) will likely be affected adversely. OEM manufacturers are often the entity in position restricting repair efforts and, consequently, the “Right to Repair” movement will limit an OEM manufacturer’s ability to control the repair process. Indeed, the “Right to Repair” movement has already spurred some OEM manufacturers into action. For example, according to Reuters, Deere and Company has [recently entered into a memorandum of understanding](#) with the American Farm Bureau Federation ensuring that farmers have the right to repair their own equipment. However, in contrast, the “Right to Repair” movement may benefit aftermarket manufacturers, as many “Right to Repair” efforts may expand access to aftermarket products.

Liability Exposure

These recent developments also have the potential to increase the liability exposure of manufacturers. Many of the consumers and third-party repair providers that will gain repair access will be less sophisticated than the manufacturers themselves. Consequently, there will likely be an increase in negligent repairs, and, therefore, an increase in injuries and damages. From a product liability perspective, this could change a manufacturer's risk calculus and mean reliance on more affirmative defenses focusing on modification, alteration, or risk allocation. As product liability lawsuits often try to expand a manufacturer's liability as broadly as possible, it is anticipated that consumers will attempt to extend product liability jurisprudence to include "defects" that arise only in the repair process or post-repair. While the New York bill does contain a limitation of liability in favor of the manufacturer, it is seemingly only applicable to damage to the product itself.

Manufacturers could face potential liability for data security or privacy breaches associated with consumer or third-party service provider repairs. The New York bill, like many others, is targeted at consumer electronics. In today's digital age, digital equipment contains endless private and confidential information, along with sophisticated intellectual property. As access to the equipment expands, so does the access to the information contained within the equipment. If a consumer or third-party service provider is not properly equipped to protect this private and confidential information, an increase in data-related breaches is likely to follow.

The "Right to Repair" movement is here to stay. With the passing of the New York bill, other states are likely to follow. Manufacturers should begin to consider the possibility of right to repair legislation in their respective industries when reviewing current risk assessments, product development criteria, intellectual property strategies, and field repair practices. As developments continue to occur, manufacturers – both domestic and internationally – will be left with the difficult task of achieving compliance and limiting liability. Regardless of how these issues play out, we can be sure there is no "quick fix" to the "Right to Repair" movement.

For more information, contact any attorney with Frost Brown Todd's [Manufacturing](#) industry team.

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