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New York Enacts First State “Right-to-Repair” Law

New Media and Technology Law Blog on **January 10, 2023**

At the close of 2022, New York Governor Kathy Hochul signed the “Digital Fair Repair Act” (S4101A/A7006-B) (to be codified at N.Y. GBL §399-nn) (the “Act”). The law makes New York the first state in the country to pass a consumer electronics right-to-repair law. [1] Similar bills are pending in other states. The Act is a slimmed down version of the bill that was first passed by the legislature last July.

Generally speaking, the Act will require original equipment manufacturers (OEMs), or their authorized repair providers, to make parts and tools and diagnostic and repair information required for the maintenance and repair of “digital electronic equipment” available to independent repair providers and consumers, on “fair and reasonable terms” (subject to certain exceptions). The law only applies to products that are both manufactured for the first time as well as sold or used in the state for the first time on or after the law’s effective date of July 1, 2023 (thus exempting electronic products currently owned by consumers).

The Act defines “digital electronic equipment” as “any product with a value over ten dollars [as adjusted by the Consumer Price Index] that depends for its functioning, in whole or in part, on digital electronics embedded in or attached to the product.” “Tool” means “any software program, hardware implement, or other apparatus used for diagnosis, maintenance, or repair of digital electronic equipment, including software or other mechanisms…[and] any updates.”

The Act also explains in detail what “fair and reasonable terms” means: providing documentation to owners and independent repair providers free of charge except if requested in a physical printed form; making tools available at no additional cost or without imposing impediments to access the tools to diagnose and repair (though the OEM may charge for tools requested in physical form); and making parts available at a cost equivalent to offers to an authorized repair provider and free from various “substantial obligations or restrictions,” among other things.

However, it should be noted that in Gov. Hochul's signing memorandum, she stated that she had reached an agreement with the legislature on certain technical amendments to the original bill regarding the scope of the law, including allowing OEMs to provide "assemblies of parts rather than individual components when the risk of improper installation heightens the risk of injury."

In addition, among other amendments, she noted that an agreement had been reached to eliminate "the bill's original requirement calling for [OEMs] to provide to the public any passwords, security codes or materials to override security features"; the amended bill also includes changes to ensure original equipment manufacturers will not be required to license any intellectual property.

The Act contains a number of other limitations and exceptions. For example:

- No OEM shall be liable for damage, or loss of data or functionality caused to digital electronic equipment by any independent repair provider or owner that occurs during the course of a repair, including "any indirect, incidental, special or consequential damages; any loss of data, privacy or profits; or any inability to use, or reduced functionality of, the digital electronic equipment"
- OEMs are not required to divulge trade secrets to an owner or independent service provider or give parts to allow "modification" of devices;
- The Act does not affect certain terms of contracts between OEMs and authorized repair shops (although, the Act voids contractual terms that purport to waive or limit an OEM's obligations under the Act).
- OEMs and authorized repair providers are not required to make available parts, tools or documentation for the repair of digital electronic equipment "in a manner that is inconsistent with or in violation of any federal law, such as gaming and entertainment consoles, related software and components." The Act also expressly excludes certain items or types of manufacturers or products from the Act, including home appliances that have a "digital electronic product embedded within," medical devices, motor vehicle manufacturers, and farm and utility tractors and off-road equipment.

In addition, in Gov. Hochul's signing memorandum, she stated that an agreement had been reached to exempt digital products related to B2B and B2G sales "that otherwise are not offered for sale by retailers."

The Act will be enforced by the attorney general and, in most circumstances, offers providers a brief five-day opportunity to cure a statutory violation after receiving written notice from the attorney general. Violations of the law may be resolved/remedied with injunctive relief and civil penalties in an action brought by the attorney general.

Ultimately, the Act is generally being hailed as an important, consumer-friendly measure, since repairing or restoring digital electronic equipment provides consumers more convenient, cheaper options to maintain electronic devices. Consumer advocates, DIYers, and fans of the "maker culture" who pushed for the passage of this bill may have wanted a broader "right to repair" closer to the original bill text, but continue to hope for a "ripple effect" of right to repair laws spreading to other states and for manufacturers that are required to comply with the New York to voluntarily offer similar rights nationwide. In anticipation of this law and similarly expected legislation in other states, some OEMs have begun to develop partnerships with repair providers or begun preparations to launch their own enhanced servicing programs (or reached agreement with trade organizations over right to repair).

The "Right to Repair" Generally

The general right to repair movement is growing for digital electronics and has only gained steam with the passage of the New York law. Advocates for a right to repair electronic devices assert that more repair and maintenance options can save consumers money and is needed to discourage "throwaway culture" and aid in climate change efforts by conserving energy and resources and lowering emissions due to the manufacture of new devices. On the other side, manufacturers assert that many electronic devices are already "e-cycled" or reused (e.g., refurbished models for sale) without any legal requirements. Moreover, they often state that repair restrictions or requirements that repairs be performed only by the manufacturer or authorized provider are necessary for privacy, data security, efficient design, manufacture, distribution, anti-piracy and safety reasons. To that end, makers of sophisticated electronics or machines are especially protective of the underlying proprietary firmware or computer code that runs the device and which generally remains the intellectual property of the manufacturer, not the consumer, and which can complicate the options of independent repair.

The Administration has also taken up this issue. President Biden's Executive Order on Promoting Competition in the American Economy addressed right to repair, specifically the "unfair anticompetitive restrictions on third-party repair or self-repair of items," as a practice inhibiting competition. The Librarian of Congress, in the latest triennial process in October 2021 to determine exemptions to the DMCA anti-circumvention provision, adopted a final rule that included exemptions for repair of certain lawfully-acquired software-enabled devices primarily designed for consumers. Further, an FTC report on right to repair restrictions published in May 2021 discussed the increased difficulty to repair consumer products: "Repairs today often require specialized tools, difficult-to-obtain parts, and access to proprietary diagnostic software. Consumers whose products break then have limited choices." The Report also discusses the potential antitrust issues that can arise with repair restrictions, specifically concerning aftermarket restrictions, that is, markets for parts or services that are used after the initial purchase of a product. The agency released an accompanying policy statement on repair restrictions imposed by manufacturers and pledged to investigate illegal repair restrictions. A year later, the agency displayed its commitment by bringing several right to repair enforcement actions, including against motorcycle manufacturer Harley-Davidson and Westinghouse outdoor power equipment maker MWE Investments, LLC, for purportedly restricting a consumer's right to repair by imposing warranties that contain terms that stated the warranty is void if customers use independent dealers for parts or repairs. Under the settlements, the companies agreed, among other things, to change their warranty terms to recognize a consumer's right to repair.

Thus, with passage of the New York law and additional scrutiny by regulators, device manufacturers, beyond setting up consumer repair programs, should also reexamine terms and conditions of use for consumer electronic products to ensure that certain warranty provisions will comply with the New York or federal law regarding a right to repair.

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[1] Note, in 2020, Massachusetts voters overwhelmingly approved a ballot measure concerning an automobile right to repair, mandating car manufacturers to, among other things, make telematic vehicle data available to third-party repair shops for model year 2022 and beyond; the law is currently under legal challenge.

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