
Webinar Recap - Auto Repair in the Age of Telematics

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In 2021, the FTC released a report titled “Nixing the Fix” exploring consumer protection and antitrust issues associated with repair restrictions. In particular, that report focused on repair restrictions imposed by mobile phone and vehicle manufacturers on consumers, such as restrictions on access to telematics or other data.¹ Since the publication of that report, many states—including more than 30 states in 2023 alone—have either enacted or considered laws expanding consumers’ right to repair their products.² These new laws have prompted a growing discussion around right to repair and its impact on competition and other areas. Advocates of broad right to repair laws argue that repair restrictions limit competition for repair services and increase the prices that consumers pay to repair their products. Advocates for repair restrictions, on the other hand, highlight potential risks to safety, security, and intellectual property associated with expanding consumers’ right to repair.

On January 5, 2024, the Distribution and Franchising Committee of the ABA Antitrust Law Section hosted a webinar titled “Auto Repair in the Age of Telematics – Right to Repair, Antitrust, and Consumer Protection.” The webinar was co-sponsored by the Media & Technology Committee of the Section. During the program—which was moderated by Dr. Ishita Rajani (Analysis Group)—panelists Christine Todaro (Federal Trade Commission), Daniel Savrin (Morgan Lewis & Bockius), and Professor Matthew

Backus (University of California, Berkeley) highlighted the complexity of consumer protection and antitrust issues arising in the context of broad right to repair laws, including:

- Potential impacts of broad right to repair laws on consumers;
- Difficulties associated with state-level variation in right to repair laws;
- The tension between antitrust concerns and consumer safety standards; and
- Practical takeaways for manufacturers and consumers navigating issues around right to repair.

I. Potential Impacts of Broad Right to Repair Laws on Consumers

Ms. Todaro set the stage for the discussion by explaining that “right to repair” refers to an individual’s right to fix the products they own or to take their products to an independent repair shop. By contrast, “repair restrictions” refer to any practice that limits an individual’s ability to repair the products they own, such as product designs that complicate or prevent repair, restrictions on who can access repair manuals or parts, or provisions requiring repairs to be performed only at repair shops authorized by the Original Equipment Manufacturer (“OEM”).

Ms. Todaro noted that the FTC has a clear goal of opening repair markets. Historically, the FTC has protected consumers’ right to repair by enforcing the anti-tying provision of the Magnuson-Moss Warranty Act (“MMWA”), which prevents manufacturers from requiring consumers purchase branded parts or services to avoid voiding their warranty, unless those parts are provided for free or the manufacturer receives a waiver from the FTC. The FTC also protects consumers’ right to repair under Section 5 of the FTC Act, which prohibits unfair practices, and Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. Ms. Todaro also noted that, as a result of the rapid evolution in the technological landscape, it is important to evaluate whether these statutes continue to be effective for protecting the right to repair, especially with respect to underserved communities that are more heavily affected by right to repair restrictions. She concluded by emphasizing how the right to repair is a popular issue that finds bipartisan support, with both Republican and Democratic commissioners supporting the FTC’s work in this area, and many laws being considered by different state legislatures.

Next, Mr. Savrin highlighted the need to consider both individual and societal perspectives when evaluating right to repair laws. From the perspective of the individual, if a consumer repairs a product that they own or selects an independent repair shop to make the repairs, then the consumer is responsible for the quality of the repair work and any resulting damage to the product. From the perspective of society, risks from failed repairs—including risks to safety and cybersecurity—extend beyond the individual consumer.

Mr. Savrin also pointed to differences in risk profiles across products. For some types of products, such as gaming consoles, smartwatches, tablets, and smartphones, the impact of a failed repair is limited to that individual device and presents minimal societal risks. On the other hand, expanding access to technologies like vehicle telematics data can pose serious societal risks. Mr. Savrin explained that, while OEMs have state-of-the-art data security systems, small repair shops may not be able to or want to invest in acquiring advanced data security technologies, which may pose a threat to the safety of consumer information. He noted that proposed solutions to minimize such risks may be inadequate. For example, the proposal to allow independent repair shops and individuals to access OEMs' central data systems via Bluetooth technology ignores the fact that a wi-fi connection would still be required and would therefore not eliminate data security concerns. Mr. Savrin also indicated that the potential risks posed by expanding access to telematics data will only increase as electric vehicles ("EVs") and autonomous vehicles ("AVs") rely on vehicle-to-vehicle and vehicle-to-object connectivity to operate safely and effectively. For example, the charging infrastructure for EVs requires vehicle-to-vehicle and vehicle-to-grid communication which, if compromised, could create risks for energy security, the ability to grow EV charging infrastructure, and precise data on the movements of EV owners. AVs pose even greater risks, as illicit access to their data could allow a hacker to take control of the vehicle.³ Mr. Savrin noted that, because of the number of regulatory bodies with jurisdiction over AVs, states are limited in the extent to which they can legally require manufacturers to provide independent repair shops and consumers with access to AV-related data.

Professor Backus then discussed how right to repair laws might affect consumers by explaining the link between product markets and repair markets. When a consumer buys a product (for example, a vehicle), they are actually buying a bundle of goods that includes not just the product itself but also future repairs and maintenance in the aftermarket. The total price of this bundle includes both the sticker price of the product as well the price of future repairs and maintenance. Professor Backus then introduced the "one monopoly rent" hypothesis, which posits that if a producer has market power in one market (e.g., in the market for repairs), that producer cannot extract additional rents by tying or bundling that product with a product in another competitive market. Under this hypothesis, if broad right to repair laws decrease the price of repairs and maintenance, manufacturers would offset their lost profits in the repair market by raising the sticker price of the product, leaving the total price of the bundle (product plus repairs and maintenance) unchanged. Professor Backus, however, pointed to several reasons why the one monopoly rent hypothesis may not apply to repair markets. First, he noted that the initial purchase of the product and the purchase of repair services could be separated by several years, and as such, consumers might not fully consider the price of repairs in their initial product purchasing decisions. Furthermore, manufacturers have choices not only over price, but also over product characteristics like quality and durability which require investments in product design and research and development. Some economists have posited that if manufacturers expect to earn

less in the aftermarket for repairs, they may invest more upfront in durability and quality. Others have argued that lower expected prices in the aftermarket for repairs might lead to less investment in product durability and quality.

II. State-Level Developments in Right to Repair Laws

Dr. Rajani then asked the panelists about state-level differences in right to repair legislation, particularly in relation to telematics data.

Mr. Savrin discussed the case of Massachusetts where, in 2020, voters passed a ballot initiative known as the Massachusetts Data Access Law requiring motor vehicle manufacturers to equip vehicles using telematic systems with a standardized open access platform to allow independent vehicle repair shops to have access to the same telematics system data as OEM-authorized repair shops.⁴ Following that legislation, the Alliance for Automotive Innovation, a trade association representing OEMs, sued the Commonwealth of Massachusetts on the basis that the creation of such a platform was preempted by provisions of the National Traffic and Motor Vehicle Safety Act that protect consumers from vulnerability to cyberattacks and therefore driver safety.⁵ Although the National Highway Transportation Safety Administration (“NHTSA”) indicated its support for the lawsuit in June 2023, encouraging manufacturers to refrain from complying with the Data Access Law,⁶ it reversed course two months later after confirming that vehicle manufacturers can comply with the law by allowing owners or independent repair shops to access the OEMs’ telematics data “using short-range wireless protocols, such as via Bluetooth.”⁷ Mr. Savrin expressed his concern that this represents a “band-aid solution” to the issue of consumer safety, in that, it does not offer the protection that NHTSA or the Federal Motor Vehicle Safety Standards (FMVSS) are supposed to impose with respect to control of and access to information.

Mr. Savrin also explained that, while other states like Minnesota, New York, and California have passed right to repair legislation, these laws are limited only to certain products and have carve-out exemptions for motor vehicles. Such variation in right to repair statutes across states can make compliance difficult for manufacturers. Mr. Savrin noted that the FTC’s review of right to repair legislation serves as a “governing standard” by which manufacturers can abide. Mr. Savrin noted that even considering broad oversight by the FTC, many state-level provisions do not sufficiently relay or communicate the responsibilities that come with access to information from right to repair laws. The challenge for states is how to implement these laws without increasing risks to safety, intellectual property, and other areas potentially impacted by such laws.

III. Antitrust Concerns with Right to Repair

Dr. Rajani highlighted different perspectives on access to telematics data and the inherent tension between right to repair and data safety and security concerns. On the one hand, advocates of broader right to repair legislation highlight the benefits of independent repair shops' increased access to telematics data on competition in the market for repair services. On the other hand, advocates of repair restrictions raise concerns about data security and exposure to data breaches and cyberattacks with increasing access to telematics data.

Perspectives on the tradeoff between competition for repair services and data safety or protection concerns have evolved over time, especially with respect to the motor vehicle industry. In particular, Mr. Savrin explained that due to technological advancements, the landscape of safe motor vehicle repair today is vastly different than it was 10-20 years ago. Increased use of electrical components (e.g., AV systems, electric engines) has added considerable layers of complexity that pose challenges not only at the individual level (i.e., increasingly difficult repairs) but also at the societal level: given the connectivity and integration with other vehicles and systems, a data breach may have serious consequences for the security of larger infrastructure systems such as entire AV networks and EV charging grids. Mr. Savrin suggested that a holistic approach to right to repair needs to take these societal risks into consideration.

Ms. Todaro confirmed that the tradeoff between competition and safety concerns is a point of interest for the FTC. However, she highlighted that although safety considerations are critical to any discussion of right to repair legislation, they should not automatically justify repair restrictions without further empirical analysis. Ms. Todaro pointed to the 2021 Nixing the Fix Report, which found little evidence of safety and data protection concerns that could justify repair restrictions.

Professor Backus highlighted a few considerations for analyzing the economic impact of repair restrictions in the motor vehicle context that may distinguish it from a traditional economic analysis of tying practices. First, Professor Backus noted that commitment to keep prices down through tying could be only "partial" in the sense that, in certain contexts, the manufacturer may not be able to credibly commit to charging a competitive price for repairs in the future. Second, Professor Backus explained the importance of accounting for the entire bundle of new and aftermarket purchases when evaluating potential antitrust concerns around right to repair. Third, Professor Backus also explained that price discrimination—a common efficiency argument in favor of tying—may not be applicable in certain repair markets with less heterogeneity in demand. Each of these factors needs to be carefully considered in the context of each particular industry and product.

IV. Practical Takeaways

The panelists also discussed practical considerations for manufacturers when evaluating their repair practices. Professor Backus opened the discussion by explaining that firms have an incentive to lead the debate surrounding right to repair. Because many manufacturers are just beginning to explore the cost of engaging with right to repair and the likelihood of enforcement, domain expertise has yet to be established. Professor Backus pointed to Apple's recent launch of its "Self Service Repair Program" as an example of a company leveraging its expertise and offering concrete solutions to anticipate regulatory intervention.

Similarly, Mr. Savrin encouraged manufacturers to investigate whether their own repair restrictions are grounded in pro-competitive and pro-safety standards and to identify where conflicts with right to repair laws may arise. Any challenges manufacturers face complying with right to repair laws should be communicated to consumers, independent repair shops, and to both federal and state legislators, particularly for legislation that is currently being considered. The more consumers and manufacturers engage with the legislative process, the better all parties will be able to handle the responsibilities that come with the rights afforded by right to repair laws.

Finally, Ms. Todaro identified a few practical ways for consumers and manufacturers alike to navigate right to repair issues, including the Businessperson's Guide to Warranty Law, blog posts, and several available avenues for reporting potentially unlawful repair restrictions at www.reportfraud.ftc.gov.

Endnotes

- 1 "Nixing the Fix: An FTC Report to Congress on Repair Restrictions," *Federal Trade Commission*, May 2021, available at 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.
- 2 "Right to Repair 2023 Legislation," *National Conference of State Legislatures*, November 1, 2023, <https://www.ncsl.org/technology-and-communication/right-to-repair-2023-legislation>.
- 3 Eliot, Lance, "Serious Concerns that AI Self-Driving Cars Cybersecurity Will Be a Hacker Leak Like an Open Sieve," *Forbes*, August 21, 2021, available at <https://www.forbes.com/sites/lanceeliot/2021/08/25/serious-concerns-that-ai-self-driving-cars-cybersecurity-will-be-a-hacker-leak-like-an-open-sieve/?sh=26d9b252477f>.
- 4 "An Act to Enhance, Update and Protect the 2013 Motor Vehicle Right to Repair Law," 2020 Mass. Acts Chapter 386, available at <https://malegislature.gov/Laws/SessionLaws/Acts/2020/Chapter386>.

- 5 Witley, Skye, "New US Agency Joins Fray Over Massachusetts Repair Law, Car Data," *Bloomberg Law*, June 15, 2023, available at <https://news.bloomberglaw.com/privacy-and-data-security/new-us-agency-joins-fray-over-massachusetts-repair-law-car-data>.
- 6 Letter from Kerry Kolodziej to Counsel for Vehicle Manufacturers, June 13, 2023, available at <https://www.repairedrivenews.com/wp-content/uploads/2023/06/346-1.pdf>.
- 7 Letter from Kerry Kolodziej to Eric A. Haskell, August 22, 2023, available at <https://www.repairedrivenews.com/wp-content/uploads/2023/08/ECF-351-NHTSA-to-MA-AG-8-22-23.pdf>.

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