Calif. Right To Repair Law Highlights A Growing Movement

By **Courtney Sarnow** (October 23, 2023)

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On Sept. 13, the California Senate passed comprehensive "right to repair" legislation on a unanimous vote. The act was signed by Gov. Gavin Newsom on Oct. 10.

California becomes the first state to pass a comprehensive right to repair law, in what is most likely to be the first of many victories for a movement that has in large part flown under the radar.

Continuing the momentum, on Sept. 21, Rep. Abigail Spanberger, D-Va., was one of four members to introduce a federal agricultural right to repair act in the U.S. House.

The right to repair sounds like an innocuous consumer rights issue. But it has transformed into a multifaceted legal challenge that affects not only traditional consumer rights, but also copyright, software, antitrust, warranty law and a huge swath of the manufacturing industry.

Framing the Issue

The basic concept, as it is framed by the right to repair movement, is a simple one: If you buy a product, you should be able to repair it. The movement also invokes environmental concerns, highlighting the wastefulness of an economy focused on quickly replacing rather than repairing goods.

The evils of consumption-focused behavior like "fast fashion" and cheap electronics leading to overflowing landfills and garbage-choked waterways are invoked in a message of virtuous repair versus wasteful replacement purchases.

This is complicated, however, by the increasing technical complexity of even basic consumer goods. Cars, tractors, MRI machines, airplanes, cell phones and computers all have embedded software, which complicates the ability of a purchaser to make changes or repairs to the product.

Today, even pet toys have embedded computer chips — as do toasters, coffee makers, Roombas dishwashers and doorbells. And scientists have developed sensors that can be woven into textiles to track a wearer's vital signs.

In conjunction with washing machines that sense how dirty clothes are, and adjust wash cycles accordingly, perhaps next, the washing machine will call your doctor if you haven't been exercising strenuously enough. Even if that scenario stays safely in the realm of science fiction, when software controls a product, repair is no longer merely a matter of mechanical aptitude.

Consumer advocates insist that purchasers need to be given access to all the controlling software in products, so that they can make meaningful repairs to the goods they have purchased. Manufacturers, on the other hand, have concerns about the safety and durability of their products if repairs or modifications are attempted by untrained individuals.

Software operating systems can defeat attempts to repair by unauthorized shops, and can reject replacement parts that are not authorized by the manufacturer.

On one hand, it doesn't seem unreasonable to ensure that only high-quality parts can be used in an aerospace engine or an MRI machine. On the other hand, it's awfully handy to be able to swap out a failing cell phone battery rather than needing to buy a new phone.

Another issue is that of proprietary software. Extensive research and development efforts and budgets are dedicated to designing effective embedded software that allows equipment to meet the increasingly specific demands of consumers.

Once a company perfects code that will allow a vacuum-bot to navigate safely through a living room without endangering pets or shoes, that company is not inclined to share its code with competitors. Many right to repair acts, however, require exactly that.

Copyright and the Right to Repair

On a basic level, software is considered a literary work under the 1976 Copyright Act, and can therefore be protected by the same copyright laws that protect novels and oil paintings. This is not a particularly good fit, in large part because copyright protection expressly excludes all functionality or usefulness in the copyrighted work.

In other words, the way an author describes a pet theory in a best-selling book is protected by copyright, but the theory itself — whether it is the latest low-carb diet or an interpretation of string theory and quantum physics — is not covered.

The value of the software in consumer goods is in the function, and this is not really protected under copyright. Software can in some situations be patented — but the patent standards are rather high, and the process is long and expensive enough to deter many developers.

The Copyright Act has a second way it protects developers and manufacturers in this area. The amendment to the Copyright Act known as the Digital Millennium Copyright Act, passed in 1998, is generally best known for the take-down provisions that allow music companies to get their songs taken down off unauthorized TikTok and YouTube videos.

But the DMCA also prohibits parties from circumventing anti-copying protections embedded in digital media. Under these provisions, hacking into a neighbor's Netflix account is prohibited, as is using a program to disable encryption on a DVD.

This was originally intended to encourage content owners to offer digital media like music CDs to consumers, and remains important today — in part because the DMCA anti-circumvention provisions are not limited by fair use and other statutory limits on authors' rights, the way regular infringement actions are.

Even if the copying would be allowed under the Copyright Act as fair use, circumventing digital protection to make that copy would still violate the Copyright Act. As a result, DMCA anti-circumvention provisions are themselves limited by the statute.

The U.S. Copyright Office and the Library of Congress hold a triennial rulemaking process through which specific uses can be exempted from the DMCA's anti-circumvention provisions. For instance, in August, a petition was filed in the current round of rulemaking to carve out soft-serve ice cream machines, like the notorious, frequently broken machines

at McDonald's Corp. restaurants.

This would allow repair companies to legally circumvent protections and hack into the ice cream machines. This would be a boon for ice cream-loving McDonald's customers. But restaurant owners and the manufacturers of the machines question whether allowing potentially untrained individuals to attempt repairs could adversely affect the life and operating safety of the machines.

When airplane systems instead of soft-serve ice cream machines are at issue, the wisdom of opening systems up to unauthorized repair becomes more significant.

Antitrust and Warranty Actions: Federal Enforcement and Class Actions

The right to repair movement has also reinvigorated government enforcement actions.

In what may be the first of many such warranty-based right to repair actions, the Federal Trade Commission began an enforcement action in 2022 under Section 5 of the FTC Act and the Magnuson-Moss Warranty Act against Weber-Stephen Products LLC, Westinghouse Electric Corp. and Harley-Davidson Inc.

Almost immediately, the companies entered into a detailed and rather burdensome consent order that requires, among other things, changes to warranties, extensive self-monitoring and ongoing reports of compliance. The companies were willing to agree to the consent order so quickly in large part because their violations of the federal warranty guidelines were so blatant.

There were many expressions of dismay and surprise from companies in the wake of this enforcement action, but there had actually been significant warning. In May 2021, the FTC submitted a report to Congress announcing the commission's intention to "devote more enforcement resources" to combat unlawful repair restrictions.

This was followed by an executive order and a public statement by the FTC prioritizing enforcement of antitrust laws and the Magnuson-Moss Act with regard to repair markets, and working with state legislators and policymakers on right to repair legislation.

If the FTC was trying to be stealthy, it did not do a good job. Nevertheless, many manufacturers were caught by surprise by the 2022 enforcement action.

Perhaps of greater concern to manufacturers, private actions are allowed under the Magnuson-Moss Act and federal antitrust laws. Although the FTC Act does not include a private right of action, federal antitrust laws do. The antitrust laws require an additional showing of market power, but they include prohibitions against tying arrangements that are equivalent to those in Section 5 of the FTC Act.

Class actions with right to repair claims under these statutes have already begun. In 2022, a class action against Deere & Co. was consolidated in Illinois.[1] This was followed rather quickly by a memorandum of understanding with the American Farm Bureau Federation on Jan. 8 of this year, outlining a compromise on repair issues between the tractor manufacturer and farmers.

Farmers have been the poster children for the right to repair movement. The romantic vision of the independent and self-reliant American farmer is appealing.

Also, farmers have had legitimate repair-related problems as tractors and combines have become increasingly tech-heavy. Even a simple oil change may be impossible to do without a digital key and company-specific credentials.

When farmers discover that they are not allowed to perform repairs themselves, but that no authorized personnel are available to come to perform the repairs for weeks or months, the farmers are faced with crops literally rotting in the fields. This adds up to a compelling — and accurate — picture of the damage done by preventing consumers from repairing their own goods.

Interestingly, the John Deere class action also provides a road map to a rational response. This is probably made easier by the good faith approach of both John Deere and the American Farm Bureau Federation.

The MOU they negotiated did not satisfy the right to repair advocates, but it was a sufficient outline for the parties actually involved to begin to resolve the problem, while respecting the honest concerns on both sides. The MOU provides a framework under which John Deere and the farmers will work together to increase access for repairs, while still respecting safety and operational concerns, and the proprietary value in the equipment operating systems.

Other right to repair lawsuits have started to pile up as well. Tesla Inc. and Apple Inc. have both been sued in federal court in California over claims that the companies' warranties and repair policies attempt to prevent the use of independent shops and nonbranded parts.[2]

John Deere is not the only company to start to change policies in response to consumer concerns. Samsung Electronics Co. Ltd. and Google LLC have made announcements that they will be implementing programs to improve consumer access to manuals and repair options.

Apple's recent decision to withdraw its opposition to California's right to repair legislation may be a sign of a new strategy for this high-tech company as well. Considering the current momentum of right to repair legislative advocates, this may be the smart approach.

Right to Repair Legislation

Currently, at least 20 states have either passed or are considering right to repair acts of some kind. Acts can vary from very narrow niche acts to broadly applicable rules that have significant impact across industries.

In the past, the term "right to repair" was generally applied to landlord/tenant issues. Many states, in fact, have this type of right to repair statute on the books. That may contribute to the lack of attention that the new statutes seem to be attracting.

Some of the new right to repair legislation is very narrowly focused. Colorado's Right to Repair Powered Wheelchair Act, passed in 2022, applies only to powered wheelchairs, as the name implies.

Nebraska's right to repair law is agriculture focused, as are proposed bills currently moving through the Alabama and Colorado legislatures. New York state has one of the broadest right to repair laws, aside from California's.

Massachusetts passed a law in 2020 that requires auto manufacturers to provide telematics for their vehicles. This law is currently facing multiple challenges on preemption and

constitutional grounds. Subaru of America Inc. recently complied with the law by deactivating all Starlink systems in its cars in Massachusetts, to avoid the disclosure requirements of the law.

California's act marks a significant victory for the right to repair movement.

Federal legislation is part of the movement as well. Current versions of the federal Fair Repair Act would require manufacturers to make diagnostic, maintenance and repair equipment available to owners and independent repair shops and are currently paused in relevant committees. Expect to see it come out of committee in response if enough momentum in state legislatures can be created.

Meanwhile, an agriculture-focused bill, the "Agriculture Right to Repair Act," was introduced in the House on Sept. 21. It claims bipartisan support and may have an easier path forward than the broader bill.

Conclusion

The momentum of the right to repair movement is undeniable. Legislative victories are starting to pile up, and lawsuits are forcing change, even if they have not yet resulted in large recoveries or dramatic victories.

For manufacturers, at the very least, warranty provisions must be brought into compliance with Magnuson-Moss Act standards. Companies need to acknowledge legitimate consumer complaints that result from unduly expansive proprietary software protections, and look for ways to loosen those protections without completely undermining them.

A rational balance, which allows consumers to more freely repair their goods, while still ensuring meaningful safety and quality controls and protecting the competitive advantage for companies with innovative proprietary systems, will benefit everyone.

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[1] In Re: Deere & Company Repair Services Antitrust Litigation, 607 F. Supp. 3d 1350 (Judicial Panel On Multidistrict Litigation, 2022); 2022 U.S. Dist. LEXIS 105561.

[2] Lambrix v. Tesla Inc., Case 3:23-cv-01145 U.S. N.D.Ca (March 13, 2023); Granato v. Apple Inc., Case 5:22-cv- 02316 U.S. N.D.Ca (July 19, 2023).