



DOJ Anti-Trust Subcommittee Testimony

Written Statement for the Record by the Repair Association for a hearing before The House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law

Online Platforms and Market Power, Part II : Innovation and Entrepreneurship

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Rep. David Cicilline, Chair

Rep. James Sensenbrenner, Ranking Member

Dear Chairman Cicilline, Representative Sensenbrenner and Members of the Committee

My name is Gay Gordon-Byrne and I am writing in my capacity as the Executive Director of the Digital Right to Repair Coalition, commonly known as The Repair Association at Repair.Org.

Our organization was founded in 2013 with the purpose of reversing manufacturer monopolies on technology equipment repair. Repair is being monopolized by big tech which is killing small business, preventing new business formation and discouraging innovation and interoperability.

Technology repair is being thwarted across many industries in the same way as it had been thwarted for automotive repair. Monopolized repair is common because it is easy to do, highly lucrative, and until recently, has gone unchallenged.

Having approached legislation in states to broadly unlock repair monopolies, we have faced opposition from dozens of industries ranging from toys to tractors, home appliances to mainframes. Original Equipment Manufacturers (“OEMS”) always watch each other for how to

generate more revenue. Monopolization of repair has been widely copied as a huge profit opportunity. Manufacturers have no reasons for blocking repair other than money.

Repair as a business is separate from that of manufacturing, retailing or software development.. Tying repair to the sale shouldn't be allowed, but has become the norm. Manufacturers consistently assert that they alone should be allowed to make repairs. They conflate repair of hardware with access to licensed software patches and fixes. Consumers are told only the manufacturer has the information and expertise to correctly repair equipment, which manufacturers then refuse to sell or share.

We are excited to see the Congress, the DOJ and FTC investigate how to restore the normal and necessary opportunity for repair.

Right to Repair History with Anti-Trust

Our members are alert to anti-trust law and its potential to protect consumers from OEM repair monopolies. Several of our members have been engaged directly in anti-trust litigation often as a defense against OEM claims of copyright infringement. We have solicited expert legal advice from anti-trust specialists in advance of meetings with the US DOJ held in 2012.

Several cases in court have involved our members notably Red Lion Medical v GE in Texas and Continuant/TLI v. AVAYA in New Jersey. We can see from these actions that anti-trust litigation is hideously costly and time consuming and that our members will be best served through legislation. In July of 2012 Massachusetts passed their Automotive Right to Repair law providing a nearly perfect legislative template.

How Repair Monopolies are Created and Enforced

Repair monopolies are easily created. It takes less effort to monopolize repair than to support it. Manufacturers don't have to print and ship repair manuals to anyone, including libraries. They don't have to support a retail parts distribution capability. Its also cheaper to manufacturer products using adhesives instead of mechanical fasteners, leading to less repair overall.

Blocking competition for repair not only allows for inflated prices for repair, but when prices are too high and availability too limited, consumers are easily pushed it a new product purchase. Their monopoly pricing power over repair is used to create a new sale.

Manufacturers also engage in deceptive marketing to dissuade customers from asking for repairs. Consumers are often told a repair will void their warranty (well documented by the FTC

in April of 2018¹ and by the October 2018 study from US PIRG on warranty policies for 50 home appliance manufacturers.²

Purchase, warranty and End User License Agreements (EULA) also dissuade consumers from knowing or understanding their legal rights. I conducted a brief study for Repair.Org on this topic to submit to the FTC for empirical research on matters of repair. In this study I reviewed the documentation packages for 50 different manufacturers across 5 different industries. There is a consistent pattern of unfair and deceptive documentation.³

- documentation is extremely difficult to find prior to purchase
- consumers are nearly always unable to review all the relevant docs with all embedded links and references
- documentation consistently removes existing legal rights to repair as intended by Congress in the DMCA and in Patent Law.
- Nearly all required documents are then “deemed to be accepted” by turning on the device without any positive acknowledgement at all on the part of the buyer.

Impact on Small Business and Entrepreneurship

Tech repair employment has been in steady decline for over a decade.⁴ In the computer repair sector alone we've lost roughly 2% per year in employment and gone from 160,000 small repair businesses to 140,000. Repair is nearly all small business because its a hands-on business very much like auto repair. These jobs are local, feed families, and are part of the fabric of a community.

The appearance of small cell-phone repair shops in kiosks betrays the ephemeral nature of these businesses. Most are limited to replacing batteries and glass and only for a tiny segment of available products. New models with different designs are a constant threat. Apple just announced that their parts are now cryptographically tied to the motherboard which is the death-knell for these entrepreneurs.

Small repair businesses are mostly gone in our towns. Where we used to see an appliance repair shop, a camera repair shop, a TV repair shop and a Radio Shack to buy parts these businesses are long gone. The need for repair continues to grow, and once the means to consistently acquire the materials and information to repair more than one product line, entrepreneurs will rapidly respond to the opportunity.

We've surveyed our members to get a sense of the jobs impact of passage of right to repair laws. The consensus is that employment will immediately increase by 14%, as access to OEM

¹ https://www.ftc.gov/system/files/documents/foia_requests/Warning-Letters.pdf

² Warranties in the VOID - <https://uspirg.org/reports/usp/warranties-void>

³ <https://www.regulations.gov/document?D=FTC-2019-0013-0030>

⁴ Data from IBIS World.

original parts and diagnostics for products that are brought in for repair can now be repaired. Much wider growth is logical if only to keep up with the growth of the tech sector in general. Some products sets set as IOT devices are growing at a rate of 40% per year. These things break and will need repairs.

Scope of Repair Monopolies

Every OEM that inserts a digital electronic part within their product can monopolize repair. The industry doesn't matter - tech parts are all cousins and are all repaired the same way. Most people accept there are only minor differences between a cell phone, tablet, laptop, desktop and server. It is less widely understood these same parts and designs are also inside of major and minor appliances, motorized cars, trucks, boats, tractors, lawn mowers and snow plows.

In our evaluation of common contracts for the FTC, we documented that roughly 90% of OEMS are already engaging in some form of repair monopolization. A few industries remain somewhat open to repair, notably the windows/linux based computing platforms, but even the contracts for these products insert loopholes for future mischief. Because repair limitations are marketing policies and not technological imperatives, any OEM can become a repair monopolist overnight and without any consequences.

Consumers therefore do not have a choice of repairable products at the outset and no opportunity to negotiate for themselves against powerful corporations. The scale of these abuses is so vast that only government has the clout to restore the rights of equipment owners to control their property.

Repair and Impaired Ownership

Repair is the canary in the coal mine for complete or impaired ownership. If a consumer has access to competition for repair services, then they are in control of their purchase as the owner. They can modify, customize, damage, enjoy, ignore and resell without permission from the prior owner. If repairs are limited -- then something is wrong in the contracts or marketing or both. The USCO Study in Embedded Software makes this exact point.⁵ Yet the majority of tech purchases today come with similar strings that are completely inappropriate for purchases.

Only government can fix these problems. Consumers and small business are helpless to use the courts to protect them. We know -- we've tried and so have many of our network of member businesses. Consumers cannot negotiate unfair and deceptive contracts against corporations. If we could -- End User License Agreements would be widely rejected.

It is impossible for consumers to work around these monopolies as is possible with analog or mechanical products. Consumers cannot (yet) build their own replacement electronics parts in

⁵ <https://www.copyright.gov/policy/software/software-full-report.pdf>

their garage or barn. If the manufacturer will not sell parts -- repair is impossible. Similarly, diagnosis of problems within a complex product is technically possible with multimeters, oscilloscopes and other tools, but without a schematic diagram is extraordinarily tedious. When manufacturers refuse to sell their diagnostic tools, they are intentionally blocking repair.

Manufacturers have made repair impossible in other insidious ways that are themselves tying agreements. Software patches and fixes to known defects used to be provided at no charge and freely to all equipment owners as basic defect support. These are the recalls of the digital world. Famous OEMS such as IBM, CISCO, HPE and Oracle all require a post-warranty service contract in order to download patches and fixes. Lack of access to patches is a powerful marketing tool for sales of manufacturer only services contracts for businesses large and small.

Consumers see similar tactics deployed to block their own choice of repair with passwords and locked ("cryptographic") settings that activate replacement parts. The manufacturer is the holder of the activation password and will not provide it unless they perform the repair. While manufacturers tell consumers this is for their security benefit -- that is demonstrably not the case. The US Copyright Office has exempted such locks from being copyright violations⁶ -- but their permission to break locks is not the same thing as not having the locks in the first place. The idea that a consumer would need to hack a lock in order to replace a part in their owned device should raise everyone's blood pressure.

For example, a friend of mine was able to buy a replacement OEM original digital thermostat in his refrigerator. Once installed, the part requested a password. He called the manufacturer who insisted he must schedule a service call with their authorized technician to insert the password. This wasn't even a "smart" refrigerator so there wasn't any security to protect. The manufacturer was using their control over repair to extort service revenue. Another insidious tying agreement.

Recommendations:

We urge the DOJ to demand all manufacturers document transactions honestly, succinctly and in plain language. Consumers should know how they will repair, reuse or resell their equipment before they purchase products. Consumers (and business) should not have to agree to private law requiring additional purchases in order to enjoy their legal rights as owners, to continue to enjoy their purchases as they see fit, and should never have to beg permission or approval from the manufacturer in order to transfer their property to another entity.

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<https://www.federalregister.gov/documents/2018/10/26/2018-23241/exemption-to-prohibition-on-circumvention-of-copyright-protection-systems-for-access-control>

A good step would be to ban the use of End User License Agreements for physical purchases. There may be some utility for EULA on media. The DOJ and FTC should be investigating hardware manufacturers for monopoly policies regardless of the size of their market share. Modern Monopolies are no longer monopolies on production but also of information.

Thank you for your interest. Please let me know if you have any questions or if I can be of service.

Sincerely,

Gay Gordon-Byrne

Gay Gordon-Byrne July 15, 2019

ggbyrne@repair.org

Mobile: 201-747-4022

Office: 518-251-2837