repair.org

March 16, 2023

Re H. 81 – Agricultural Right to Repair

Dear Chairman Durfee and Members of the Agricultural, Food Security, and Forestry Committee:

Thank you all for your attention and consideration of H. 81. Based on the testimony provided by David Hall, I would like to elaborate on the issues raised, as they have previously been raised.

My notes in the order of his testimony:

Small correction: The MOU made in MA for Automotive Right to Repair was not a compromise on language. The MOU is the 2012 Statute in MOU form. It was executed in January of 2014 after 18 months of negotiation within the Auto Alliance over which form of common diagnostics portal was acceptable as a standard.

Commercial Vehicles executed their own MOU in 2015 -- also mirroring the MA Statute.

Legislation has passed in NY and takes effect July 1, 2023 primarily for consumer electronics products. 26 additional states are mid-session or just starting to move legislation forward. This is bringing continued pressure on OEMS to figure out how to comply with law.

AG products from John Deere and Case-IH are to be voluntarily covered by an MOU between AFBF and individual OEMS, but legislation is likely to overtake the utility of the MOU this year. There are ten states, (and more yet to file) currently considering AG/Forestry equipment statutes, and passage by any one of them will allow these companies to withdraw entirely. But the result will be statute with enforcement ultimately covering the full spectrum of equipment used by producers and foresters. For more about the AFBF MOU – suggest reading this piece for the overview in context of federal legislation.
https://www.natlawreview.com/article/let-s-make-deal-american-farm-bureau-federation-right-to-repair-memorandum

Mr. Hall referenced some evidence of voluntary compliance. This is correct. Announcements of plans to comply have been made by multiple famous brand names such as Microsoft, Google, Motorola, Nokia, and Samsung. Apple is intending to be in compliance but hasn't yet setup a working method to enable competition for repair. The very few parts that Apple will sell to consumers do not meet the conceptual requirements of the statute which takes effect in July of this year.

Mr. Hall has previously written extensively about potential conflicts with the Commerce Clause. George Slover, Chief Attorney for Consumer Reports, wrote his analysis for the use of the Committee. (provided as a PDF in the same packet circulated with this document) Use of the Commerce Clause argument in litigation remains theoretical. The auto and truck industries did not seek to litigate. Europe and Canada are also moving their own laws and regulations. We believe that OEMS will not want to be the first to litigate against their customers - and indications we have had from OEMS is that as soon as law is passed, they will comply. This is already happening in the CE sector. We expect the same for other industries as well.

The Takings argument is based on the idea that buying a franchise or entering into a distribution agreement entitles that business to also monopolize repair. Under antitrust law, sales and repair are separate industries. The intent of this statute is to block the formation of repair monopolies which, IMHO, serves the entire state rather than standing up for the very narrow interests of monopolists.

Monopolists in all industries hate Right to Repair for good reasons -- it forces them to have to compete.. The FTC did a very thorough analysis over two years and concluded there are no benefits for consumers by blocking repair. See Nixing the Fix executive summary concluding statement on page 6 finding “Scant Evidence” that consumers are harmed by independent repair.
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

The US DOJ has recently weighed in in support of class action litigation against John Deere in federal court for having tied the provision of equipment repair to the original sale.
https://www.vice.com/en/article/n7zayb/doj-john-deere-right-to-repair-lawsuit

Example -- you buy a McDonalds franchise which gives you the exclusive right to sell McDonalds products. A Burger King wants to open next door. Under the Takings Argument-- the government should block the Burger King so that the McDonalds franchise might lose some of the value of their investment as the result of competition. Yet we see franchises adjacent to each other in many spots -- proving that competition lifts all boats. Similarly drug stores, similarly retail stores..... Competition is good for all but the monopolist.

The argument that R2R legislation might be considered “Compelled Speech” is entirely theoretical. We were advised early on that we should avoid making any requirement for how documentation is presented in order to avoid any hint of compelled speech. The bill requires only access to what already exists in the format already in use.

The bill before you has been thoroughly vetted by legal staff and States Attorneys General over a period of 9 years and across more than 40 states. We have not been challenged by any other AGs on the topic of compelled speech. (So far) Among our many members is the Electronic Frontier Foundation who regularly argues IP issues before Congress, before the courts, and

before the US Copyright Office. They assisted us with early drafting in 2014 in order to avoid such issues.

I have also attached a letter from some prominent IP Professors in support of R2R in general terms. These folks are IP Experts and do know the issues raised. IP law is not different if the product is a tractor, a cell phone, or a refrigerator. Professor Perzanowski's bio shows he is very much an expert.
https://michigan.law.umich.edu/faculty-and-scholarship/our-faculty/aaron-perzanowski

We can probably arrange a discussion with Professor Perzanowski and David Hall if that is helpful.

Most of this information is equally useful for any R2R legislation.

Regards,

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Gay Gordon-Byrne
Executive Director
The Repair Association
518-251-2837 (office)
201-747-4022 (mobile)
repair.org
ggbyrne@repair.org