MEMORANDUM

To: Right to Repair Task Force
From: David P. Hall Esq., Legislative Counsel
Date: September 10, 2018
RE: Legal considerations arising from "right to repair" legislation

I. Origins of Right to Repair – On-Board Diagnostic (OBD) Systems; Clean Air Act Amendments of 1990; California Automobile Emission Regulatory Framework

This section accurately recaps the history of R2R legislation to date -- from the 1990 Clean Air Act to THE 19 bills of record.

One additional statute to reference is CA Song-Beverly Consumer Warranty Act can be found in CA Civil Code Section 1790-1795.8, **which requires OEMs to provide spare parts or replacements for products of greater than $50 wholesale value for three years and seven years for products of greater than $100 wholesale value.**

A. Federal Clean Air Act Legislation

1. 1990 - Clean Air Act amendments; section 202(m)(4)-(5): 42 U.S.C. § 7521(m)

a. Requires that passenger vehicles and light trucks sold in the U.S. be equipped with an on-board diagnostic system that monitors the performance of the vehicle's emissions system and alerts the driver of a possible pollution control device malfunction.

b. Directs EPA to require by regulation: that connectors through which OBD systems are accessed be standard and uniform on all vehicles and engines; that access to OBS systems is unrestricted and not require any access code or device only available from a manufacturer; that output of emissions data is usable without any unique decoding information or device; and that, subject to protections for trade secrets; and

c. Directs EPA to require "manufacturers to provide promptly to any person engaged in the repairing or servicing of motor vehicles or motor vehicle engines, and the Administrator for use by any such person, with any and all information needed to make use of the emission control diagnostics system prescribed under this subsection and such other information including instructions for making emission related diagnosis and repairs. No such information may be withheld under section 7542(c) of this title if that information is provided (directly or indirectly) by the manufacturer to franchised dealers or other persons engaged in the repair, diagnosing, or servicing of motor vehicles or motor vehicle engines."

2. 1995 – EPA Final OBD Service Information Rule; 60 F.R. 40474-01; 40 C.F.R. Parts 9 and 86

a. Regulates the diagnostic and repair information that manufacturers must deliver to independent repair businesses, which includes "information regarding any system, component, or part of a vehicle that controls emissions and any system, components and/or parts associated with the powertrain system, including… the fuel system and ignition system … and for any system, component, or part that is likely to impact emissions, such as transmission systems.

b. Manufactures are required to disclose the same information they provide to authorized dealers or others, at a reasonable price, in a standard format to be developed.

c. Manufacturers are not required to disclose other proprietary information or trade secrets if not also disclosed to franchise dealers or others.

d. Manufactures are required to either provide information to aftermarket tool and equipment companies information necessary to produce generic diagnostic tools, or to sell their enhanced diagnostic equipment to aftermarket technicians for a reasonable price.

e. Manufacturers are required to provide recalibration or reprogramming information[1] to the same extent as they provide it to franchise dealers; however, manufacturers are not required to provide the underlying computer software, code, or data directly to independent technicians, nor to aftermarket parts manufacturers. Allows, but does not require, manufacturers to adopt security and anti-tampering measures.

f. Aftermarket business interests argued that EPA should require manufacturers to release all vehicle-related service information and information necessary to manufacture aftermarket parts. EPA concluded it did not have such authority, and specifically noted the limitations of the CAA amendments to emissions-related diagnosis and repair, and expressly protected trade secrets.

3. 2003 Final Rule – 68 FR 38428-01; 40 C.F.R. part 86 - EPA updates rules requiring manufacturers to provide diagnostic and repair information to repairers, including in part to fill identified gaps in information and asserting the authority to not only require manufacturers to provide additional information to independent dealers, but to franchise dealers if necessary.

4. 2014 Final Rule – 79 FR 23414-01; current requirements, including "Tier 3" regulations, intended to reduce emissions and harmonize EPA OBD requirements with California's Low Emission Vehicle program. Includes manufacturer duties to provide emission control diagnostic service information to any person engaged in repairing or servicing motor vehicles and engines. 40 C.F.R. § 86.1808-1(f).

B. California Clean Air Act Legislation

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[1] "An engine calibration is the set of instructions the computer module uses for operating many of the engine systems (e.g., fuel and ignition). These instructions are made up of preset values and algorithms that are located in a computer chip. Recalibration is the act of revising the preset values and/or algorithms for an existing engine calibration in a particular vehicle model/engine configuration. Reprogramming is the act of installing a 'new' engine calibration (i.e., a recalibration) into the module of a specific vehicle." *Id.* at 40490.

1. 1982-1988 – California develops and ultimately implements requirement under its express authority to regulate emission pursuant to the Clean Air Act that vehicles sold in the state beginning must include an on-board diagnostic system beginning in 1991 (OBD I).

2. 1994 – California mandates revised regulations (OBD II) governing OBD systems beginning with model year 1996 vehicles, with full implementation by 1999.

3. 1998 – *Motor Equipment Man. Assoc. v. Nichols/EPA*, 142 F.3d 449; against challenge from aftermarket business interests, D.C. Circuit Court upholds EPA's approval of California waiver and "deemed compliance" ruling, effectively upholding California's mandate that manufacturers equip OBD systems with anti-tampering and security measures.

3. 2000 – CA HLTH & S § 43105.5; 13 CCR § 1969 – California statute and regulations require manufacturers to provide OBD information, tools, etc. to all "covered persons."

4. 2013; most recent round of CARB OBD statutes and regs; bases of 2014 revised EPA regulations; requirement to provide diagnostic information remains valid law. CA HLTH & S § 43105.5; 13 CCR § 1969.

C. Federal Motor Vehicle Right to Repair Legislation

1. 2001 – U.S. Senate Bill S.2617, "Motor Vehicle Owners' Right to Repair Act of 2001" introduced by Sen. Wellstone.

a. Based on Commerce Clause jurisdiction, bill would require manufacturers to provide to owners, independent repair facilities, and the FTC information necessary to repair vehicles and to use replacement equipment.

b. FTC to adopt rules; includes provision for protection of trade secrets, and a private right of action based on unfair and deceptive act in commerce.

2. 2001-2011 – a "Motor Vehicle Owners Right to Repair Act" was introduced in either the U.S. Senate or House in 2003, 2005, 2007, 2009, 2010, and 2011.

3. No bill ever passed out of a House or Senate committee.

II. Massachusetts Automotive Right to Repair; State R2R Proposals

A. Massachusetts Experience – Automotive Right to Repair Timeline

1. December 2011 – Massachusetts voters approve an initiative petition for a law that would require vehicle owners and independent repair facilities in Massachusetts to

have access to the same vehicle diagnostic and repair information, and diagnostic tools, made available to the manufacturers' Massachusetts dealers and authorized repair facilities (applicable to model years 2002-2014; access to common interface for onboard diagnostic and repair information for new vehicles beginning with 2015).

2. January 2012 – initiative petition introduced in Mass. Legislature, which was required to adopt the language by May, or else it would be offered to voters to enact the law in the November general election (provided signatures were gathered and submitted by July).

3. March-May 2012 – Mass. Legislature considered the initiative petition; passed Senate but House did not hold a vote.

4. July 2012 – petitioners submitted requisite signatures to have initiative petition offered to Mass. voters for approval in November general election.

5. August 2012 – Mass. adopted session law chapter 241 (2012), an automotive right to repair law similar to the initiative petition, but based on a legislative compromise among manufacturers and repair proponents. (applicable to model years 2002-2017; access to common interface for onboard diagnostic and repair information for new vehicles beginning with 2018; no telematics)

6. November 2012 – the initiative petition, still on the general election ballot, is approved by Mass. voters and creates another automotive right to repair law ~ session law chapter 368 (2012).

7. November 2013 – Mass. legislature adopts session law chapter 165 (2013), which repeals the statutes created by chapters 241 and 368 (2012) and replaces them with new language based heavily on chapter 241 (2012) (applicable to model years 2002-2017 and heavy duty vehicles 2013 and after; access to common interface for onboard diagnostic and repair information for new vehicles beginning with 2018; no telematics).

8. January 2014 – Memorandum of Understanding and Right to Repair Agreement executed by the Automotive Aftermarket Industry Association, Coalition for Auto Repair Equality, Alliance of Automobile Manufacturers, and Association of Global Automakers.

The Alliance of Automobile Manufacturers members all agreed to the MOU. Tesla is not a member of the Alliance and is not a signatory. There are other groups that might have logically been included in the Statute or MOU who remain outside of the agreement including motorcycles, buses, motor homes, and off road products even when provided by the same OEM.

a. *Memorandum of Understanding*

- manufacturers agree to comply with MOU and R2R Agreement in all 50 states and DC (individual manufacturers must individually sign on);

- AAIA and CARE agree to work through 2018 to implement MOU and to oppose, and not otherwise fund or support, any new state R2R legislation;
- parties agree to bring any new market entrants into the agreement; to work to resolve new issues and amend agreement if necessary; to meet at least semi-annually to assess implementation;
- parties agree to call a meeting with 30 days notice to discuss viability of agreement if circumstances change, and that a manufacturer may elect to withdraw for

b. *R2R Agreement*
- virtually identical to Mass. statute (but excludes heavy duty vehicles; separate MOU in 2015 addresses heavy duty vehicles);
- creates a 5-member Dispute Resolution Panel to attempt to resolve disputes.

The Memorandum of Understanding announced in January of 2014 was the result of 18 months of negotiation following the passage of legislation in August of 2012. It took this long because the MA statute required a common diagnostic harness, which required design and manufacturing changes on the part of OEMs. OEMs had to make their own agreement on the standard, which was a lengthy process.

R2R as proposed in Vermont has no such design or manufacturing requirements and can be implemented immediately. We advise against adding any specific design or manufacturing requirements in order to avoid unintended impediments to innovation.

B. Beyond Automobiles – State Right to Repair Initiatives

The following is also an accurate list of our activities as of October, 2018. As of early October, New Hampshire has decided to go ahead with refiling Right to Repair legislation in 2019. There will be more bills filed in 2019 with a likely total of over 20 states active.

1. Legislation relating to the right to repair electronic products has been introduced in 19 states. With some exceptions, the legislation is virtually identical, and seeks to require the original equipment manufacturer of an electronic product (however defined in the legislation) to provide to owners and independent repair providers the same diagnostic and repair information, tools, and equipment as the manufacturer provides to its authorized repair providers.

2. To date no state has enacted a right to repair bill for electronic products other than Vermont, which is also the only state to enact legislation to study the issue.

3. The following states have introduced legislation, as indicated below:

a. California – 2017 AB-2110; filed 2/8/18; 4/17/18 first committee hearing canceled at request of author.

b. Hawaii – H.B. No. 1649; introduced 1/17/2018; 2/2/18 committee recommends measure be deferred.

c. Illinois – HB 4747; filed 2/13/18; passed committee 4/12/18; floor - referred back to rules committee 4/27/18.

d. Iowa – HF556/SF2028; introduced and referred to committee 3/8/2017.

e. Kansas – HB 2122; introduced 1/23/2017; "died in committee" 5/4/18.

f. Massachusetts – S.96/H.143 first referred 1/23/2017; accompanied new draft – S.2430 (resolution to create study commission) on 4/17/18; new draft substituted – S.2630 (resolution to create study commission) on 7/25/18; S.2630 passed Senate on 7/25/18; referred to House Ways and Means on 7/26/2018.

g. Minnesota – SF 15; introduced and referred on 1/5/2017; HF 287; introduced and referred on 1/17/2017.

h. Missouri – HB 2204 introduced 1/23/2018 and referred 5/18/2018; HB 2254 introduced 1/24/2018 and referred 5/18/2018; HB 1178 introduced 3/1/2017 and referred on 5/12/2017.

i. Nebraska – LB 67 introduced 1/5/17; indefinitely postponed 4/18/18.

j. New Hampshire – HB 1733 introduced 1/3/18; referred for interim study on 3/6/18; interim study scheduled for 9/18/2018 @ 1 pm.

k. New Jersey – AB 589 introduced and referred 1/9/18; SB 1638 introduced and referred 2/5/18; A4934 introduced and referred 6/5/17

l. New York

- AB 8192 referred to committee 6/2/17; amended at recommitted to committee on 1/29/18.
- SB 618 referred to committee 1/4/17; amended at recommitted to committee on 4/18/17, 6/5/17; referred on 1/3/18 and recommitted to committee on 1/31/18.
- SB 9058 (mobile device and computer fair repair act) introduced 6/15/18 and referred to rules committee.

m. North Carolina – HB 663 ("Fair Repair Requirements Act") filed 4/6/17 and referred to committee 4/11/17.

n. Oklahoma - HB 2551 ("Right to Repair Farming Act") introduced 2/5/18 and referred to committee on 2/6/18

o. Tennessee – SB 888 introduced on 2/9/17 and referred to committee on 2/13/17, and to subcommittee on 3/24/17; HB 1382 introduced 2/9/17, referred to committee on 2/15/17, and action deferred by subcommittee on 3/29/17;

p. Vermont

– S.180 introduced 1/3/18; amended to create Right to Repair Task Force and passed Senate on 3/15/18; further amended and passed House 5/4/18; Senate concurred with further amendment 5/9/18; session ended without passage.

- H.9, "An act relating to the fair repair of consumer electronic devices" (2018 Special Session) introduced and passed House on 5/30/18; passed Senate on 6/7/19; Governor approved 6/22/18. Creates Right to Repair Task Force.

q. Virginia

– HB 20 introduced and referred to committee on 11/22/17, assigned to subcommittee on 1/25/18, approved by subcommittee 1/25/18, left in committee on 2/13/18;

- HB 486 introduced on 1/7/18 and passed by indefinitely by committee on 1/29/18; would prohibit an original equipment manufacturer of a digital device from deactivating embedded software, defined in the bill, in the digital device or altering embedded software so as to substantially alter the functioning of the digital device as a response to its being repaired by an independent repair provider.

r. Washington – HB 2279 introduced and referred on 1/8/18, substituted with recommendation to pass on 1/24/18, referred to Rules committee on 1/26/18

s. Wyoming – HB 91, right to repair farm equipment, introduced on 2/9/18, referred on 2/14/18, and postponed indefinitely on 2/22/18.

II. Scope of Potential Vermont Legislation

The task force, and ultimately committees of jurisdiction, will face several fundamental questions if pursuing legislation governing the right to repair:

1. What is the problem you are trying to solve, on whose behalf?

The problem to be solved is one of restoring competition for repair services so that all Vermont consumers and businesses can keep their purchases in use for as long as they see fit.

These problems exist with any device or gadget with embedded electronics, regardless of industry or application. Without access to reasonably priced repair services, every

consumer in Vermont will be forced to pay the OEM either for repair, to make a replacement purchase, or to do without.

2. What are potential solutions to the problem?

Vermont could engage in antitrust action against a single OEM, but antitrust actions are lengthy and expensive, and the results would not automatically apply to other companies facing the same kind of situation. Given the broad nature of monopolization by thousands of companies across potentially all industries, a legislative solution is appropriate.

Consumers could theoretically reject buying products that cannot be affordably repaired, but would then lose the advantages of modern technology in exchange. Many modern-day products do not exist without electronics – and as such, repair monopolies will be routine unless stopped. For example -- there are no TVs on the market today that are not “Smart”. It is not even possible for consumers today to turn off embedded data gathering functions to secure their own personal privacy.

Other solutions, such as a Vermont requirement that manufacturers open Authorized Repair locations in Vermont, would be more intrusive on manufacturer operations and more likely to actually be in conflict with the Commerce Clause than the Right to Repair solution being proposed.

Furthermore, any solution based on “Authorized Repair” will fail to provide consumers the benefits of effective choice, because the franchise/dealership/authorized business model remains under the control of the OEM and not the equipment owner.

3. What are corresponding costs and benefits?

Vermont could launch antitrust actions one at a time for selected OEMS. This is not a cost that Repair.org could calculate. We can report that a private antitrust case was brought by an independent repair company Continuant/TLI against AVAYA and they had spent $15 million in legal fees over 8 years before the matter went to a jury trial. They won the case, but two years later lost the jury award on appeal.

4. If Vermont will attempt to create a statutory “right to repair,” what does that actually mean?

a. *What is the scope of products?*

- smartphones, tablets, computers?
- household appliances and gadgets?
- farm equipment?
- recreational vehicles?
- airplanes?

All of the above are possible at the choice of the legislature.

Consumer Electronics are the most obvious market where consumers need protection from unfair and deceptive contracts and trade practices.

Household appliances are rapidly becoming less durable and less repairable at great cost to consumers. Few households can afford a new $1500 refrigerator every 10 years just because an OEM decided to include a digital thermostat or a touch panel display rather than a durable mechanical version.

Farm Equipment includes a wide range of equipment from process controls, automated milking and feeding equipment, irrigation systems, refrigeration and heating equipment and anything and everything connected to the internet. Very few farms in Vermont will be using large harvesting equipment, but they still need to operate all of their equipment without being forced to call on – and wait for – the equipment dealership exclusively for repair.

RVs are assemblies of motor vehicles already falling under the Auto/Truck MOU with appliances made and warrantied by each OEM. For the appliances, the RV manufacturers may have their own warranty on their workmanship, but do not fall under R2R as an electronics OEM.

Aircraft have not been discussed specifically as yet, but could be included under the principle that the equipment owner has the right under Federal law, and subject to all federal regulations, to select the repair provider of their choice.

The Repair Association believes that everything that is manufactured using digital electronic parts should be treated consistently under statute. There are no technical differences between a processor used to calculate engine timing, wash cycles, water temperature or a homework problem in math.

Legislators may choose to exempt specific sub-sets of products, which we recommend should have a specific reason for exemption – such as the recommended exemption for Motor Vehicles already covered by the Automotive Right to Repair MOU of 2014.

The downside of dealing in subsets is:

a) the appearance of playing favorites,
b) the likelihood of OEMs re-categorizing equipment to avoid statute
c) the likely need to amend legislation in the future to include products initially left out or products that may be created in the future.

Federal regulations on manufacturers and on equipment owners are wholly consistent with Right to Repair. Independent repair already exists, and has long existed in all regulated industries including medical equipment, on-road and off road vehicles,

appliances and aircraft. Right to Repair makes no changes to any federal regulations and cannot under the principle of pre-emption.

b. *What is the scope of the duty? ~ What will the law require someone to do?*
- Manufacture and sell diagnostic equipment?
- Manufacture and sell repair tools?
- Manufacture and sell parts?
- Provide training?
- Provide information necessary to perform repairs?
- For how long?
- In what format?

Template legislation applies only to those manufacturers and products that already offer a repair option -- including any form of in-warranty repair. As such, they will have already created diagnostics, tools, spare parts, training, and manuals. The intent of the legislation is to allow equipment owners and independent technicians to acquire the SAME information and materials that have already been created for purposes of repair.

This principle also extends to availability. If the OEM no longer has access to service parts -- their requirement to provide access to those parts is concluded. Similarly, tooling, diagnostics, and manuals are also subject to the same standard. California already has a spare parts statute that requires parts or replacement access for 7 years beyond last date of manufacture -- which has not been challenged in court.

Template legislation intentionally does not address format, as many industries will have their own preferred standards. Other standards organizations may make their own requirements which will not impact Right to Repair. Right to Repair will not require the negotiation of standards.

c. *To whom does the duty apply?*
- Original manufacturers?
- Multiple manufacturers, designers, licensors?
- Who has responsibility to coordinate provision of equipment, tools, parts, information?

Template legislation applies only to the OEM. It is left up to the OEM to determine how they wish to comply with the requirements of the statute. We suggest this is necessary in order to allow for maximum flexibility and the lightest touch on a highly dynamic and innovative industry.

There are no impacts on designers, choices of design, or any creators of licensed material including media or content. Unless the Copyright Office rules otherwise, products using Digital Rights Management (DRM) chips will remain off limits to independent repair..

VT Tech Association expressed concern about negative impacts on entrepreneurial businesses, a parts manufacturer, and an authorized retail/repair center. These impacts are misunderstood.

- Manufacturers offering repair service are not asked to share their secrets -- only to allow repair services to be available competitively. Manufacturers, not matter how much we like them, are not guaranteed repair revenue under the antitrust bar against tying agreements.

- Manufacturers of parts are not OEMs and do not fall under the statute.

- Retailers do not fall under the statute, and retailers with authorized repair service entities will only face ordinary competition. In the case of the marketplace for Dell and HP products including servers, for example -- competition remains vibrant for these brands as they are among the most open to repair today.

d. Who are the beneficiaries?

- First purchasers, subsequent purchasers, "independent" repair shops, aftermarket parts producers, anyone?

All of the above.

Every equipment owner - from the original buyer through multiple owners to the final buyer of scrap materials - is a beneficiary. Repair is the function that keeps equipment valuable over time and supports healthy secondary markets.

Independent repair shops will benefit by being able to offer more repair services on a wider variety of products. This will add net new jobs in Vermont that are accessible without a college education, and are highly entrepreneurial. We guesstimate that repair jobs in Vermont can easily be 4X to 10X current employment because so little repair is currently available in-state.

Businesses and consumers alike will benefit from having more choices for repair of their products. For businesses, this would lead to potentially lower operating costs and make Vermont a more attractive location for expanding or starting a business.

Aftermarket parts producers could potentially benefit, if they are competitive with OEM original parts. Consumers need access to OEM original parts.

III. Magnuson-Moss Warranty Act

This section is a point of fact. R2R is wholly consistent with MMWA.

Many of the OEMS who have appeared in opposition are in violation of MMWA. For example, US PIRG just released a study of the 50 members of AHAM -- finding that 45 are in violation of this basic consumer protection law. See https://uspirg.org/reports

1. The purpose is not to require consumer warranties, but rather, to ensure that consumers get complete information about warranty terms and conditions when offered; to enable consumers to compare available warranty coverage; to promote competition on the basis of warranty coverage; and to provide incentives for timely, and less costly, resolution of disputes.

2. Applies to written warranties—if offered—to consumer goods (not services, and not products sold for resale or other commercial purposes).

3. FTC has adopted three rules under the act - Rule on Disclosure of Written Consumer Product Warranty Terms and Conditions (the Disclosure Rule), the Rule on Pre-Sale Availability of Written Warranty Terms (the Pre-Sale Availability Rule), and the Rule on Informal Dispute Settlement Procedures (the Dispute Resolution Rule).

4. Rules establish three basic requirements to warrantors or sellers:
(1) Warrantor must designate, or title, the written warranty as either "full" or "limited"
(2) Warrantor must state certain specified information about the coverage of the warranty in a single, clear, and easy-to read document.
(3) Warrantor or seller must ensure that warranties are available in the location where the warranted consumer products are sold so that consumers can read them before buying.

5. Rules establish three prohibitions:
(1) Warrantor cannot disclaim or modify implied warranties (implied warranty of merchantability is guaranteed), except that for a time-limited warranty, warrantor can limit implied warranties to the time period of the limited warranty.
(2) Absent a waiver from FTC, no “tie-in sales” – warrantor cannot condition the warranty on a requirement that the consumer buy an item or service from a particular company.

CLARIFICATION: The MMWA provides that, absent a waiver from FTC, no “tie-in sales” – warrantor cannot condition the warranty on a requirement that the consumer use an item or service, including but not limited to obtaining an item or service from a particular company – unless the item or service is provided without cost to the consumer.

(3) No deceptive warranty terms.

6. Includes provisions for dispute resolution, providing federal cause of action and recovery of costs and fees for consumers, but also permitting mandatory alternative dispute resolution before court filing.

Other Laws of Potential Applicability

Public Intellectual Property - patents, copyrights, trademarks

Federal Law controls all IP. Right to Repair does not propose to alter any federal law, and under the principle of pre-emption, could not do so.

Specifically -- it is legal under US Copyright Law to backup and restore copyrighted materials (software) for purposes of repair. This is well documented in Section 117 of the DMCA. See https://www.copyright.gov/policy/software/software-full-report.pdf Nearly all repair efforts fall under this Section.

It is also illegal, under Section 1201, for some equipment to be unlocked for purposes of repair. Much as we might dislike it -- This section remains entirely intact under Right to Repair. See https://www.copyright.gov/policy/1201/section-1201-full-report.pdf The primary beneficiaries of Section 1201 are in the entertainment software industry. If there are any changes to Section 1201 - it will come about from Congress, not Vermont.

Patents are not infringed by repair. Repair is not production and it is not counterfeiting. Right to Repair will help OEMs better control their parts supply chain by reducing the incentive to find alternative sources for parts that OEMs refuse to sell directly.

Trademarks and trade dress are not impacted by Right to Repair.

Nonpublic Intellectual Property – trade secrets

Trade Secrets are specifically protected in template legislation as none are needed. The same was determined in Automotive Right to Repair. OEMs are aware that distributing trade secret information in repair documentation would void protection under the Uniform Trade Secrets Act. If there were a trade secret issue under R2R, the VT Attorney General would manage the claim.

Antitrust - Sherman and Clayton Acts; tying; refusal to deal

Illegal tying agreements under antitrust provide legal support for Right to Repair. In the very few cases that have gone to trial in the past 20 years -- starting with SCM v. Xerox in 1977
https://www.nytimes.com/1978/07/11/archives/jury-finds-monopoly-by-xerox-but-verdict-may-reduce-scms-damage.html .

It was more than 20 years before another similar case came to trial in 2014 - AVAYA v. TLI when a Jury Trial found AVAYA guilty of illegal tying, unfortunately reversed in 2016 on appeal
http://www.dailyreportingsuite.com/antitrust/news/judgments_against_telecom_equipment_maker_for_tying_attempted_monopolization_reversed

The most recent case is still wrapping up in the courts -- the jury in Texas having found GE illegally monopolizing repair of anesthesia equipment, See GE v. RedLion Medical
https://resource-recycling.com/e-scrap/2018/09/07/legal-case-with-right-to-repair-implications-rolls-forward/

Such cases are exceedingly rare because of their costs. Repair businesses are nearly all small businesses -- and rather than fight in the courts will find another line of work. The very few cases that have gone forward have taken 5-10 years before any trial -- another massive handicap for any small business to absorb. Trade Associations, such as ourselves, have no standing to bring actions.

IV. Potential Constitutional Considerations

George Slover of Consumers Union is providing his analysis separately. Comments below are from Repair.Org.

A thorough presentation of potential constitutional issues is beyond the scope of this memo. Furthermore, absent bill language, a complete constitutional analysis is not possible. Depending on its content, a "right to repair" law that would require a business to produce and sell equipment, parts, tools, or information may raise issues under the following constitutional provisions:

Template legislation closely follows the implementation of Automotive Right to Repair law first passed in Massachusetts and then subsequently incorporated into an industry-wide agreement for the automotive industry. Constitutional challenges did not occur.

It is our view that the auto industry believed its customers would prevail both in court and in the court of public opinion if Right to Repair where challenged. And the industry has clearly not been substantially harmed by R2R – dealerships are still making repairs and still selling new vehicles.

Competition for automotive repair services has made a notable different in the treatment of consumers by dealerships. Consumers now watch TV, get free internet, free coffee and expanded service hours. Competition is good.

A. Commerce Clause

The Commerce Clause grants Congress the power "[t]o regulate Commerce … among the several States." U.S. Const. art. I, § 8, cl.3. The U.S. Supreme Court has said that under the "dormant" or negative aspect of the Commerce Clause, a state may not discriminate against interstate commerce, and a state may not impose undue burdens on interstate commerce. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93 (1994).

1. Discrimination

a. A state law that discriminates against interstate commerce on its face is subject to "a virtually *per se* rule of invalidity," *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2091 (2018), and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Dep't of Revenue of Ky. V. Davis*, 553 U.S. 328, 338 (2008).

b. A state law may also be discriminatory in effect if it provides for differential treatment of similarly situated entities based on their contacts with the state, or has the effect of providing a competitive advantage to in-state interests vis-à-vis similarly situated out-of-state interests. *Ford Motor Co. v. Texas Dept. of Transportation*, 264 F.3d 493, 501 (5th Cir. 2001).

2. Undue Burden

a. Absent facial discrimination, "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.* 397 U.S. 137 (1970).

3. Extraterritoriality

a. A state law that is extraterritorial in effect is *per se* invalid.

b. A state law may not apply to commerce wholly outside the state's borders; legislative intent is not relevant if the law controls commerce wholly outside the state's borders; and, the Commerce Clause prohibits on state projecting its laws into another state. *See Healy v. Beer Inst.*, 491 U.S. 324 (1989).

Concerning "right to repair" legislation – could an out-of-state business successfully challenge a Vermont law on one or more of the following theories:

(1) The statute discriminates against interstate commerce in effect because it creates a competitive advantage for Vermont-based independent repair providers over out-of-state providers.

(2) Even if not discriminatory in effect, under *Pike* the statute is unconstitutional because:

(a) Vermont does not have a legitimate local public interest;
(b) the effects on interstate commerce are more than incidental; and
(c) the burden imposed on interstate commerce is clearly excessive in relation to any putative local benefit.

(3) The statute is invalid because of its extraterritorial effects:
(a) If an out-of-state business does not provide diagnostic or repair services in Vermont, does not sell parts into Vermont, etc., a Vermont law that purports to force that business to conduct such activity in Vermont could be extr

It will be true that residents of nearby states might choose to travel to Vermont or ship their equipment to Vermont businesses for alternative repair services. This will create healthy competitive incentives for the growth of independent repair providers both in-state and out-of-state.

B. First Amendment

1. Compelled Commercial Speech

Would a court characterize the statute as compelled commercial speech? If so, what level of scrutiny would apply?

a. Rational Basis Review
i. Would the court conduct a rational basis review under *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 638 (1985) (challenger must demonstrate that the law is not rationally related to any legitimate governmental interest)?

ii. This standard applies to compelled commercial speech that is "purely factual and uncontroversial" and is "reasonably related to the State's interest in preventing deception of consumers?" *Id.*

b. Intermediate Scrutiny
i. Would a court apply intermediate scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566) (1980)—whether:
(1) the regulated expression is false or misleading;
(2) the government interest is substantial;
(3) the statute directly and materially advances the governmental interest asserted; and
(4) the statute is no more extensive than necessary to serve that interest.
ii. Does the *Zauderer* standard apply <u>only to</u> "purely factual and uncontroversial" and "reasonably related to the State's interest in preventing deception of

consumers," or does it extend beyond preventing deception? The answer is unclear in light of recent jurisprudence.

2. Compelled Speech

Would a court characterize the statute as non-commercial compelled speech, insofar that it is not a "disclosure" requirement, but rather, compels content-based speech? Consequently, would the statute be subject to strict scrutiny?

a. See *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018); *CTIA-The Wireless Association v. City of Berkeley, California*, 138 S.Ct. 2708 (2018).

b. Arguably, a content-based statute that forces disclosure of information to competitors is not aimed directly at consumers, or simply proposing a commercial transaction, or an advertisement that must be regulated to avoid deception. Rather, it is a government mandate that forces a speaker to convey a particular message (to business competitors) in order to [increase consumer choice] [save consumers money] [indirectly, and potentially, reduce waste and protect the environment] [increase business competition].

C. Contracts Clause

1. A legislative enactment that constitutes a substantial impairment of a contractual relationship must have a significant and legitimate public purpose. *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400 (1983).

There are many public interests that support legitimate use of legislative power.

a) Vermont has a state interest in making sure that its residents are treated fairly in all purchase and license contracts.
b) Vermont has a state interest in reducing the volume of unnecessary discards of electronics into the waste stream.
c) Vermont government offices, health care and educational systems will be restored the opportunity of competitive bidding for repair and maintenance contracts. The resulting savings are a direct benefit to taxpayers.

2. Concerning "right to repair" legislation – are there existing contracts between the manufacturer and others (e.g., license holders, authorized service providers) that would be impaired by the law?

As drafted, Right to Repair language is careful to avoid any impact on contracts between vendors, suppliers, authorized providers, dealerships, retailers or any other contract other than the contract between the OEM and the Buyer. Further, R2R also allows for the

authorized provider to have the advantages of offering repair for other products as an independent.

3. If so, can Vermont demonstrate a "significant and legitimate public purpose" that justifies the impairment of contracts?

D. Takings Clause

1. Under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), the Supreme Court identified factors that a court must balance to determine whether a law effects a compensable government taking of property:

a. the regulation's economic impact on the claimant;

b. the extent to which it interferes with distinct investment-backed expectations; and

c. the character of the government action.

2. Concerning "right to repair" legislation, to what extent could manufacturers, authorized dealers, or others claim compensation from Vermont for a compensatory taking?

Closing Remarks - Paraphrasing Yogi Berra – Repair isn't Rocket Surgery.

It is a myth that modern products are hard to repair and that it takes a highly skilled tech to perform repair. The opposite is the case. Products are designed by OEMS to be easily repaired in as short period of time as possible by the least costly technician possible. This is an economic necessity for OEMS for their own warranty or service delivery costs.

The reality of repair as a business isn't one of highly paid or highly trained techs regardless of employer. Most repair techs hired by Apple are paid between $13-$20 per hour. In comparison, the average auto body shop tech makes $22 per hour. Medical equipment repair techs earn slightly more on average -- $26 per hour.

Training for supposedly "complex" repair is minimal – because OEMs don't want to pay a US wage for repair when then can use bulk repair services overseas. OEMS are far better served by making a fast product swap in the retail facility and then bulk shipping to a repair depot in a low wage country such as Mexico or Vietnam. Depot repair facilities abound where repairs are made in bulk by factory workers. Under Right to Repair, local repair jobs in the US would pay more, and the repairs would be more immediately accessible.

Nor is repair difficult or mysterious. Middle school kids are repairing electronics. Thousands of schools are teaching coding and robotics as part of their STEM programs. Many are teaching using open source products such as Arduino and raspberry pi. High school age kids are running repair businesses on their kitchen tables. Millions of

Americans have taken Comptia's A+ computer tech certification as the foundation for a career in IT.

Furthermore, Electronics repair is fundamentally different from mechanical repair. Unlike mechanical repair, where there may be subtle adjustments that could make the difference between complete or partial repair, there is no such ambiguity with electronics. All electronics repairs are validated by running manufacturer provided diagnostics. If the diagnostics report the unit is operating correctly – it's fixed. If not – the tech has more work to do.

This means that overpriced repair isn't better repair. Consumers don't benefit in any way from paying more for an OEM's authorized technician to make a repair than an independent. Patients in hospitals don't get better MRI results when the T shirt on the tech says "OEM" versus "Other".

Every dollar saved on electronics repair is literally more money available for consumers or businesses to buy or invest in other things at no risk to themselves or others.

Competition for repair services in the auto industry provides some guidance on economic value. Independent auto repair is typically 30% less than the same service provided by the dealership. OEMs with electronics repair monopolies are earning 90-95% margin on repair as the true costs of parts and labor are currently detached from pricing. Competition will restore rational prices.