



The right to repair –
what's at stake, and what's happening

The push for the right of consumers to repair devices like smartphones, tablets and electronics raises important new legal issues and challenges for manufacturers of digital devices. The “right to repair” movement would expand a consumer’s right to access the “guts” of digital devices to fix problems. Federal action and state law have pioneered right to repair in recent years, but these legal developments raise questions around liability for exposure to hazardous substances and protection of copyright interests.

The Federal Trade Commission (FTC) triggered a flurry of commercial compliance reviews last summer when it brought back-to-back enforcement actions against a trio of manufacturers whose warranties limited the ability of consumers to seek third-party repairs or spare parts. The actions were brought as part of the FTC’s commitment to protect consumers’ “right to repair” their own devices or engage independent repairers rather than be forced to pay for parts or services from the original manufacturer.

And FTC action is just one piece of the puzzle. Since then, several states have passed increasingly broad right-to-repair legislation, with the first such law going into effect July 1, 2023, while many more states are considering proposed bills.

The legislation has garnered significant attention and sparked extensive policy debate, but most discussion has been limited to the immediate practicalities surrounding self- and third-party repair. The broader consequences these laws and bills could pose for companies striving to harmonize new right-to-repair compliance with existing chemical exposure liability or protect legitimate copyright interests have been largely overlooked.

Manufacturers who will be subject to state right-to-repair legislation should consider conducting a compliance risk assessment, beginning by reviewing the substances enclosed in any products that will be subject to state right-to-repair protection, and determine which of those substances are covered by laws and regulations governing chemical exposure. Manufacturers subject to broader laws, such as that passed in Minnesota, should also determine the extent, if any, to which repair-facilitation obligations under the legislation create friction with interests protected by copyright law.

This handbook explores these issues, beginning with a review of the legal action of the right-to-repair movement to date, including federal efforts to move the right-to-repair ball forward, the sweeping legislation adopted in New York and Minnesota, and pending legislation as exemplified by that proposed in California. It then considers the potential unintended consequences of the right-to-repair movement by imposing chemical exposure liability on manufacturers, along with the potential for unintended conflict with copyright law.



How it began, and existing state legislation

The right-to-repair movement began in 2012, when Massachusetts passed the [Motor Vehicle Owners Right to Repair Act](#), requiring automobile manufacturers to allow owners and independent mechanics the same access to the diagnostic tools and repair information provided to their own dealers and authorized repair facilities. Massachusetts extended the law in 2020 to include “mechanical data” and “telematics systems data,” ie, wireless data. That law has been stalled in a legal challenge since then, with enforcement pending resolution of the challenge beginning only recently.

The Massachusetts law has also had the larger effect of spurring the right-to-repair movement across the United States, and the movement has swelled in recent years. Advocates push right to repair as a means to protect employment opportunities for independent repairers, reduce electronic waste, mitigate device and equipment obsolescence, and enforce owners’ rights of control over their property. In response to the legal action in Massachusetts and subsequent federal action, in the last year, Colorado, New York, and Minnesota have also adopted right-to-repair legislation.

The four states are evenly split between a sector-specific approach to right to repair and a “universal” approach that applies broadly and designates carveouts. As noted, the Massachusetts law applies to the automotive industry, while Colorado passed two laws that facilitate repair access for powered wheelchairs and agricultural equipment, respectively. The New York and Minnesota laws apply to electronic devices more generally, including consumer devices. Below we unpack key takeaways of those acts, before turning to their implications for manufacturers.

NEW YORK: DIGITAL FAIR REPAIR ACT

New York was the first state to pass sweeping right-to-repair legislation, and its Digital Fair Repair Act contains key industry-friendly provisions that were added at the eleventh hour. While the Act passed in June 2022, Governor Kathy Hochul did not sign the bill until December 2022. Dialogue with stakeholders in the interim led to additional safeguards for electronics manufacturers against unreasonable exposure to liability and protections for intellectual property. Now manufacturers must comply with the Act’s as-amended provisions for **all devices manufactured after July 1, 2023**.

The law covers “digital electronic equipment,” meaning, “any product with a value over ten dollars [adjusted annually according to the consumer price index] . . . that depends for its functioning, in whole or in part, on digital electronics embedded in or attached to the product,” with carveouts including those for cars, home appliances, medical devices, and off-road equipment (including agricultural equipment).

Under the Digital Fair Repair Act electronics manufacturers must make parts, tools, and device documentation available to independent repair shops and electronic equipment owners on “fair and reasonable” terms. “Fair and reasonable terms” means:

- Parts are made available, either directly or indirectly through an authorized repair provider, to independent repair providers and owners at reasonable costs and terms
- Tools are made available at no charge and without requiring authorization for use of the tool or imposing impediments to access or use of the tool, except for reasonable costs associated with procuring and preparing the tools in physical form and
- Documentation required for repair is made available by the manufacturer at no charge, except for reasonable costs associated with providing documentation in printed form.

The law exempts manufacturers from liability for damage or injury caused to equipment, persons, or other property due to repairs made by independent shops or device owners. As noted, significant protections for manufacturers were added to the as-signed bill. For example, if individual components, such as batteries, could pose a safety risk if not installed properly, the manufacturer may offer those pre-assembled with other parts. Products sold business to business or business to government, and not offered for sale by retailers, are wholly exempted from the law. Additionally, the Act clarifies that electronics manufacturers do not have to divulge trade secrets or intellectual property and cuts “security codes” and “passwords” from the definition of documentation that must be provided for repair.

MINNESOTA DIGITAL RIGHT TO REPAIR ACT

Most recently, Minnesota became the state with the broadest right-to-repair law, passing its [Digital Fair Repair Act](#) in April 2023 (signed by Governor Tim Walz in May). It has been described as filling in the “loopholes”

in New York’s Fair Repair Act. The Act goes into effect July 1, 2024 (with now usual carveouts for motor vehicles, medical devices, agricultural and construction equipment, energy storage systems, and video game consoles). Unlike New York’s law, Minnesota’s Act will not be limited to devices manufactured after its effective date and will apply to a devices sold on or after July 1, 2021.

The Digital Fair Repair Act applies to “digital electronic equipment,” meaning, “any hardware product that depends, in whole or in part, on digital electronics embedded in or attached to the product in order for the product to function, for which the original equipment manufacturer makes available tools, parts, or documentation to authorized repair providers.” Its definition of “fair and reasonable terms” largely tracks that of New York’s law, although it clarifies that tools, software, and documentation must be provided at costs equivalent to the lowest actual cost for which a manufacturer offers them to an authorized repair provider, and on terms equivalent to the most favorable terms it provides them to an authorized repairer.

The Minnesota exceptions are significantly narrower than those in New York. Categorical exceptions to the obligation to provide documentation, tools, and parts extend only to cybersecurity, antitheft security measures, and work requiring licensure. The Act does not permit pre-assembly of parts under any circumstances, and it leaves the door open for mandatory provision of intellectual property “as necessary to provide documentation, parts, and tools on fair and reasonable terms.” Nudging toward a potentially European-Union-inspired framework, it offers manufacturers exemption from the Act by providing “equivalent or better, readily available replacement equipment” to the consumer free of charge.

Proposed state legislation through the lens of California

As of July 2023, 29 states have introduced one or more right-to-repair bills. The bills vary in scope, with some designating a specific category of devices covered (eg, specifically covering farm equipment, wheelchairs, or consumer devices), and others providing for sweeping application and assigning carveouts (eg, covering all electronics except cars, medical devices, and/or farm equipment). As relevant for the telecom community, many bills include consumer electronics.

The proposal in California reflects ongoing development of legislation at the state level, while also foreshadowing the likely unanticipated legal and regulatory friction such legislation could create given California’s existing chemical exposure framework.

It applies to any “electronic or appliance product” with a wholesale price of at least \$50, specifically including antennas and antenna rotators but providing carveouts for most vehicles; lawn, agricultural, industrial, and other machinery; and video game consoles. It would obligate manufacturers of covered products to provide “sufficient documentation and functional parts and tools, inclusive of any updates, on fair and reasonable terms, to effect the diagnosis, maintenance, or repair of a product.” It does not permit pre-assembly of parts and specifically includes products sold to schools, businesses, local governments, “or in other methods outside of direct retail.”

Notably, in addition to largely tracking the definition of “fair and reasonable terms” adopted in New York (and incorporating the clarification from Minnesota that this includes the most favorable terms afforded to authorized providers), the California proposal goes one step further to specify the duration for which manufacturers must continue to make documentation, tools, and parts available: three years from the final date of manufacture of a product model or type for products sold for \$50 to \$99, and seven years for products sold for \$100 or more – a structure similar to the European regulatory framework.

Federal action on right to repair

State legislation continues to build on federal action that took place in 2021 and 2022, comprised of congressional failure to establish a federal legislative framework, Presidential endorsement of the right to repair, and FTC advocacy and enforcement actions. Understanding the federal action that influenced state action underscores the expansiveness of state approaches and why they risk adverse impacts beyond their immediate application.

In May 2021, the FTC submitted a report to Congress, titled *Nixing the Fix*. The report analyzed anticompetitive practices related to repair markets, including common reasons for restrictions on repairs. While the report emphasized the mobile phone





and car markets, the FTC has come to rely on it as a cornerstone of its proposals for broad legislation and regulation.

Shortly after, in June 2021, a Fair Repair Act was introduced in the US House of Representatives that would have required original equipment manufacturers of “digital electronic equipment” to make available to independent repair providers or equipment owners, “in a timely manner and on fair and reasonable terms, documentation, parts, and tools, inclusive of any updates to information or embedded software.”

In his introductory remarks on the House floor, the bill’s sponsor, Joseph Morelle (D-NY), did not try to obscure its target, stating that “[f]or too long, large corporations have used embedded technology to prevent small business owners and everyday Americans from repairing their own equipment.” To the bill’s sponsor, “the concept behind this is as old as it is simple: if you own something, you own all of it, including the right to repair it.”

However, the House took no action after the introductory remarks. A US Senate version introduced in March 2022 also stalled, and there have been no meaningful efforts to legislatively advance the right-to-repair movement at the federal level since then. There remains a chance Congress could return to the issue; [28 state attorneys general](#) recently called on it to consider the Fair Repair Act and two other pieces of proposed right-to-repair legislation from the 117th Congress, the SMART Act and the REPAIR Act.

Not long after the federal Fair Repair Act failed to gain traction in the House, the Biden Administration picked up the baton. On July 9, 2021, the President issued an [Executive Order on Promoting Competition in the American Economy](#) that encouraged the FTC to consider rulemaking on “unfair anticompetitive restrictions on third-party repair or self-repair of items.”

Less than two weeks later, the FTC unanimously adopted a [policy statement](#) signaling it would “devote more enforcement resources to combat” unlawful restrictions on repair and that it would specifically scrutinize whether warranties run afoul of antitrust provisions in the Magnuson-Moss Warranty Act or constitute unfair or deceptive acts or practices under the Federal Trade Commission Act.

It proceeded to bring three enforcement actions within three weeks in June and July 2022, against [Weber-Stephen Products LLC](#), [Harley-Davidson Motor Company Group, LLC](#), and [MWE Investments, LLC](#) (manufacturer of Westinghouse outdoor power equipment). The FTC cited violations of both the Magnuson-Moss Warranty Act and the FTC Act due to provisions in each company’s warranties stating that the warranties would be voided by use of third-party parts and, in the Harley-Davidson and MWE Investments warranties, independent repairers. The action against Harley-Davidson also alleged that the company violated the Magnuson-Moss Act’s [Disclosure Rule](#) by directing consumers to local dealerships for warranty information rather than disclosing all its warranty terms in a single document.

All three cases resulted in consent decrees, and the FTC adopted its final orders in October 2022. Among other things, the final orders require each company to cease the above violations, add a “Required Disclosure” to their warranties explicitly noting – with some differences between companies – that third party parts and/or services will not void the warranty, and provide notice to existing customers that their warranties will still be in effect if they utilize third-party parts or repair services. Harley-Davidson and MWE Investments were also ordered to instruct their authorized dealers to enter into compliance by training employees, accordingly, refraining from promoting branded parts or dealers over those of third parties, and removing deceptive display materials.

The FTC didn’t stop there. On the same day it voted to adopt final orders in these enforcement actions, it issued an [Advance Notice of Proposed Rulemaking](#) for the Energy Labeling Rule that included a section seeking comment on whether the FTC should require manufacturers to provide repair instructions in accordance with the analysis in the *Nixing the Fix* report.

In response, a handful of commenters raised concerns that providing repair instructions posed safety risks to consumers and, to a lesser degree, undermined the intellectual property rights of manufacturers – the two main categories of unintended consequences that recent right-to-repair laws pose. No further Commission action on this docket has been released as of July 2023, but it remains a potential source of auxiliary right-to-repair regulation and reflects the willingness of the FTC to find creative ways to impose it.

Looking beyond the federal landscape, the FTC also provided testimony at the April 11, 2023 committee hearings in California for its proposed law, discussed below. Taking the opportunity to highlight two conclusions from its Nixing the Fix report, it explained that it found little or no evidentiary support for repair-restriction justifications provided by manufacturers in comments and in response to its requests for data: namely, that restrictions on repair (1) protect repairers and device users from injuries resulting from improper repair and (2) offer greater cybersecurity protection.

Unintended consequences: Chemical exposure

The development of the right to repair at the federal and state levels has consistently focused on a handful of rights and risks. On the one hand, action to date has sought to foster timely and affordable repairs, consumer choice and other competitive benefits, the viability of small business, and environmental stewardship. This action has sought to fairly protect manufacturers by exempting liability for resulting injury, permitting proactive protective measures in New York, and protecting intellectual property to varying degrees.

But a lesser discussed and potential consequence of right to repair is that forcing access to the inner workings of electronics may expose consumers to hazards (eg, batteries that have specific handling protocols) and chemicals that they would never encounter otherwise. In addition to potential injuries to consumers and independent repairers, who unlike manufacturers may not have the same expertise with respect to a particular device, the potential exposures have other legal implications.

Both the New York and Minnesota laws provide exemptions for manufacturers from liability for damage or injury to any digital equipment, property, or person occurring “as a result of repair, diagnosis, maintenance, or modification performed by an independent repair provider or owner,” including “indirect, incidental, special, or consequential damages.” But what about the application of other affirmative exposure-related laws and regulations that did not apply when consumers lacked access, and were not exposed to, enclosed or encapsulated chemicals and other hazardous substances?

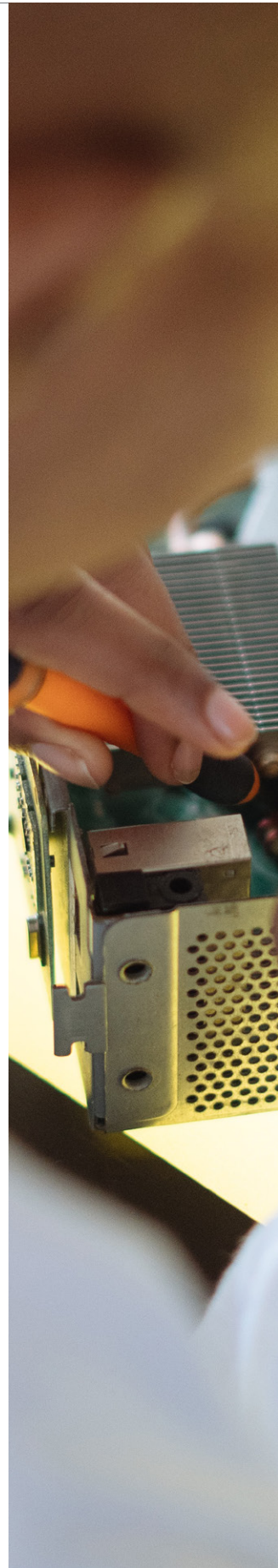
One such example is California’s [Proposition 65](#). Prop. 65 is a right-to-know law requiring companies that sell products in California to provide warnings where their products expose consumers to any one of well over 1,000 listed chemicals. *Content* is not Prop. 65’s intended concern. *Exposure* triggers its requirements. Given the aggressive advocacy of many plaintiffs’ lawyers, and the heavy burden on Prop. 65 defendants, the ability to even allege exposure creates an enhanced risk of litigation.

Before right to repair, only external features of electronics would be accessible to consumers and arguably create potential “exposures” within the meaning of Prop 65. But if SB 244 is enacted, consumers who attempt repairs themselves could be argued to be exposed to the components of electronics, including, potentially, certain chemicals that are critical to the operation of such devices (that they would not have otherwise been exposed to) and that nonetheless arguably trigger Prop 65’s warning requirement.

A number of chemicals commonly within electronic consumer devices and not currently subject to exposure-related laws and regulations could become the subject of regulation and follow-on toxic tort litigation under Prop 65 and similar legislation or regulation. Highlights of top chemicals and legal action to watch are summarized below:

FLAME RETARDANTS

- **Use:** Commonly included in consumer electronics to prevent or slow the spread of fire.
- **Legal action to watch:** Laws regulating their use have already passed in states including New York, Minnesota, Delaware, and Washington. Bills vary in approach – for example, prohibiting sale of certain flame retardants in electronic displays for personal residential use (New York) or prohibiting manufacture, sale, or distribution of products containing any flame-retardant above a certain threshold in children’s products (Delaware). Regulation of this chemical at this time may nonetheless be specifically preempted under federal law due to its ongoing review by the Environmental Protection Agency (EPA) under the Toxic Substances Control Act (TSCA).



PFAS

- **Use:** This family of “miracle compounds” (now dubbed “forever chemicals”) comprising over 4,000 chemicals resist oil, water, and heat. PFAS are used in electronics for chemical and thermal stability, water resistance, and electrical insulation.
- **Legal action to watch:** Laws and follow-on litigation have so far fiercely targeted textiles and cosmetics, but action regarding PFAS has been aggressive enough that at least one major electronics retailer has committed to phasing out PFAS. The International Chemical Secretariat published a report, [Check Your Tech](#), identifying where PFAS are used in electronics and semiconductors and which uses are subject to comparable alternatives; which could be replaced with lower-performing, but good, alternatives; and which currently lack viable alternatives. The latter category includes printed circuit boards for high-speed telecommunication network infrastructure, wiring and cable insulation for high voltage cables, lubrication and coatings in ICT equipment, acoustic equipment for challenging environments, touchscreen displays with haptic feedback, and several uses of semiconductors. Broadly, many PFAS are already regulated under the TSCA, as well as the dual POP and REACH regime in Europe. In addition, two PFAS chemicals, PFOS and PFOA, are listed under California’s Prop 65.

PERSISTENT BIOACCUMULATIVE AND TOXIC (PBT) CHEMICALS (LEAD, BROMINE, AND CHLORINE)

- **Use:** PBTs can perform various functions; some of the most important to watch include Decabromodiphenyl ether (DecaBDE), a flame retardant used in plastic enclosures for TV, computers, and AV equipment; Phenol, isopropylated phosphate (3:1) (PIP (3:1)), used as a plasticizer, flame retardant, anti-wear additive, or anti-compressibility additive in manufacturing wire, cables, semiconductors, and other components in cell phones, laptops, and other electronics; and lead, commonly used in steel, aluminum, copper alloys, high temperature solder, and ceramic electronic components across innumerable household appliances, consumer electronics, and IT and telecom equipment for its low melting point, insulation, shielding, and durability.
- **Legal action to watch:** EPA published final rules in January 2021 limiting or prohibiting the manufacture, import, processing, distribution in commerce

of specific PBTs. It went on to announce a new rulemaking that will begin Spring 2023 for five PBTs, including DecaBDE and PIP (3:1), and in the interim published a final rule extending compliance dates for the prohibitions on processing and distribution of those five, as well as recordkeeping requirements, until October 31, 2024. Lead is also regulated under Prop 65 and is a frequent enforcement target.

PHthalATES

- **Use:** Phthalates are commonly used to enhance flexibility/longevity of plastics, such as those found in power cords and headphone cables.
- **Recent legal action:** US restrictions so far have been limited to children’s products but revolve around concerns of environmental impact and health risks, as phthalates tend to leach out of products over time and can have harmful impact on human development and act as reproductive toxins. These are already regulated in the United States by the Consumer Product Safety Commission, but these regulations could expand to a regime more consistent with European regulation under RoHS and REACH. Many phthalates are also listed under Prop 65 and are likewise a frequent enforcement target.

LITHIUM ION BATTERIES

- **Use:** Lithium ion batteries are the power source of choice across consumer electronics, as well as many medical devices and equipment, small electric vehicles such as power scooters and golf carts, and large vehicles like boats and RVs.
- **Recent legal action:** Legal action as to consumer devices has so far been limited, but lithium-ion batteries have been in the spotlight in safety-related regulatory comments and legal discourse relating to right-to-repair legislation, given both the risks they carry and the high likelihood that consumers might attempt to install new batteries under Right to Repair. Discourse so far has focused on the lack of labeling/visual cues (the batteries are often indistinguishable despite having very different power/chemical makeup, and most are manufactured for specific power demands of a particular device, not interchangeably), the common use of adhesive to fix them in place but thereby increasing risk of injury when removing them, and the risk of causing a chemical fire if improperly handled or installed.

These and other substances enclosed in consumer devices and telecommunications equipment could impact not only legal compliance and liability risks for manufacturers, but frivolous follow-on litigation that takes advantage of a tumultuous legal environment. Introducing tension between regulatory regimes can also introduce costly inefficiencies and compromise innovation if manufacturers receive conflicting guidance regarding the necessity of design changes when alternative components are less effective (if any are viable at all).

Unintended consequences: Copyright

Manufacturers have consistently raised IP, particularly copyright, objections to right to repair. In *Nixing the Fix*, the FTC noted that a full analysis of the interplay between right to repair and IP is beyond the scope of the report but maintained that “in many instances intellectual property rights do not appear to present an insurmountable obstacle to repair.” As support for its position, the agency pointed to the exemption for repair provided in the 2021 final rule from the [triennial Digital Millennium Copyright Act \(DMCA\) rulemaking](#).

Nonetheless, copyright could continue to be a significant hurdle for state right-to-repair legislation. The approach of copyright advocates has been effective to date, driving some of the last-minute concessions adopted before the New York law was signed. Video game manufacturers, in particular, have successfully maintained vigorous assertion of the risk of abuse of right-to-repair access, winning carveouts in some proposed state legislation, including that in California.

While the FTC pointed to the exemption for repair in support of its position that the right to repair does not conflict with the rights of copyright holders, it acknowledged that a full analysis remains outstanding. One nuance that remains unaddressed is the extent of the DMCA exemption for repair. Crucially, the 2021 DMCA Final Rule did not clarify whether the repair exemption extends beyond device owners to repair service providers. Whether copyright preempts state right-to-repair legislation, such as Minnesota’s provision requiring manufacturers to license intellectual property as necessary to comply with the law, remains to be seen.

What’s next?

Manufacturers of telecommunication devices subject to the legislation in New York and Minnesota, or who anticipate becoming subject to legislation in California, should conduct compliance and risk assessments for products covered by state laws and identify areas where these laws create tension in their interaction with the rights and liabilities of other legislation and regulation. With extensive global experience in such essential areas as telecoms, product liability, and intellectual property law, DLA Piper can assist business stakeholders seeking updates and guidance about this evolving trend. If you would like to know more, do not hesitate to contact the Telecoms Team or Product Liability team at DLA Piper or any of the authors:



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