

Date of Hearing: April 30, 2019

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Ed Chau, Chair

AB 1163 (Eggman) – As Amended March 19, 2019

SUBJECT: Consumer warranty protection: express warranties

SUMMARY: This bill would require specified electronics and appliance manufacturers to make available sufficient service literature and functional parts to owners of the equipment or products and service dealers to effect the repair of a product, as specified. Specifically, **this bill would:**

- 1) Require every manufacturer making an express warranty with respect to equipment or other electronic or appliance product with a wholesale price to the retailer of not less than \$50 to make available to owners of the equipment or products and service dealers (in addition to service and repair facilities, as required under existing law) sufficient service literature, at no charge, and functional parts, on fair and reasonable terms, to effect the repair of a product, as specified.
- 2) For the purposes of the provision above, expand the list of electronics and appliances to which these provisions apply to include: certain accessories used in connection with an antenna or rotator installation or repair; computer systems; video games; and, direct satellite signal receiving equipment.
- 3) Define “fair and reasonable terms” to mean that the costs and terms, including convenience of delivery, and including rights of use, are equivalent to what is offered by the original equipment or other electronic or appliance manufacturer to an authorized service dealer.

EXISTING LAW:

- 1) Establishes the Song-Beverly Consumer Warranty Act, which generally requires, among other things, that every sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer’s and the retail seller’s implied warranty that the goods are merchantable. (Civ. Code Sec. 1790 et seq.)
- 2) Requires every manufacturer making an express warranty with respect to an electronic or appliance with a wholesale price to the retailer of not less than \$50, as specified, to make available to service and repair facilities sufficient service literature and functional parts to effect the repair of a product for at least three years after the date a product model or type was manufactured, regardless of whether the three-year period exceeds the warranty period for the product. (Civ. Code Sec. 1793.03(a).)
- 3) Requires every manufacturer making an express warranty with respect to an electronic or appliance with a wholesale price to the retailer of not less than \$100, as specified, to make available to service and repair facilities sufficient service literature and functional parts to effect the repair of a product for at least seven years after the date a product model or type was manufactured, regardless of whether the seven-year period exceeds the warranty period for the product. (Civ. Code Sec. 1793.03(b).)

- 4) Defines “service dealer” for these purposes of this bill to mean a person who, for compensation, engages in, or holds himself or herself out to the public as offering services in the business of:
- Repairing, servicing, or maintaining an electronic set normally used or sold for personal, family, household, or home office use.
 - Installing, repairing, servicing, or maintaining equipment or a burglar alarm system for use in private motor vehicles.
 - Installing, repairing, servicing, or maintaining television or radio receiver antennas, rotators, and accessories or direct satellite signal receiving equipment located on or adjacent to a residence, as specified.
 - Repairing, servicing, or maintaining major appliances. (Bus. & Prof. Code Sec. 9801(f).)

FISCAL EFFECT: None. This bill has been keyed nonfiscal by the Legislative Counsel.

COMMENTS:

- 1) **Purpose of the bill:** Seeks to ensure fair pricing for electronic and appliance repair by requiring manufactures to provide functional parts and service literature to owners of the equipment or products and service dealers, in addition to the repair facilities to whom they must provide these things under existing law. This bill is sponsored by Californians Against Waste, CALPIRG, Consumer Reports, and the Electronic Frontier Foundation (EFF).
- 2) **Author’s statement:** According to the author:

Manufacturers currently have broad authority to determine who they share repair information and service parts with, stifling the individual and third-party repair market, and creating barriers to repair in general. The vast majority of electronic product manufacturers require consumers to pay for repair services through their own repair division or manufacturer-authorized repair, creating an aftermarket monopoly run by the manufacturer. When the manufacturers are the only entities that hold the correct information and parts to make repairs, they’re able to set artificially high repair prices that ultimately result in a high turnover of electronics, thus more electronic waste. Without a fair and competitive repair marketplace for electronics we will continue to see vast amounts of electronic waste generated in the state.

In an economic that investigates the impact of landfilling versus repairing electronics it was found that repair creates 200 more jobs than landfilling, and 185 more jobs than even recycling. Providing independent repair shops with the correct information and parts to make repairs efficiently will stimulate jobs within communities that need repairs, while continuing to allow manufacturers to incentivize the replacement of electronics instead stimulates factory jobs overseas.

Right to repair laws have been successful in the recent past. In 2012, the Massachusetts legislature passed the first Automotive Right to Repair bill in the nation, creating a level playing field between car dealers and independent repair shops for car repair. The law required car manufacturers to sell repair tools and service information at a fair price,

exempting proprietary information. When put to Massachusetts voters, the measure passed with 86 percent of the vote, showing the overwhelming support from consumers for competitive repair prices. In 2014, major national auto industry groups signed a memorandum of understanding that made the requirements of Massachusetts Automotive Right to Repair bill a national policy.

- 3) **Right to repair movement:** Before the advent of software-embedded technology, repairing a appliances was straightforward if one knew how to do it. Today, however, software is embedded in devices that were once strictly mechanical, adding a layer of digital complexity, and requiring diagnostic software to fully fix any problems. Diagnostic software is generally only available from either the manufacturer or a licensed repair provider answering directly to the manufacturer. Electronics are no different. Consumers are keeping their electronic devices longer today than in the past because the prices of the devices have increased, resulting in more consumers needing their devices repaired.

In turn, manufacturers use the Digital Millennium Copyright Act (DCMA), a federal law, and digital rights management to encourage consumers to get their devices repaired by either the device manufacturer or one of its authorized repairers. In 2011, Massachusetts passed a “right to repair” bill targeted at automobile manufacturers. Every automobile manufacturer in the country subsequently promised to adhere to the requirements in the legislation, making it a de-facto nationwide standard for automotive repair and independent repair shops. In response, states have considered right-to-repair laws that require manufacturers to make repair tools, equipment, and software available to device owners and independent repair shops. While almost half of the country’s state legislatures have considered these bills, such legislation has only been enacted in Massachusetts.

Last year, AB 2110 (Eggman) would have enacted the Right to Repair Act in California. That bill would have required the original equipment manufacturer of electronic equipment or parts sold and used in California to, among other things, provide to independent repair providers and owners of the equipment certain parts, tools, and information, including diagnostic and repair information, as specified, for the purpose of providing a fair marketplace for the repair of that equipment. That bill was referred to this Committee where no further action was taken. This year, AB 1163, by the same author, would instead amend California’s manufacturer’s warranty law, the Song-Beverly Act, to require electronic and appliance manufacturers to make available sufficient service literature, at no charge, and functional parts, under fair and reasonable terms, to owners of the equipment or products, service and repair facilities, and service dealers. The bill would also expand the category of products to which these provisions apply to include certain accessories used in connection with an antenna or rotator installation or repair, computer systems, video games, and direct satellite signal receiving equipment. In support, the sponsors of the bill write:

Manufacturers use their power in the marketplace to make electronic devices and appliances harder to repair. The solution is California’s “Right to Repair” legislation—it will bring more competition to the repair marketplace and give Californians more repair options. Here are some of the reasons to support Right to Repair:

- **More choices for consumers.** Many people don’t live close to a repair outlet for the original manufacturer—whether that’s the Apple store to replace a battery or the John

Deere outlet to fix a tractor. People should have more repair choices, which are currently stifled by manufacturers.

- **Less waste.** CALPIRG estimates that Californians dispose of 46,900 cell phones every day—that’s our share of the 141 million cell phones tossed in America each year. Many of those devices could be used again, but simple repairs can become impossible without the proper tools and information.
- **Greater availability of affordable used devices.** Many people can’t afford the latest gadgets. Extending the life of tablets, laptops and other electronics will allow more people more access to these important technologies.
- **Inspiring the next generation of engineers, entrepreneurs, and innovators.** Repair teaches people about technology, and inspires and empowers a new generation of entrepreneurs and inventors.
- **More opportunities for small business.** Repair work is typically done by small local businesses, and more repair means more opportunities for those businesses to grow or new businesses to start. Employees would gain valuable skills as well. [Emphases in original.]

Consumer Action, in support, writes:

All too often, consumers discard expensive smartphones and other devices even though a cheap part and a 10-minute repair is all that was needed to restore the device to full functionality. The Right to Repair Act, by requiring device manufacturers to provide access to diagnostic guides and repair parts, will help prolong the lifespan of electronic devices and save consumers money. In turn, fewer discarded electronics will lead to fewer toxic chemicals leaching into our soil and groundwater. [...]

Monopolized repair options are needlessly expensive and needlessly slow, which drives consumers to overpay and upgrade at unnecessarily short intervals. Absent a competitive market to repair electronic devices, consumers mail off devices to monopoly shops, waiting weeks or even months to receive a repaired unit. The high cost and sluggish turnaround times benefit manufacturers (which can sell more units) but unfairly disadvantage consumers.

- 4) **Copyright, trade secret, and state contract law:** Existing law requires that any manufacturer making an express warranty with respect to an electronic or appliance sold in California, make available sufficient service literature and functional parts to service and repair facilities. For these purposes, “service and repair facilities” are arguably part of what the proponents and opposition refer to as “a manufacturer’s authorized service network.” This bill would additionally require that manufactures make available to owners and service dealers (or, “independent repair providers”), sufficient service literature, at no charge, and functional parts, on fair and reasonable terms. The bill would additionally provide that “fair and reasonable terms” means that the costs and terms, including convenience of delivery, and including rights of use, are equivalent to what is offered by the original equipment or other electronic or appliance manufacturer to an authorized service dealer. “Authorized service dealer” is not defined in the bill. The proponents argue that such a bill is necessary to ensure

that manufacturers of electronics are not the only entity holding the correct information and parts to make repairs, so that they are able to set artificially high prices for repair that ultimately result in a high overturn of electronics.

In contrast, a coalition of businesses, manufacturers, and associations, argue in opposition that manufacturers make significant investments in the development of software, products and services, and the protection of intellectual property is a critically important aspect of sustaining the health of the vibrant and innovative technology industry, and that this bill would put that intellectual property at risk:

Consumer electronics now contain a sophisticated integrated package of software that make the product perform thousands of tasks based on the manufacturers' intent. Virtually all modern electronics contain an operating system, middleware (software that lies between an operating system and the applications running on it), firmware (software programs permanently etched into the device's hardware), and digital rights management software (the DRM, aka, "digital locks" that control the use, modification, and distribution of copyrighted works such as software and multimedia content). Software programs are copyrightable subject matter under federal law, and Section 1201 of the Digital Millennium Copyright Act ensures that bad actors cannot tamper with the digital rights management that copyright owners use to protect this software. Granting independent repair shops (i.e., those not authorized by the manufacturer) the tools and know-how to modify the various software programs to restore functionality may expose the devices' security features to potential tampering, including disabling or removal of the digital locks. This action may well be in violation of federal law if done without the permission of the copyright owner (subject, of course, to the rules and regulations of the US Copyright Office and the Library of Congress).

Importantly, however, firmware controls many other product functions, and opening it up for repair purposes exposes to potential tampering other, more sensitive functions, such as security features. Given the scope of products covered and what must be provided under the legislation – including diagnostics, tools, parts, and updates to software – it is highly likely some of that information would be proprietary. Providing unauthorized repair facilities and individuals with access to proprietary information without the contractual safeguards currently in place between OEMs and authorized service providers places OEMs, suppliers, distributor and repair networks at risk on many levels.

On the issue of copyright, EFF, a sponsor of this bill, provided a letter presenting arguments as to how, based on how copyright law has been applied in California, AB 1163 will not overlap with Section 1201 of the DCMA. EFF writes:

In 2015, the Senate Judiciary Committee requested that the Copyright Office issue a report on the interplay between software in everyday products as it relates to Section 1201 of the DMCA. A year later the Copyright Office issued its Software-Enabled Consumer Products report and provided an extensive overview of the rights of users to repair and tinker with software and software enabled products. After acknowledging arguments that repair and tinkering activities potentially implicate exclusive rights under Section 106 of the Copyright Act, the Office found that "current copyright law, properly interpreted, may provide relief for many repair and tinkering activities" and that the traditional limitations and exceptions such as the idea/expression dichotomy, merger,

scenes a faire, and fair use provide a “combined and reasonable defense for many tinkering and repair activities.”

In fact, the Copyright Office went so far as to recommend that Congress *not* amend Section 1201 for in its view such an amendment would be unnecessary given that repair and tinkering activities did not collide with the exclusive rights of a copyright holder and provided a detailed summary as to why there is no conflict.³ Lastly, addressing license agreements that restrict a “purchaser’s ability to freely repair or refurbish their product” were not within the scope of copyright per the Copyright Office, but rather are a matter of contract and therefore subject to state regulation like AB 1163.⁴ [Emphasis in original.]

Further, EFF argues, that “[t]wo separate times the Ninth Circuit has found that research into the functional aspects of software, including copying for purposes of analysis, is a fair use. In its *Sega v. Aolade* decision, the court established that reverse engineering of software for certain purposes were protected under fair use. In the subsequent *Sony v. Connectix* decision, the Ninth Circuit reaffirmed its rationale under *Sega* and found that copying the functional parameters of Sony’s Playstation Basic Input/Output System (BIOS) for purposes of creating a competing means to play Playstation console games was also a fair use.” EFF states “[t]hese decisions bind how the Copyright Act is applied in California and lay a strong legal foundation that repair legislation enacted by the state of California would not run afoul of copyright law.”

That being said, this bill would also require manufacturers to provide any owner or repair dealer with “sufficient service literature” to effect the repair of the product. While, arguably not all service literature is created equally, when distributed to entities under contract with the manufacturer, the manufacturer is able to exert some control over how that information is used and disseminated, and also vet the qualifications of the repair provider. In addition, the issue of copyright and trade secret may not be entirely cut and dry. The United States Court of Appeals for the Eighth Circuit has determined that repair manuals and information can be protected as trade secrets, regardless of whether the information can be discerned by others through other means, including reverse engineering. (*AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, (8th Cir. 2011) 663 F.3d 966, 975.) While that case is not controlling in California, it does offer insight to how a court could rule on the issue of whether information in a particular service manual is protected under intellectual property laws. In addition, authorized service providers generally pay a fee to gain access to repair information, enter into nondisclosure agreements, and face steep penalties for violating the agreements. The fact that owners and independent repair dealers could receive this same information for the exact same price and under the same terms as businesses under contract with manufacturers who are subject to specific training and/or vetting, and have invested considerably more capital to obtain that business relationship with the manufacturer, could arguably create a windfall for independent repair providers. Additionally, there is no assurance that the service provided would be of the same caliber as that provided by an authorized repair dealer.

To date, staff notes that it is not clear whether a bill such as this would conflict with the DCMA, because such a case has not been brought before a court. This uncertainty is further illustrated by the fact that the opponents who argue that such a law would be incompatible with the DCMA, and the proponents who argue the opposite. Regardless of whether repair manuals are protected under federal copyright law, as noted by EFF above, addressing license agreements that restrict a purchaser’s ability to repair their product, is arguably a

matter of contract, and thus regulated by the state, which puts a number of public policy and consumer protection considerations squarely before this Committee, as discussed further below.

- 5) **Are California residents better protected by being able to have more choice in the repair of their electronics and appliances?** This bill would require functional parts (on fair and reasonable terms) and sufficient service literature (at no cost) to be provided to owners and independent repair providers, in an effort to stimulate the individual and third-party repair market. In support, a coalition of environmental and consumer advocacy groups, including Environment California, Consumer Federation of California, and Clean Water Action write:

When manufacturers of electronics are the only entity that hold the correct information and parts to make repairs, they're able to set artificially high prices for repair that ultimately result in an unnecessary and wasteful high turnover of electronics. Right to repair will give independent electronics repair shops the necessary information and tools they need to safely and effectively make repairs for customers that extends the life of electronics.

Empowering electronics repair will create more jobs locally within the communities where repairs are needed, rather than creating barriers to repair, and stimulating low-wage factory jobs overseas. The United States generated 6.3 million tons of e-waste in 2016, but only collected 22% of the total amount. In California alone, it is estimated that 46,900 cellphones are discarded per year. Our electronic waste problem is exacerbated by the inability to affordably repair devices and devices that still have life left in them. This bill provides consumers with more options to affordably repair electronics that still have life, and meaningfully addresses the vast amounts of electronic waste generated in the state.

By contrast, a coalition of coalition of businesses, manufacturers, and associations, argue that this bill is based on "an inaccurate assumption, specifically that there is a 'growing quantity of e-waste' in California. However, CalRecycle data on implementation of the *Electronic Waste Recycling Act of 2003* show California e-waste not growing but rather declining since 2012. According to the Rochester Institute of Technology Golisano Institute of Sustainability, in the U.S. e-waste generation peaked in 2013-2014 and is in a period of extended decline. This trend is corroborated by the most recent data from U.S. EPA." The coalition further expresses concerns related to consumer security and safety:

The security of user information on these products is of the utmost importance to consumers that rely on them. Industrial equipment, home appliances, smartphones, computers, servers, consumer electronics, medical devices, and other software-enabled connected devices are at risk of hacking, and weakening of the consumer privacy and security protections of those products. With access to proprietary guides and tools, hackers can more easily circumvent security protections, harming not only the product owner but also everyone who shares their network. [...] Bad actors could seek to exploit compliance requirements for illegal purposes, such as circumventing digital locks protecting copyrighted content and/or making unauthorized modifications. This problem would be compounded if those bad actors share details on how to exploit this proprietary information (such as posting on the internet), which could be replicated by others.

Consumers, businesses of all sizes, public schools, hospitals, banks, and industrial manufacturers all need reasonable assurance that those they trust to repair their connected products will do so safely, securely, and correctly. State law should not mandate that all manufacturers must provide a “how to” manual for any product and provide it to anyone who asks.

Manufacturers offer authorized repair networks to provide consumers with assurance that their products are serviced by properly trained and vetted repair professionals that have the necessary skills to safely and reliably fix software-enabled products. Some types of repairs can be extremely detailed, because of the integrated network of software programs found in modern devices. It is particularly important that products containing high-energy lithium ion batteries are repaired only by trained professionals who understand the hazards associated with these batteries.

Manufacturers want to ensure that their products are serviced by professionals who understand the software that operates their products and have spent time procuring the knowledge necessary to safely repair and return it to the consumer without compromising those standards or undermining critical safety and security features (such as technological protection measures). Authorized repair networks not only include training requirements, but also ensure that only the correct parts and procedures will be used. Consumers can be protected by warranties or other means of recourse. The legislation provides no such protections for consumers, repair shops or manufacturers.

In support of this measure, Double Dex, a Sacramento-based business selling refurbished Apple products, writes:

We employ 15 people, offering fair wages and good benefits. Our company not only furnishes the state of California with jobs and sales tax revenue, but also brings millions of dollars into the economy (over \$8 million in sales last year) from outside California via the products we sell. All of this is dependent on our ability to work with and repair Apple products.

We strongly believe that consumers and companies like ours have the right to repair the items we have purchased. The idea that a manufacturer of a product can restrict the right of its customers to repair or improve a product after they have taken legal ownership of it is antithetical to the idea of ownership.

On this same point, the coalition writes in opposition, “[w]hen an electronic product breaks, consumers have a variety of repair options, including using an OEM’s authorized repair network, which often include local repair service providers as well as mail-in, and even in-house repair options for some categories of products. Consumers may also choose to use one of many independent repair service providers; although they do so without the quality assurance provided by using a manufacturer’s authorized network provider. The point is that the free market economy already provides a wide range of repair choices without the mandates imposed by this legislation.”

As a matter of public policy, these rights and interests of individuals and businesses need to be weighed against the safety and benefits provided by this bill to the community as a whole.

On the one hand, the proponents of this bill argue that property ownership necessarily means that one should have the opportunity and ability to repair their own devices, and contend that offering of functional parts and service literature to owners and independent repair dealers on the same terms as provided to authorized repair dealers could result in lower cost repairs and less e-waste in the state's landfills. On the other hand, property ownership has never been absolute. For example, there are zoning restrictions on real property, and as a matter of common law one generally cannot use their property in a manner that creates a nuisance for others. Similarly, vehicles cannot be operated in certain ways, and are subject to certain regulations and standards. To that end, opponents of this bill would likely argue that authorized repair networks are important because electronics and appliances that are incorrectly repaired can be dangerous for individuals and the community if they malfunction.

Taking all factors into consideration, AB 1163 now presents this Committee with the question of whether the cost vs. benefit analysis for consumers favors a right to repair law, as offered by this bill.

6) **Prior legislation:** AB 2110 (Eggman, 2018) *See* Comment 3.

REGISTERED SUPPORT / OPPOSITION:

Support

Californians Against Waste (sponsor)
CALPRIG (sponsor)
Consumer Reports (sponsor)
Electronic Frontier Foundation (sponsor)
5 Gyres Institute
California League of Conservation Voters
California Resource Recovery Association
Clean Water Action
Consumer Action
Consumer Federation of California
Culture of Repair
Double Dex
Environment California
Fixit Clinic
Heal the Bay
Homeboy Electronics Recycling
iFixit
Northern California Recycling Association
Plastic Pollution Coalition
Purism
Rediscover Center
Reuse Alliance
Save Our Shores
Seventh Generation Advisors
South Bayside Waste Management Authority
Surfrider Foundation
The Center For Oceanic Awareness, Research, and Education

The Story of Stuff Project
Upstream
Wishtoyo Chumash Foundation
Zero Waste Usa

Opposition

Air Conditioning, Heating And Refrigeration Institute
Association Of Home Appliance Manufacturers
Bay Area Council
California Chamber Of Commerce
California Manufactures & Technology Association
California Technology Association
Comptia Member Services, LLC
CTIA-The Wireless Association
Entertainment Software Association
Information Technology Industry Council
Internet Coalition
National Electrical Manufacturers Association (Nema)
Netchoice
PRBA - The Rechargeable Battery Association
Security Industry Association
Silicon Valley Leadership Group
State Privacy And Security Coalition, Inc.
Technet-Technology Network
Telecommunications Industry Association
The Toy Association

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