

Date of Hearing: June 27, 2023

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Jesse Gabriel, Chair

SB 244 (Eggman) – As Amended June 21, 2023

SENATE VOTE: 38-0

SUBJECT: Right to Repair Act

SYNOPSIS

This bill proposes to make California the third state, joining New York and Minnesota, to pass a “right to repair” law governing consumer electronics and appliances.

As computer chips and software have become more common in ordinary household products and appliances, it has become more difficult for their owners and small repair shops to diagnose and fix problems with these devices. Even if a manufacturer repairs its own products, or establishes a network of authorized repair providers to provide repair services, there may be delays in getting the product fixed through these channels, and the repairs may be more expensive than if a competitive repair market existed. Alternately, if no means of repair is provided, product owners are left with little choice but to throw away the broken product and buy a replacement—if they are lucky enough to be able to afford one.

This bill would address this issue by requiring manufacturers to make available to product owners and independent repair providers, on fair and reasonable terms, sufficient documentation and functional parts and tools, to effect the diagnosis, maintenance, or repair of electronic and appliance products, as defined.

The bill promises a number of benefits, including faster repairs at lower cost; reduced electronic waste; increased competition in the repair market; incentivizing of manufacturers to design products are more easily repairable; increased safety and reliability of repaired devices, as repairs should no longer require counterfeit or “grey market” replacement parts; and a variety of economic benefits for low-income and minority Californians.

This analysis addresses the following issues:

- 1) What would this bill do?*
- 2) What are this bill’s anticipated benefits?*
- 3) Is this bill consistent with existing federal and state warranty law?*
- 4) Does this bill impair manufacturers’ intellectual property rights?*
- 5) Does this bill impair cybersecurity or privacy?*
- 6) Does this bill threaten consumer safety?*
- 7) What other concerns have been raised by bill opponents?*

The bill is sponsored by and supported by over 70 organizations and public entities. It is opposed by 18 trade associations and manufacturers. California Chamber of Commerce and TechNet have taken an “oppose unless amended” position on the bill.

If passed by this Committee, the bill will next be heard by the Assembly Judiciary Committee.

SUMMARY: Requires a manufacturer of electronic or appliance products, as defined, to make available to product owners and repair shops, on fair and reasonable terms, sufficient documentation and functional parts and tools, to effect the diagnosis, maintenance, or repair of the product. Specifically, **this bill:**

- 1) Establishes the Right to Repair Act, consisting of the provisions below.
- 2) Codifies the intent of the Legislature to provide a fair marketplace for the repair of electronic and appliance products and to prohibit intentional barriers and limitations to third-party repair.
- 3) Requires, notwithstanding any other law, every manufacturer of an electronic or appliance product with a wholesale price to the retailer (or to others, if outside of retail sale) of fifty dollars (\$50) or more to make available sufficient documentation and functional parts and tools, inclusive of any updates, on fair and reasonable terms, to effect the diagnosis, maintenance, or repair of the product. These must be made available to owners of the product, to service and repair facilities, and to service dealers.
- 4) Provides that if the product's price was between fifty dollars (\$50) and nine-hundred and ninety-nine cents (\$99.99), the requirement under 3) extends for at least three years after the last date a product model or type was manufactured, regardless of whether the three-year period exceeds the product's warranty period.
- 5) Provides that if the product's price was one hundred dollars (\$100) or more, the requirement under 3) extends for at least seven years after the last date a product model or type was manufactured, regardless of whether the seven-year period exceeds the product's warranty period.
- 6) Clarifies that:
 - a) Except as necessary to comply with the bill's requirements, the bill does not require a manufacturer to divulge a trade secret or license any intellectual property, including copyrights or patents.
 - b) The bill does not require the distribution of a product's source code.
 - c) The bill should not be construed to require a manufacturer to make available special documentation, tools, and parts that would disable or override antitheft security measures set by the owner of the product, absent the owner's authorization.
 - d) The bill does not require a manufacturer to sell service parts that it no longer provides or that it no longer makes available to an authorized repair provider.
- 7) Requires a service and repair facility or service dealer that is not an authorized repair provider to provide customers with a written notice, prior to repairing a product, that does both of the following:
 - a) Informs the customer that the facility or dealer is not an authorized repair provider for the product.

- b) Discloses if the facility or dealer uses any replacement parts that are either used parts or parts provided by a supplier other than the manufacturer.
- 8) Defines the terms “electronic or appliance product” and “product” to mean a product that meets all of the following criteria:
- a) The product is an “electronic set,” “appliance,” “major home appliance,” “antenna,” or “rotator,” as those terms are defined under the Electronic and Appliance Repair Dealer Registration Law in the Business and Professions Code. The product is also included if it is sold to schools, businesses, local governments, or other methods outside of direct retail sale.
 - b) The product is one for which the manufacturer makes available tools, parts, and documentation to itself or to authorized repair providers.
 - c) The product was manufactured for the first time and first sold or used in California on or after July 1, 2021
- 9) Excludes from the definitions of “electronic or appliance product” and “product” the following:
- a) “Equipment” and “repair parts,” as those terms are defined under the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act in the Business and Professions Code.
 - b) An “alarm system,” as defined under the Alarm Companies Act in the Business and Professions Code.
 - c) Video game consoles.
- 10) Defines “authorized repair provider” as an individual or business that is unaffiliated with a manufacturer and that has an arrangement with the manufacturer, for a definite or indefinite period, under which the manufacturer grants to the individual or business a license to use a trade name, service mark, or other proprietary identifier to offer diagnostic, maintenance, or repair services for electronic or appliance products under i) the name of the manufacturer or ii) an arrangement with the manufacturer to offer such services on behalf of the manufacturer.
- 11) Clarifies that a manufacturer is itself considered an “authorized repair provider” with respect to its own electronic or appliance products if it offers diagnostic, maintenance, or repair services for these products—but only if the manufacturer does not have an arrangement, as described in 10), with an unaffiliated individual or business.
- 12) Defines “fair and reasonable terms” to mean:
- a) At costs and terms that are equivalent to the most favorable costs and terms under which the manufacturer offers the part, tool, or documentation to an authorized repair provider, accounting for any discount, rebate, convenient and timely means of delivery, means of enabling fully restored and updated functionality, rights of use, or other incentive or preference the manufacturer offers to an authorized repair provider.

- b) For documentation, including any relevant updates, at no charge, except that, when the documentation is requested in physical printed form, a charge may be included for the reasonable actual costs of preparing and sending the copy.
 - c) For tools, at no charge and without imposing impediments to access or use of the tools to diagnose, maintain, or repair and enable full functionality of the product, or in a manner that impairs the efficient and cost-effective performance of any such diagnosis, maintenance, or repair, except that, when a tool is requested in physical form, a charge may be included for the reasonable, actual costs of preparing and sending the tool.
 - d) If a manufacturer does not use an authorized repair provider for a given repair, at a price that reflects the actual cost to the manufacturer to prepare and deliver the part, tool, or documentation, exclusive of any research and development costs incurred.
- 13) Defines “documentation” to mean any electronic or appliance product manual, diagram, reporting output, service code description, schematic, or similar information that is provided by a manufacturer to an authorized repair provider (or that is for use by the manufacturer if the manufacturer does not have any authorized repair providers) for purposes of effecting the services of diagnosis, maintenance, or repair of the electronic or appliance product.
- 14) Defines “part” to mean any replacement part or assembly of parts, either new or used, made available by a manufacturer of an electronic or appliance product to an authorized repair provider to facilitate the maintenance or repair of a product sold by the manufacturer.
- 15) Defines “tool” to mean any software program, hardware implement, or other apparatus made available by a manufacturer of an electronic or appliance product to an authorized repair provider for the diagnosis, maintenance, or repair of the product, including software or other mechanisms that provision, program, pair a part, provide, or calibrate functionality, or perform any other function required to repair the product or part back to fully functional condition, including any updates.
- 16) Permits a city, a county, a city and county, or the state to bring an action in superior court to impose civil liability on a person or entity that knowingly, or reasonably should have known it, violates these provisions, in the amount of \$1,000 per day for the first violation, \$2,000 per day for the second violation, and \$5,000 per day for the third and any subsequent violations.
- 17) Provides that any civil penalties collected are to be paid to the office of the city attorney, county counsel, district attorney, or Attorney General, based on whichever office brought the action.

EXISTING LAW:

- 1) Defines the following terms under the Electronic and Appliance Repair Dealer Registration Law:
 - a) “Electronic set” includes, but is not limited to, any television, radio, audio or video recorder or playback equipment, video camera, video game, video monitor, computer system, photocopier, or facsimile machine normally used or sold for personal, family, household, or home office use. (Bus. & Prof. Code § 9801(h).)

- b) “Appliance” or “major home appliance” includes, but is not limited to, any refrigerator, freezer, range, microwave oven, washer, dryer, dishwasher, trash compactor, or room air-conditioner normally used or sold for personal, family, household, or home office use, or for use in private motor vehicles. (Bus. & Prof. Code § 9801(i).)
 - c) “Antenna” includes, but is not limited to, a resonant device designed especially for the purpose of capturing electromagnetic energy transmitted by direct satellite or commercial radio or television broadcasting facilities. (Bus. & Prof. Code § 9801(j).)
 - d) “Rotator,” when used in connection with an antenna installation or repair, includes, but is not limited to, an electromechanical device operated from a remote location to rotate an antenna on a horizontal plane. (Bus. & Prof. Code § 9801(k).)
 - e) “Service dealer” means persons who, for compensation, engage in, or hold themselves out to the public as offering services in the business of one of the following:
 - i) Repairing, servicing, or maintaining an electronic set normally used or sold for personal, family, household, or home office use.
 - ii) Installing, repairing, servicing, or maintaining equipment or a burglar alarm system for use in private motor vehicles.
 - iii) 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, provided the person is not subject to regulation under the Contractors State License Law.
 - iv) Repairing, servicing, or maintaining major appliances. (Bus. & Prof. Code §§ 9801(f).)
- 2) Defines “trade secret” as information, including a formula, pattern, compilation, program, device, method, technique, or process, that both:
- a) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
 - b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. (Civil Code § 3426.1(d); Penal Code § 499c(a)(9).)
- 3) Defines the following terms under the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act:
- a) “Equipment” means all-terrain vehicles (but does not include self-propelled vehicles designed primarily for the transportation of persons or property on a street or highway) and other machinery, equipment, implements, or attachments used for, or in connection with, any of the following purposes:
 - i) Lawn, garden, golf course, landscaping, or grounds maintenance.

- ii) Planting, cultivating, irrigating, harvesting, and producing agricultural or forestry products.
 - iii) Raising, feeding, or tending to, or harvesting products from, livestock and any other activity in connection with those activities.
 - iv) Industrial, construction, maintenance, mining, or utility activities or applications, including, but not limited to, material handling equipment. (Bus. & Prof. Code § 22901(j).)
- b) “Repair parts” means all parts and products related to the service or repair of “equipment” under 3) a), including superseded parts. (Bus. & Prof. Code § 22901(s).)
- 4) Defines an “alarm system” as an assembly of equipment and devices arranged to detect a hazard or signal the presence of an off-normal situation. Excludes a “fire protection system,” as defined under the California Fire Code, from this definition. (Bus. & Prof. Code § 7590.1(c).)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS:

1) **Background.** Recent years have seen the emergence of a grassroots “right to repair” movement, both in the United States and globally. As computer chips and software have become more common in ordinary household products and appliances, it has become more difficult for their owners and small repair shops to diagnose and fix problems with these devices. Even if a manufacturer repairs its own products, or establishes a network of authorized repair providers to provide repair services, there may be delays in getting the product fixed through these channels, and the repairs may be more expensive than if a competitive repair market existed. Alternately, if no means of repair is provided, product owners are left with little choice but to throw away the broken product and buy a replacement—if they are lucky enough to be able to afford one.

As consumer frustration with this state of affairs has grown, federal and state lawmakers have responded:

- In February 2018, this bill’s author introduced AB 2110, which sought to establish a right to repair. It was the first such effort in California, joining “right to repair bills...introduced in at least 20 state legislatures in the last few years.” (Federal Trade Commission, *Nixing the Fix: An FTC Report to Congress on Repair Restrictions* (May 2021) p. 47, available at https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf [hereinafter, “FTC Report”].)
- In July 2019, the Federal Trade Commission (FTC) held a public workshop entitled “Nixing the Fix: A Workshop on Repair Restrictions,” focused on examining how manufacturers might be limiting third-party repairs of their products and seeking further research on the topic. For more details, see <https://www.ftc.gov/news-events/events/2019/07/nixing-fix-workshop-repair-restrictions>.

- In December 2020, the U.S. Congress directed the FTC to produce a report regarding anticompetitive practices in repair markets, including recommendations on how to best address problems in these markets. (H.R. Rep. No. 116-456 (2020), *available at* <https://www.congress.gov/116/crpt/hrpt456/CRPT-116hrpt456.pdf>.)
- In May 2021, the FTC released a comprehensive report, in response to Congressional direction, identifying repair restrictions, assessing justifications for these restrictions, and exploring means of expanding consumers' repair options. (FTC Report, *supra*.)
- In July 2021, President Biden signed an "Executive Order on Promoting Competition in the American Economy." Among the initiatives therein was an order directing the FTC to "address persistent and recurrent practices that inhibit competition...such as unfair anticompetitive restrictions on third-party repair or self-repair of items[.]" The order can be found at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>. An accompanying White House fact sheet explains that the initiative will "[m]ake it easier and cheaper to repair items you own by limiting manufacturers from barring self-repairs or third-party repairs of their products." The fact sheet can be found at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>.
- In December 2022, New York enacted the Digital Fair Repair Act, the first "right to repair" legislation in the country to cover consumer electronics. It requires manufacturers to make available to owners and to repair shops, on fair and reasonable terms, any documentation, parts, and tools required for the diagnosis, maintenance, or repair of digital electronic equipment, defined as "a hardware product...that depends for its functioning, in whole or in part, on digital electronics embedded in or attached to the product." (N.Y. Gen. Bus. Law § 399-nn.) The law, however, excludes products not sold at retail.
- In May 2023, Minnesota enacted its own Digital Fair Repair Act, a right to repair law with even broader scope than the New York law, as it does not exclude products not sold at retail. (2023 Minn. Chap. Law 57.)

This bill seeks to ensure that California joins New York and Minnesota as states granting product owners the right to choose to repair, rather than replace, their consumer electronics and appliances, and the freedom to choose who will perform those repairs. The alternative is to maintain a status quo in which manufacturers are the sole arbiters of who can repair the products they manufacture, and on what terms; a status quo in which repair markets are unable to function and the conflict of interest ought to be apparent.

2) Author's statement. According to the author:

SB 244 would make it easier and cheaper to get our consumer electronics and appliances fixed. Manufacturers currently have broad authority to restrict who can access repair information, replacement parts, and the specialized tools that they design devices and products to require. This is authority that we know they are using despite little evidence of the harms they claim to protect against, according to a report to Congress by the Federal Trade Commission. Restrictions on repair have direct costs to consumers when they have to

pay exorbitant prices to have devices repaired through manufacturer-authorized networks or replace the product entirely. These restrictions also ripple out into the economy, hurting local, regulated repair shops, contributing to our growing e-waste crisis, and stifling the practicality of product owners to resell their property if they choose to do so.

Electronic devices have become an essential part of our lives, and we need access to more choices when it comes to the inevitable repairs that will be needed. Providing independent repair shops and product owners with the correct information and parts to make repairs efficiently will stimulate jobs within the communities where repairs are needed, reduce the need to replace products with simple fixes, and save money for consumers.

3) **What would this bill do?** As can be seen by reviewing the **SUMMARY** above, this bill rests on a number of highly-technical and nuanced definitions of terms such as “fair and reasonable terms,” “documentation,” and “tool.” But at its core, the bill works as follows:

1. It would apply to consumer electronics, such as televisions, personal computers, printers, speakers, cellphones, and tablets, and appliances, such as microwaves, refrigerators, washers, dryers, and dishwashers, that are normally used or sold for personal, family, household, or home office use. The bill also covers these products if they are sold outside of direct retail sale. The product would have to have been first sold or used in California on or after July 1, 2021, and have a wholesale price of at least \$50. (The bill excludes alarm systems, video game consoles, and heavy machinery.)
2. A manufacturer of a covered product would have to make available sufficient documentation, parts, and tools to allow either the product’s owner or an independent repair shop to diagnose issues with, maintain, and repair the product.
3. The manufacturer would have to make documentation, parts, and tools available on “fair and reasonable terms”: essentially, at costs and on terms equivalent to those under which the manufacturer makes these things available to one of its authorized repair providers, or if there are no such providers, at its actual cost to produce and deliver these things.
4. Manufacturers would have to make documentation, parts, and tools available for three years from a product’s last date of manufacture if the product’s wholesale cost was between \$50 and \$99.99, and seven years if it was \$100 or more. (These prices and timeframes are based on California’s Song-Beverly Warranty Act.)
5. If a repair shop is not a manufacturer’s authorized repair provider, then it must provide customers with a written notice informing them of this fact, as well as whether the shop uses replacement parts that are used or provided by a supplier other than the manufacturer.
6. The bill may only be enforced by a city, county, or the state, with civil penalties assessed for violations.

4) **What are this bill’s anticipated benefits?** The bill’s anticipated benefits are as follows:

- Faster repair times and reduced costs for product owners.
- Reduced electronic waste, by facilitating repair, rather than replacement.

- Allowing small businesses to provide independent repair services, thereby creating competition in the repair market, leading to both lower costs and faster repair times.
- Incentivizing of manufacturers to design products to be more easily repairable, in order to more easily meet this bill's requirements.
- Increased safety and reliability of repaired devices, as repairs will no longer require counterfeit or "grey market" replacement parts.
- A variety of economic benefits for people with low incomes, whom the FTC Report notes are less likely to be able to afford to replace broken devices, and people of color, who, per the FTC, are more likely to be entrepreneurs who provide independent repair services. (*See* FTC Report, *supra*, pp. 3-4.)

5) **Is this bill consistent with existing federal and state warranty law?** Federal law prohibits the warranty provider on a consumer product from requiring the use of branded or trademarked items or services in connection with the product once it is purchased. (18 U.S.C. § 2302(c).) In other words, if a product owner chooses to use an independent repair shop or replacement parts purchased from a third-party vendor, doing so does not void the warranty on that product. This is known as the "anti-tying principle" of federal warranty law.

This principle has worked well in some markets, such as automotive repair. If your car breaks, you can generally go to an independent auto repair shop to get it fixed, or even fix it yourself if you have the necessary skills and equipment. Auto manufacturers are not allowed to require you to use their dealerships for service, and are required to make parts and service manuals available to third parties.

But this principle has been eroded in many other product markets. As described by the FTC:

[T]echnological developments have introduced new challenges that warrant a reconsideration of whether the anti-tying provision [of federal warranty law] has kept pace with the evolving consumer goods repair market. Even when a warranty does not explicitly require that repairs be performed by the original equipment manufacturer (OEM) using OEM parts, many manufacturers restrict independent repair and repair by consumers through:

- Product designs that complicate or prevent repair;
- Unavailability of parts and repair information;
- Designs that make independent repairs less safe;
- Policies or statements that steer consumers to manufacturer repair networks;
- Application of patent rights and enforcement of trademarks;
- Disparagement of non-OEM parts and independent repair;
- Software locks and firmware updates; or
- End User License Agreements.

[...B]ased on the record before us, it is clear that repair restrictions have diluted the effectiveness of [the anti-tying provision] and steered consumers into manufacturers' repair networks or to replace products before the end of their useful lives. [...T]here is scant evidence to support manufacturers' justifications for repair restrictions. Moreover, the

specific changes that repair advocates seek to address manufacturer repair restrictions (e.g., access to information, manuals, spare parts, and tools) are well supported.... (FTC Report, *supra*, pp. 5-6 [emphasis added].)

State law is consistent with the anti-tying principle. California's Song-Beverly Consumer Warranty Act requires manufacturers that offer express warranties on designated products and appliances—largely those that would be covered by this bill—to make available “service literature and functional parts” for three years after its last date of manufacture if the wholesale price was between \$50 and \$99.99 and seven years after manufacture if the wholesale price was \$100 or more. (Civ. Code § 1793.03.) Note that these timeframes apply even if the express warranty has expired.

In other words, this bill is entirely consistent with existing federal and state warranty law, and arguably updates those laws for a world in which manufacturers, resorting to the methods identified by the FTC, have made it increasingly difficult for product owners to find cost-effective methods of repairing their devices. As discussed in the previous section, there are many benefits from being able to repair one's own laptop, microwave, or dishwasher through the means one chooses, rather than the one chosen by the manufacturer.

6) Does this bill impair manufacturers' intellectual property rights? A coalition of bill opponents contend that “SB 244 puts at risk the intellectual property that manufacturers have developed.” Their main argument concerns firmware:

Consumer electronics' on-board software (i.e., firmware) [is] key to the functioning and operation of the hardware it is embedded in, and firmware helps protect against unauthorized access to other software and applications. That software is subject to copyright under federal law, and Section 1201 of the Digital Millennium Copyright Act, a related federal law, ensures that bad actors cannot tamper with the digital rights management that copyright owners use to protect this software. The problem is making repairs to hardware components may require the circumvention of digital rights management and leave the software in an unprotected state—harming the copyright owners of the software. [...] [It] is highly likely that some of the information would be proprietary. Providing unauthorized repair facilities and individuals with access to proprietary information without the contractual safeguards in place between [manufacturers] and authorized service providers places [manufacturers], suppliers, distributors, and repair networks at risk.

This risk seems overstated, for many reasons.

First, the bill includes explicit protections for manufacturers' intellectual property:

(c) Except as necessary to comply with this section, this section does not require a manufacturer to divulge a trade secret or license any intellectual property, including copyrights or patents.

(d) This section does not require the distribution of a product's source code. (Proposed Public Resources Code § 42488.2(c), (d).)

Second, consider the final sentence in the opposition's argument. Nothing in this bill would prevent manufacturers from providing documentation, parts, and tools to product owners and to independent repair shops under contract terms that protect the underlying copyrights, just as they

say they do with authorized repair facilities. The bill’s definition of “fair and reasonable terms” specifically “means at ... **terms** that are equivalent to the most favorable ... **terms** under which the manufacturer offers the part, tool, or documentation to an authorized repair provider” (emphasis added). Moreover, it is unclear why “suppliers, distributors, and repair networks” would be “at risk” from the provisions of this bill, unless it is their loss of profits from being unable to exclusively control repair markets. If the manufacturer suspects copyright infringement, it will have the advantage of knowing the product owners and independent repair shops to which it has provided documentation, parts, and tools under this bill, enabling it to more easily find the culprit.

Third, the opponents fail to distinguish between using firmware to protect intellectual property (copyrights, patents, trade secrets) and using firmware to prevent product owners and repair shops from fixing their own products. The latter is illegitimate. As the FTC writes:

[T]he use of embedded software that forces consumers to have the maintenance and repair of their products performed by the manufacturers’ authorized service networks may also raise competition issues. Such restrictions may take the form of “software locks” that disable a computerized device repaired outside of the manufacturer’s authorized service networks, or the use of firmware updates that limit third-party repairs. In general, the intellectual property laws and the antitrust laws share the common purpose of promoting innovation and competition. However, misuses of intellectual property rights may create barriers to independent repairs, and thereby harm competition. (FTC Report, *supra*, p. 10.)

Fourth, both copyright and patent law recognize exceptions for repair. A group of twelve law professors who specialize in intellectual property law, including such luminaries as Mark Lemley (Stanford Law School), Pamela Samuelson (UC Berkeley Law School), and Rebecca Tushnet (Harvard Law School), jointly write:

As early as 1901, courts have recognized a “right of repair or renewal” under U.S. copyright law. *Doan v. American Book Co.*, 105 F. 772 (7th Cir. 1901). Since then, courts have repeatedly brushed back efforts to use copyright law to control the markets for repair parts and information. *See ATC Distribution Grp., Inc. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700, 703 (6th Cir. 2005) (holding part numbers and technical illustrations unoriginal) [...]

It’s not just the courts that have rejected these efforts. In amending § 117 of the Copyright Act, Congress explicitly embraced repair. *See* § 17 U.S.C § 117(c). And more recently, the Copyright Office has recognized that repairing a range of software-enabled devices, from smartphones to tractors, is non-infringing activity. *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 86 Fed. Reg. 206, 59627 (October 28, 2021).

Facilitating the repair of consumer devices is consistent with federal copyright law and policy. SB 244 is in no way preempted by the Copyright Act, which merely prohibits states from enacting exclusive rights “equivalent” to those provided under federal law. 17 U.S.C. § 301(a). Nor does SB 244 conflict with § 1201 of the Copyright Act. [...]

If anything, the rules favoring repair under patent law are even clearer. Under the exhaustion doctrine, when a patentee sells a particular device to a consumer, it loses the right to control the use or subsequent transfer of that device. Exhaustion is why you can sell your used car

without the manufacturer's permission. It's also why you can repair it free from any risk of patent liability. So long as you don't "reconstruct" the patented article—that is, rebuild it entirely—there is simply no infringement. *See Aro Mfg. Co., Inc. v. Convertible Top Co.*, 365 U.S. 336 (1961). More recently, the Supreme Court made clear that manufacturers cannot leverage their patent rights to restrict the repair of the devices they sell. *Impression Prods., Inc. v. Lexmark Int'l, Inc.*, 581 U.S. ____ (2017).

These law professors also recognize this bill's consistency with trade secrecy law:

SB 244 specifically exempts most trade secrets. Manufacturers must disclose information only "as may be necessary to provide service literature, documentation, tools, software, and parts on fair and reasonable terms." Since repair parts and tools are often generally known within the industry, they can't be considered secrets. And the information necessary to enable repair would not extend to manufacturing schematics or other documents that would expose production processes. The sort of repair information the bill would require manufacturers to disclose is frequently shared with authorized repair providers, who may or may not be under any legal obligation to maintain its secrecy. Even if such information is secret, the legislature is entitled to craft exceptions to trade secret law in order to safeguard the public's interest in repair. That power is consistent with the federal Defend Trade Secrets Act. *See* 18 U.S.C. § 1838.

Fifth, the opponents' citation of the federal Digital Millennium Copyright Act (DMCA) is misplaced. The DMCA prohibits circumvention of technological measures that control access to copyrighted work, but provides the Librarian of Congress with regulatory authority to create temporary exemptions to this prohibition. (17 U.S.C. § 1201.) Current DMCA regulations exempt "[c]omputer programs that are contained in and control the functioning of a lawfully acquired device that is primarily designed for use by consumers, when circumvention is a necessary step to allow the diagnosis, maintenance, or repair of such a device, and is not accomplished for the purpose of gaining access to other copyrighted works." (37 C.F.R. § 201.40(b)(14).)

Finally, and perhaps most importantly, this bill would simply provide Californians with rights similar to those now enjoyed by New Yorkers and Minnesotans under their "right to repair" statutes. If a "right to repair" law facilitates theft or infringement of intellectual property, a criminal will simply use the laws in those states to commit those crimes; passing this bill does not make infringement any easier or more likely

7) Does this bill impair cybersecurity or privacy? Bill opponents contend that "SB 244 harms consumer security," specifically as follows:

Computers, tablets, and smartphones are at risk of hacking, and weakening of the privacy and security protections of those products will increase risks to consumers. With access to technical information, criminals can more easily circumvent security protections, harming not only the product owner but also everyone who shares their network. In an era of sophisticated cyberattacks, we should not make it easier for criminals to hack security provisions.

This is a very speculative argument. It applies only to one category of devices that would be subject to this bill, those that have sufficient network access and capabilities to facilitate hacking—i.e., not to most consumer electronics or appliances. If obtaining documentation, parts,

and tools to diagnose issues with, maintain, and repair products facilitates criminal infiltration of home networks, why wouldn't these criminals simply work at manufacturers or authorized repair shops to obtain the needed information? After all, as the opposition themselves admit, authorized repair shops are rife with privacy abuses:

A recent study found that privacy violations already occur when consumers seek computer or phone repairs, with technicians accessing female customers' personal data at a higher rate than males. Without the contractual safeguards created by authorized repair networks that allow OEMs to hold bad actors accountable, SB 244 will merely create new opportunities for snooping repair technicians to access and copy consumers' personal data.

But, as noted above in the discussion of intellectual property law, there is nothing in this bill that would prevent a manufacturer from establishing equivalent contractual safeguards with independent repair shops.

The bill itself protects against invasions of users' privacy by repair providers. It explicitly states that it does not "require a manufacturer to make available special documentation, tools, and parts that would disable or override antitheft security measures set by the owner of the product without the owner's authorization." (Proposed Public Resources Code § 42488.2(f).) In other words, if a user has set a password or a safety lock on their device, an independent repair provider would not be able to use information, tools, or parts obtained from the manufacturer to bypass that password or lock.

Moreover, an independent repair shop, which is less likely to be part of a chain of stores, is more likely to try to protect its reputation by ensuring that its technicians are safeguarding customers' privacy.

Ultimately, the FTC Report considers and dismisses the cybersecurity/privacy argument as follows:

The record contains no empirical evidence to suggest that independent repair shops are more or less likely than authorized repair shops to compromise or misuse customer data. [...] Furthermore...replacing a part on a device with an identical OEM part or functionally equivalent aftermarket part is unlikely to create a cybersecurity risk. Providing individuals and independent repair shops with the diagnostic software to fix devices and with firmware patches is fully consistent with Commission staff's 2015 *Internet of Things* report and its subsequent *Start with Security* guidance. [...] With appropriate parts and repair information, the record supports arguments that consumers and independent repair shops would be equally capable of minimizing cybersecurity risks, as are authorized repairers. (FTC Report, *supra*, pp. 31-32.)

In light of the foregoing, particularly given that privacy abuses already occur at authorized repair facilities, it is unclear why enacting this bill would significantly increase most consumers' privacy and cybersecurity risks.

8) **Does this bill threaten consumer safety?** The final major argument raised by the opposition is that "SB 244 harms consumer safety." The opposition writes:

Most consumer technology products are comprised of complex electronics which require specialized training and sophisticated test instruments to repair safely. Some types of repairs

can be extremely detailed, complicated, and dangerous to anyone without proper training. It is particularly important that products containing high-energy lithium-ion batteries are repaired only by trained professionals who understand and mitigate the hazards associated with installing, removing or replacing these batteries. In January 2021, the U.S. Consumer Product Safety Commission released a consumer safety warning that rechargeable lithium-ion battery cells, when they are “loose” and not installed in a device or part of an integral battery, are “potentially hazardous to consumers when handled, transported, stored, charged, or used to power devices” and “can overheat and experience thermal run[a]way, igniting the cell’s internal materials and forcibly expelling burning contents, resulting in fires, explosions, serious injuries and even death.”

The FTC Report thoroughly refutes this argument, as follows:

Safety considerations are a critical part of any discussion about repairs. Concerns about the safety of users, repair personnel and the public, however, should not automatically justify restricting repairs to authorized repair networks without further analysis. [...M]anufacturers provided no data to support their argument that injuries are tied to repairs performed by consumers or independent repair shops. This is so despite the fact that the [FTC’s] Call for Empirical Research specifically asked for data concerning “[t]he risks posed by repairs made by consumers or independent repair shops” and several manufacturers and their associations submitted comments and were provided the opportunity to participate in the Workshop. Nor have manufacturers provided factual support for their statements that authorized repair persons are more careful or that individuals or independent repair shops fail to take appropriate safety precautions, or that independent repair workers who enter homes pose more of a safety risk to consumers than authorized repair workers. (FTC Report, *supra*, p. 26.)

The FTC goes on to note that automobiles are among the most complex and potentially-dangerous consumer products available, and then writes:

The automotive sector demonstrates that consumers and independent repair shops are able to repair cars every day even though cars are a diverse group of complex machines that contain gasoline and battery acid and have hundreds of moving parts. With appropriate parts, repair information, and training, consumers and independent repair shops would similarly be capable of safely repairing other products. (*Id.* at 26.)

Beyond these arguments, the bill’s definition of “part” includes an “assembly of parts.” If it would be hazardous for a product owner or repairperson to handle a specific component, the manufacturer can provide the component as part of a safer-to-handle assembly. (*See* Proposed Public Resources Code § 42488.2(h)(5).)

9) What other concerns have been raised by bill opponents? California Chamber of Commerce and TechNet have submitted a letter that expresses “appreciat[ion for] earlier amendments that provide critical security protections for consumers and acknowledge the importance of protecting manufacturer trade secrets and intellectual property.” They seek additional amendments to address the following topics:

1. The bill would currently apply to products first manufactured and sold on or after July 1, 2021. Opponents argue that “[r]equiring existing electronic products to meet retroactive repair standards imposes new unanticipated costs on manufacturers and creates an unfair

competitive landscape.” (Committee staff notes that Minnesota’s law applies to products sold on or after this date.)

2. Opponents argue, “If manufacturers are required to allow the general public to perform repairs, the bill should clearly state that no manufacturer or authorized repair provider shall be held liable for any damage or injury that is caused as a result.” (Committee staff notes that California law already deals comprehensively with the issue of whether a manufacturer can be held liable for errors introduced by a repair, under the doctrine of “superseding cause.”)
3. Some manufacturers do not have authorized repair providers. “This [bill] would mean that such manufacturers must hand over the documentation, parts, and tools used for their in-house diagnostic or repair offerings.”
4. Opponents argue, “To account for components with a heightened safety risk if improperly installed, we strongly believe that manufacturers should be able to offer those components as pre-assembled parts rather than as individual components.”

Committee staff has discussed these topics in detail with the author’s office. The problem faced by the author is that some manufacturers have already negotiated with the author on bill amendments that address those manufacturers’ specific needs. Altering the bill’s wording risks undoing agreements previously reached with these manufacturers, who negotiated with the author in good faith.

Nevertheless, the author has pledged to continuing working on the delicate task of reconciling manufacturers’ varying needs on these topics, and ensuring the bill remains effective.

10) **Related legislation.** SB 271 (Roth, 2023) would requires a manufacturer of powered wheelchairs designed for use by people with physical disabilities to make available to independent repair providers and wheelchair owners, on fair and reasonable terms, the documentation, parts, and tools needed to repair those wheelchairs. Status: Assembly Privacy and Consumer Protection Committee.

AB 1659 (Gabriel, 2023) would require all small electronic devices, as defined, manufactured on or after January 1, 2026 and sold in California to support USB Type-C charging. Status: Senate Business, Professions and Economic Development Committee.

SB 983 (Eggman, 2022) was substantially similar to this bill, with the major difference being that it provided consumers with a private right of action for violations. The bill died in the Senate Appropriations Committee.

SB 605 (Eggman, 2021) would have required manufacturers of powered medical devices to make the documentation, software, and parts necessary to maintain and repair such devices available to hospitals and to independent service organizations engaged by hospital, on fair and reasonable terms, so that a hospital or its engaged repair service could conduct its own maintenance and repairs. The bill died in the Senate Appropriations Committee.

AB 1163 (Eggman, 2019) would have altered express warranty law by requiring manufacturers of certain equipment, electronic products, and appliances to make available sufficient service literature and functional parts, on fair and reasonable terms, to owners of the equipment or

products, service and repair facilities, and service dealers. The bill died in the Assembly Privacy and Consumer Protection Committee.

AB 2110 (Eggman, 2018) would have required manufacturers of an array of electronic equipment or parts sold and used in the state to, among other things, provide to independent repair providers and owners of the equipment certain parts, tools, and information for the purpose of providing a fair marketplace for the repair of that equipment. The bill died in the Assembly Privacy and Consumer Protection Committee.

ARGUMENTS IN SUPPORT: A coalition of twelve law professors who specialize in intellectual property law summarize this bill’s merits as follows:

The right to repair our devices is crucial, not only to our autonomy as individuals, but to our collective obligations to the planet. This bill would provide the citizens of California with tools to regain control over the consumer devices they rely on every day and to stem the environmental harms of a throwaway consumer culture. As consumers as well as IP experts, we think that allowing people to repair the things they own makes common sense. It saves money by making the products we buy last longer. It eliminates waste in the form of discarded devices. And it reduces the need to extract raw materials from the earth. Device makers now assert exclusive control over the supply of replacement parts, tools, software, and diagnostic information necessary for consumers to repair devices themselves or to rely on independent repair providers. As a result, independent repair shops are being driven out of business, which only reinforces the dominance of device makers and their authorized repair partners. Faced with monopoly pricing in the repair market, consumers are often persuaded to replace their devices rather than repair them. We think the people of California would benefit from the existence of more competition and the opportunity to do repairs themselves.

ARGUMENTS IN OPPOSITION: A coalition of manufacturers and trade associations contends that the supposed environmental benefits of this bill do not take recent developments into account:

The bill is partly based on an inaccurate assumption that the bill will aid in the reduction of electronic waste in the state of California. According to a recent study by Yale and Rochester Institute of Technology researchers, e-waste generation in the U.S. peaked in 2015 and is in a period of extended decline (see “Electronic Waste on the Decline, New Study Finds”). This trend is corroborated by the most recent data from the U.S. Environmental Protection Agency whose data shows consumer electronics as the fastest declining part of the municipal solid waste stream.

Electronic product manufacturers have developed robust policies and programs to ensure that they are continuously improving the sustainability of their products for their whole lifecycle, from design, to material sourcing, product performance, reuse, and responsible end of life management.

This has led to continued innovation and the use of new technologies which provide consumers improved devices while simultaneously reducing the overall amount of e-waste generated—all under the existing product repair environment.

REGISTERED SUPPORT / OPPOSITION:

Support

California Public Interest Research Group (CALPIRG) (co-sponsor)
Californians Against Waste (co-sponsor)
iFixit (co-sponsor)
350 Conejo / San Fernando Valley
Active San Gabriel Valley
AscdiNatd
Aspiration
Associated Students, California State University, Northridge
BAN SUP (Single Use Plastic)
Breast Cancer Prevention Partners
California Environmental Voters
California Product Stewardship Council
Carbon Cycle Institute
Citizens' Climate Santa Cruz
City of Berkeley Zero Waste Commission
City of Laguna Beach
City of Thousand Oaks
Clean Water Action
Climate Action California
Climate Reality Project, Los Angeles Chapter
Climate Reality Project, San Fernando Valley
Consumer Action
Consumer Federation of California
Consumer Reports
Consumer Watchdog
Democrats of Rossmore
Educate. Advocate.
Electronic Frontier Foundation
Environment California
Environmental Working Group
Fillgood
Fixit Clinic
Fort Ord Environmental Justice Network
Friends Committee on Legislation of California
Gotrg
Heal the Bay
Homeboy Electronics Recycling
Hyde Consulting
Los Angeles Unified School District
Media Alliance
Mojave Desert and Mountain Recycling Authority
Moore Institute for Plastic Pollution Research
National Stewardship Action Council
Northern California Recycling Association
Natural Resources Defense Council (NRDC)
Oakland Privacy
Plastic Free Future

Plastic Oceans International
Plastic Pollution Coalition
Privacy Rights Clearinghouse
Recology
Recycle2riches
ReGen Monterey
Repair Cafe Palo Alto
Reuse Alliance
Salinas Valley Recycles
Santa Cruz Climate Action Network
Save Our Shores
Securepair
Seventh Generation Advisors
Sierra Club California
South Bayside Waste Management Authority d/b/a RethinkWaste
Surfrider Foundation
Sustainable Rossmoor
The 5 Gyres Institute
The Center for Oceanic Awareness, Research, and Education
The Culture of Repair Project
The Last Plastic Straw
The Repair Association
The Story of Stuff Project
Tradeloop
Trident Computer Resources, INC
Waveform
Wishtoyo Chumash Foundation
Zero Waste USA
109 Local Elected Officials
22 Individuals, including 12 law professors

Oppose Unless Amended

California Chamber of Commerce
TechNet

Opposition

Air-Conditioning, Heating and Refrigeration Institute
Association of Home Appliance Manufacturers
Bradford White Corporation
California Manufacturers & Technology Association
Civil Justice Association of California
Consumer Technology Association
CTIA – The Wireless Association
Information Technology Industry Council
Internet Coalition
Medical Imaging and Technology Alliance
National Electrical Manufacturers Association

NetChoice
PRBA - the Rechargeable Battery Association
Repair Done Right
State Privacy and Security Coalition, Inc.
Telecommunications Industry Association
The Toy Association

Analysis Prepared by: Jith Meganathan / P. & C.P. / (916) 319-2200