

# The clash of two movements

By Stephen Piepgrass, Esq., and Abbey Thornhill, Esq., Troutman Pepper Hamilton Sanders LLP

APRIL 22, 2022

In January, President Joe Biden doubled down on his support for the “right to repair” movement, a push to increase consumers’ ability to repair equipment on their own or at aftermarket repair shops. The movement has garnered widespread and even bipartisan support.

---

*President Joe Biden stressed that “denying the right to repair raises prices for consumers” and “means independent repair shops can’t compete for ... business.”*

---

Yet, its success could force many companies into a precarious situation where compliance with a new legal regime would require serious changes to other developing business models. One industry has already begun to feel the effects of the right to repair movement is the automotive industry.

This article examines the challenges the right to repair movement has created for major car companies, especially in light of another emerging movement within the industry involving subscription-based features.

## I. Right to repair movement

The “right to repair” generally refers to proposed legislation or regulations that ensure consumers, or aftermarket businesses, have the ability to repair, maintain, and/or modify the devices and equipment consumers purchase, even where the manufacturer has attempted to require the consumers to use only “original equipment manufacturer” replacement parts and manufacturer-approved services.

On July 9, 2021, President Biden issued an executive order compelling, among many other things, the Federal Trade Commission (FTC or Commission) to draft “right to repair” rules to increase consumers’ ability to repair equipment on their own or at after-market repair shops. The Biden administration also asked the U.S. Department of Agriculture to consider new rules aimed at increasing competition in the industry by examining intellectual property rights, potentially giving farmers the “right to repair” farming equipment.<sup>1</sup>

Less than a month later, the FTC unanimously announced that it would indeed ramp up enforcement against illegal repair restrictions.<sup>2</sup> Specifically, the FTC stated that “it would target repair restrictions that violate antitrust laws enforced by the FTC and the FTC Act’s prohibitions on unfair and deceptive acts or practices.”<sup>3</sup>

The Commission also urged the public to submit complaints of violations of the Magnuson-Moss Warranty Act, a law that prohibits tying a consumer’s product warranty to the use of a specific service provider or product without an FTC-issued waiver.<sup>4</sup>

In January of this year, the president doubled down on his support for the right to repair movement in remarks at a meeting with the White House Competition Council, as he stressed that “[d]enying the right to repair raises prices for consumers” and “means independent repair shops can’t compete for ... business.”<sup>5</sup>

---

*Companies may use subscriptions to create a stream of recurring revenue for years after initial purchase and to build a longer-term relationship with a customer.*

---

Days later, congressmen began to announce proposed federal legislation that would regulate the right to repair in specific industries like agricultural equipment and automotive vehicles, signaling major changes in the way software access and warranty restrictions are regulated.

For example, Illinois Representative Bobby Rush introduced a bill that would require all tools and equipment, wireless transmission of repair and diagnostic data, and access to on-board diagnostic systems needed for repairs be made available to the independent repair industry.<sup>6</sup>

Although this may be the first time a president has extensively and formally backed the right to repair movement, this does not mark the movement’s first set of victories.

In 2012, a right to repair initiative requiring vehicle owners and independent repair shops to have access to the same vehicle diagnostic and repair information made available to manufacturers

was presented to Massachusetts voters on the general election ballot and passed with an overwhelming 86 percent of voters voting in favor of enactment.<sup>7</sup>

In 2020 a new version of the law appeared as Question 1 on the general election ballot, and again the initiative passed with overwhelming support.<sup>8</sup> The latest version of the law requires all carmakers doing business in the state of Massachusetts to give consumers access to a car's telematic data, the diagnostic information provided to individual vehicles over a wireless connection.

## II. Subscription-based car features

At the same time the right to repair movement has been gaining steam, several automakers have begun rolling out a subscription-based model for certain vehicle features, meaning consumers can pay monthly or annual fees to use features such as active driving assistance or voice recognition, activating those features that are already hard-wired into the car. For car companies, such a business model presents certain advantages.

---

*There is already a small, but active market of "coders" who offer to activate features on cars that may not have been activated at the time they were sold.*

---

For example, automotive makers can streamline manufacturing by building all cars to more uniform specifications.<sup>9</sup> Additionally, companies may also use subscriptions to create a stream of recurring revenue for years after initial purchase and to build a longer-term relationship with a customer.<sup>10</sup>

Today, General Motors and Ford each offer subscription plans for their hands-free highway driving systems.<sup>11</sup> The companies purportedly aim to generate at least \$20 billion in annual revenue from software services by 2030.<sup>12</sup>

Some consumers may like the flexibility such a subscription-based system could provide. When deciding whether to purchase a new car, one need not fret over whether heated seats or certain self-driving features are "worth it." The consumer can wait until after the initial purchase to decide to activate the feature. But overall, the consumer reaction to subscription-based features has been mixed.

In 2019, for example, BMW asked buyers to pay an extra \$80 per year subscription fee to use the Apple CarPlay program, a feature that now comes standard on many makes and models.<sup>13</sup> Due to customer pushback, BMW quickly scrapped this policy.

Beyond consumer pushback though are complex legal issues that the subscription business model creates. Examples of issues raised include:

- Should automakers be permitted to deactivate certain proven, effective, and well-functioning safety systems after a "free trial"?

- Can manufacturers deactivate features that the initial purchaser paid to activate once the car is sold on the used market, so that the used car buyer must make a second payment to reactivate the feature?
- Should automakers be allowed to hold back certain "updates" to safety features?
- Could consumers bring false advertising claims against a company if they test drive a vehicle with features only to find out that those features require an extra subscription fee after their purchase?

While many of these issues already have begun to percolate, one significant issue that is likely to arise has yet to reach the surface: How will the subscription-based model work under a new right-to-repair regime?

## III. The clash of two movements

The Right to Repair movement presents an extreme challenge for automakers hoping to adopt the subscription-based model for certain car features. Quite simply, if the Right to Repair movement prevails and all automakers are required to make their "under the hood" software data available to consumers and third-party repair shops, consumers who have not paid the required subscription fees may be able to unlock certain features without the automaker's permission.

There is already a small, but active market of "coders" who offer to activate features on cars that may not have been activated at the time they were sold. Other coders seek to "tune" software to tweak engine output beyond factory specifications.<sup>14</sup>

---

*The Alliance for Automotive Innovation has taken the stance that compliance with the new right to repair law is practically impossible for all its members.*

---

This market, in particular, could see dramatic growth if manufacturers are required to make public their previously closely guarded software and firmware. Given access to this data, coding companies not only could customize engine mapping software to tweak performance; they could also charge small, one-time fees to unlock features for which car buyers otherwise would have to pay repeat subscription fees to the manufacturers.

This leaves car companies in a precarious situation. Should they abandon the subscription-based model? Should they fight the right to repair legislation? Or is there a way for the subscription-based model to survive and operate if the company complies with new right to repair requirements?

Massachusetts provides a good early example of how these two movements are about to collide. In January, Kia became the

latest automaker to respond to the Commonwealth's right to repair initiative that requires access to telematic data by simply shutting off the telematic data systems in all new cars sold in Massachusetts.<sup>15</sup>

The move means that new Kia buyers will not have access to wireless technology — meaning their cars will not receive wireless software updates or automatic crash notifications, and drivers will be unable to wirelessly connect to navigation systems or use remote start functions.

Kia made this move, claiming that compliance with the new right to repair legislation was impossible: "The new law requires that 2022 and newer vehicles that utilize a telematic system be equipped with an inter-operable, standardized and open access platform, but such a platform does not currently exist in the market, thus making compliance impossible."<sup>16</sup>

The Alliance for Automotive Innovation (AAI), a trade group representing virtually all of the nation's automakers, has taken the stance that compliance with the new right to repair law is practically impossible for all its members.

In an attempt to protect the industry, the trade group has now sued Massachusetts over the voter-approved initiative arguing that, due to conflicts with numerous federal laws related to cybersecurity and intellectual property, only the federal government, not the states, may pass right to repair legislation.<sup>17</sup>

AAI further asserts that the law imposes an unfair financial burden on auto manufacturers by requiring compliance starting with 2022 models and threatens the privacy of car owners by exposing data from their vehicles.<sup>18</sup> The suit seeks a declaration that the law is unenforceable and an injunction barring enforcement of the law and its requirements.<sup>19</sup>

#### IV. Key takeaways

In early February, the federal judge presiding over the AAI case indicated that he was close to a verdict. But even if the judge decides that the Massachusetts law does conflict with federal law, or that the law's compliance requirements are too harsh in terms of timing, any relief such a decision might provide necessarily will be limited.

With the new, national Right to Repair movement looming, automakers will need to search for a new solution. Their strategy may require political maneuvering, coordination and difficult business decisions as they seek to navigate a changing legal and regulatory regime.

#### Notes

<sup>1</sup> Stephen Piepgrass, Daniel Waltz, and Jessica Ring, "Executive Order Signals Significant Changes for Technology Manufacturers," Troutman Pepper (July 14, 2021), <https://bit.ly/36yDB9s>.

<sup>2</sup> Stephen Piepgrass and Abbey Thornhill, "President Biden Doubles Down His Support for 'Right-to-Repair' Movement," Regulatory Oversight (Feb. 8, 2022), <https://bit.ly/3Mh8Apv>; Press Release, Fed. Trade Comm'n, "FTC to Ramp Up Enforcement Against Illegal Repair Restrictions" (July 21, 2021), <https://bit.ly/3OAKTL4>.

<sup>3</sup> Press Release, *supra* n. 2.

<sup>4</sup> *Id.*

<sup>5</sup> "Remarks by President Biden Before Meeting with White House Competition Council" (Jan. 24, 2022), <https://bit.ly/3rDzRuu>.

<sup>6</sup> Press Release, U.S. Congressman Bobby L. Rush, "Rush Introduces REPAIR Act to Ensure Equal Access to Auto Repair Data for Independent Repair Shops and Preserve Consumer Choice" (Feb. 3, 2022), <https://bit.ly/36wj59j>.

<sup>7</sup> Right to Repair Question 1 — 2012 Massachusetts Election Results, Boston Globe (Nov. 8, 2012), <https://bit.ly/3vz5xCm>.

<sup>8</sup> "Massachusetts Question 1, 'Right to Repair Law' Vehicle Data Access Requirement Initiative (2020)," Ballotpedia, <https://bit.ly/3KZyUEl> (last visited April. 20, 2022).

<sup>9</sup> Tim Levin, "Car companies stand to make billions by charging you monthly fees for add-on features like heated seats," Business Insider (Feb. 5, 2022), <https://bit.ly/38TXoAQ>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Keith Barry, "Why You Might Need to Subscribe to Get Certain Features on Your Next Car," Consumer Reports (Oct. 29, 2020), <https://bit.ly/386lZ4W>.

<sup>14</sup> See, e.g., Kyle Wiens, WTF! It Should Not Be Illegal to Hack Your Own Car's Computer, Wired (Jan. 23, 2015), <https://bit.ly/3L2pCrq>.

<sup>15</sup> Hiawatha Bray, "In latest 'right to repair' move, Kia shuts off new car tech in Massachusetts," Boston Globe (Jan. 21, 2022), <https://bit.ly/3uZAUae>.

<sup>16</sup> *Id.*

<sup>17</sup> Complaint, *Alliance for Automotive Innovation v. Healey*, No. 1:20-cv-12090 (D. Mass. Nov. 20, 2020), <https://bit.ly/3xO5HIK>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

## About the authors



**Stephen Piepgrass** (L), a partner in **Troutman Pepper Hamilton Sanders LLP**'s government enforcement actions and investigations practice group, represents clients in interactions and investigations by state attorneys general and other government enforcement bodies, including the Consumer Financial Protection Bureau and the Federal Trade Commission. He can be reached at [stephen.piepgrass@troutman.com](mailto:stephen.piepgrass@troutman.com). **Abbey Thornhill** (R), an associate in the firm's white collar and government investigations practice group, focuses on enforcement actions, investigations and civil litigation. She can be reached at [abbey.thornhill@troutman.com](mailto:abbey.thornhill@troutman.com). The authors are based in Richmond, Virginia.

This article was first published on Westlaw Today on April 22, 2022.