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Executive Order Signals Significant Changes for Technology Manufacturers

FTC's 'Nixing the Fix' Offers Insight Into Ramifications of Presidential Directive

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Introduction

Regulators are increasingly interested in transactions related to consumer technology. For example, hybrid transactions involving the purchase and sale of Internet of Things (IoT) devices is one area ripe for regulatory oversight and enforcement as detailed in our prior article, “[Regulators Likely to Focus on Hybrid Transactions and IoT Devices](#).”

In the regulatory world, the “right to repair” is also quickly gaining momentum. On July 9, 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. These new rules could reshape the landscape for manufacturers that must be prepared to make significant changes to comply with the evolving regulatory requirements.

The “right to repair” generally refers to proposed legislation or regulation that ensures consumers (or after-market businesses) have the ability to repair, maintain, and/or modify the devices and equipment they purchase even where the manufacturer of those devices and equipment attempts to require the consumer to use only “original equipment manufacturer” (OEM) replacement parts and services. In this article, we examine what the proposed regulatory focus on the “right to repair” means for manufacturers, and how manufacturers can begin positioning themselves in this evolving legal environment to satisfy regulators, while maintaining control over their intellectual property, preserving their brand, and protecting consumers from dangers associated with after-market repairs of complex technology.

The FTC recently provided Congress a critique of technology manufacturers on repair restrictions titled, [*Nixing the Fix*](#), which offers a roadmap of specific actions the FTC will likely take in response to President Biden's directive. The report seeks to curb repair restriction, which occur when a manufacturer directly or indirectly limits repairs by the consumer or a third-party repair shop. The problem, as described by the FTC, is primarily focused on the automotive and cell phone markets, but has deep roots in everything from [farming equipment](#) to [video game consoles](#). One could argue that manufacturers hinder independent repairs by, for example, physical constraining (e.g., gluing batteries in place or requiring proprietary screwdrivers to open a device), limiting availability of parts and part information, designing products to make independent repairs unsafe, and pursuing aggressive patent and trademark claims, software or firmware locks, and end-user license agreements. Another FTC concern is the practice by some manufacturers of seeking to void warranties for third-party repairs even though the 1975-passed Magnuson-Moss Warranty Act (MMWA) may prohibit such conduct. Although the relevant legal issues are far from settled, the Commission warns that manufacturers that limit consumers' repair rights could run afoul of existing anticompetitive regulations. This report signals a crackdown on manufacturers under existing federal law.

In *Nixing the Fix: An FTC Report to Congress on Repair Restrictions*, the FTC analyzes the relevant legal provisions and the arguments for and against repair restrictions, concluding with recommendations to improve consumer repair choices. Manufacturers must be prepared for additional regulatory oversight as the FTC clearly signaled that manufacturers that restrict a consumer's ability to repair sophisticated technology may come under scrutiny.

FTC Report Overview

The FTC's congressional report represents the consolidation of issues explored at *Nixing the Fix: A Workshop on Repair Restrictions*, empirical data, and public comment. The FTC analyzed existing laws and their applicability, specific regulatory issues, and the arguments for and against repair restrictions presented by manufacturers and consumers.

1. Existing Laws That Will Be Enforced

Section 102(c) of the Magnuson Moss Warranty Act. The FTC warns that many repair restrictions may violate the MMWA's Section 102(c), also known as the anti-tying provision. The anti-tying provision prohibits manufacturers from conditioning a product warranty on the "consumer's using any article or service identified by brand name unless the article or service is provided for free or if the warrantor provides a waiver from the Commission." For example, a mobile phone manufacturer cannot void a warranty if a consumer has his phone's battery replaced at an independent repair store, nor can an automobile manufacturer void a warranty if the consumer has her car serviced by someone other than an authorized dealership. Though the FTC actively enforces Section 102(c) violations, warranty tying continues to be a pervasive practice. An [October 2018 study](#) conducted by the Education Fund of Public Interest Research Groups (PIRGS) found that 45 of the 50 companies surveyed had warranty provisions that potentially run afoul of Section 102(c). The FTC also acknowledged receipt of numerous public comments and complaints regarding specific companies voiding warranties upon finding that a consumer had used non-OEM parts or non-OEM services.

The Sherman Act. Manufacturers that constrain repair options may be subject to claims under [Section 1](#) of the Sherman Act, which prohibits agreements that constrain competition, and/or [Section 2](#), which makes it illegal for

any person to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations”

The FTC Act. [Section 5 of the FTC Act](#) prohibits “unfair methods of competition.” While some overlap between the FTC Act and the Sherman Act exists, the FTC Act encompasses conduct that does not meet the technical requirements of the latter and focuses on protecting the consumer from unfair deceptive acts and practices.

State Laws. Currently, only three states have passed consumer repair choice legislation. Rhode Island requires manufacturers to “have adequate service information and replacement parts available to warranty stations and independent service facilities” for at least four years after the last sale of the product. Indiana has a similar but less expansive law, applying only to express manufacturer warranties of audio or visual equipment costing more than \$50 for a period of seven years. Similarly, California’s Beverly-Song Act requires manufacturers that make an express warranty on electronics or appliances to provide service information and repair parts for a period of three years or seven years, depending on the price of the product.

2. Arguments For and Against Repair Restrictions

Manufacturers’ primary argument for repair restriction is the protection of intellectual property. Providing parts, tools, and equipment to third-party repair shops or to consumers would “force them to reveal sensitive technical information about their products, including source code, tools, and trade secrets.” Furthermore, manufacturers cited physical safety, cybersecurity, liability, design choice/consumer demand, and quality of service concerns to justify repair restrictions.

Many of these concerns may be valid — especially as the complexity of consumer technology increases. While repairs and maintenance for the physical elements of an internal combustion engine may be safely made by any auto-mechanic with sufficient knowledge and training, the same does not hold true for sophisticated electronics, especially when those sophisticated electronics are integrated with complex physical systems that work together through proprietary computer programming. For example, [John Deere](#) has famously pushed back against the “right to repair” movement for a number of reasons that warrant serious consideration from regulators. Farmers — a traditionally self-reliant industry — argue that they should receive access to the complex software that drives modern farm equipment, like tractors and combines, to make repairs and customize the machines to meet their needs. John Deere, on the other hand, argues that the large machines are simply too complex to be safely manipulated by inexperienced or untrained individuals. According to John Deere, their heavy equipment has been carefully programmed, calibrated, and tested to ensure maximum performance, efficiency, and safety. One mistake by an untrained after-market repair shop or inexperienced consumer could inadvertently send a 20-ton vehicle on a trip down a highway or into a subdivision. Regulators will need to find a balance between the consumers’ desire to repair their own equipment and the safety of consumers and the public.

Proponents of the “right to repair” offer their own competing justifications. For example, OEM repair times may be very long as consumers await OEM service. Returning to the John Deere example, a farmer waiting days for an OEM-approved service technician to repair a broken combine may be at risk of missing a harvest window, potentially devastating the farmer’s livelihood. Consumers also complain that OEM parts are frequently more expensive and harder to find than after-market parts. In Europe, one factor driving the “right to repair” movement has been a desire to reduce the number of electronic devices that end up in landfills every year because they

cannot be repaired or maintained. Finally, the FTC noted that the after-market repair industry is robust and “right to repair” regulation will likely have a positive impact on small businesses providing after-market repair and maintenance services.

3. The FTC’s Recommendations

Congress directed the FTC to recommend specific action to address and expand consumers’ repair options. The Commission recommended enforcing existing legislation, pursuing new rulemaking, encouraging industry self-regulation, and promoting consumer education through increased transparency about the repairability of their devices.

Existing and New Rulemaking. The FTC will continue to enforce existing applicable regulations under the MMWA, the Sherman Act, and the FTC Act. The Commission also suggested it could engage in rulemaking to declare “certain types of repair restrictions illegal.” Specifically, the FTC noted that it could amend Section 102(c) of the MMWA (the anti-tying provision) to clarify that repair restrictions are indeed a violation. Parties would be on notice that limiting consumer choice of repairs is illegal. In addition, the FTC suggested it could amend the FTC Act to expressly prohibit repair restrictions.

Industry Self-Regulation. The Commission suggested that the various industries engaging in repair restrictions may want to pursue voluntary self-regulation, citing the automotive industry’s Memorandum of Understanding (MOU) as a model example. The MOU was created to prevent the passage of different requirements in different states. The FTC says, while self-regulation may be difficult since the practice of repair restriction extends across multiple industries, it is not impossible.

Promoting Consumer Education. Finally, the FTC recommends increasing consumer education about the repairability of the products they purchase. Suggestions included a repairability score or scale for products to ensure that consumers understand the restrictions of a product before purchasing.

Industry Takeaways

There are several ways industries with repair restrictions can prepare themselves against increased regulation or state lawmaking, as well as ensure they follow existing rules.

Support Arguments with Evidence. In *Nixing the Fix*, the FTC pans numerous arguments supporting repair restriction due to lack of corroborating evidence. If manufacturers claim repair restrictions improve user safety or reduce company liability, then they should form industry associations and trade groups to commission studies to provide factual support and data to bolster such arguments.

Consider Self-Regulation. Manufacturers in various industries should consider forming industry-specific trade groups and association for purposes of engaging in voluntary self-regulation. These associations should work to ensure standards for what is appropriately repairable by third-party vendors and what is not. Associations should also consider metrics by which the “repairability” of products may be communicated to consumers in a clear way that is fair to those in the industry (think along the lines of the mandatory calorie and nutrition information that appears on all commercially-produced food items). Finally, associations should work with the after-market industry

to reach an agreement on the scope of after-market repairs and services, establish safety and security standards, and reach an agreement on the protection and handling of trade secret information that must be shared to allow for the safe maintenance and repair of complex technology.

The risk to industries is that, in the absence of voluntary self-regulation, manufacturers will be forced to accept a one-size-fits-all solution from regulators that will be less sensitive to the needs of each specific industry and more focused on consumer interests at the expense of the interests of the industry. Voluntary self-regulation would allow manufacturers to cooperate with regulators but on terms more favorable to the manufacturer than if regulations and laws were unilaterally imposed by legislation or state or federal regulation.

Stay Within Existing Law. The FTC points out that not all repair restrictions run afoul of the law. Justifications are scrutinized on a case-by-case basis and rejected only if they are mere pretext for anticompetitive conduct. Manufacturers should familiarize themselves with existing laws and ensure that any repair restrictions are fully justifiable, necessary, and that the reasoning is well-documented.

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