

# IF IT AIN'T WORKING, FIX IT — WITH COMPETITION, NOT MONOPOLY



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CPI Antitrust Chronicle August 2020

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## I. INTRODUCTION

The ability of individuals to repair, maintain, or modify things they own is often referred to as the “right to repair.” In response to pressure over the last decade contracting this right, an advocacy movement has gained traction in the United States as well as abroad. The movement “argues that companies should make it easier for their customers to fix their own stuff.”<sup>2</sup> It also is critical of manufacturers who have created “repair monopolies” that force customers to have their things repaired exclusively by the manufacturer or its authorized agent. Proponents also highlight that repair monopolies increase consumer repair costs and encourage waste.

In one high profile example, farmers across the United States protested repair restrictions that John Deere placed on new tractors. By the terms of a claimed “license” agreement accompanying tractor purchases, John Deere forbids farmers from doing their own repairs and modifications to equipment and requires them, instead, to go to John Deere dealerships or other authorized repair shops for maintenance work.<sup>3</sup> Tech giants like Apple and Microsoft have similarly made it difficult for independent shops to repair consumer electronics products, requiring customers to go directly to the manufacturer or other authorized shops for repairs.<sup>4</sup>

While in recent years right to repair advocates have focused on products like these, repair monopolies also affect important healthcare products. The COVID-19 pandemic has revealed that products used to treat the virus are subject to repair restrictions that make shortages of critical product more dire. For instance, repair restrictions barred hospitals from fixing one of the most necessary medical devices needed to treat COVID-19 patients: ventilators.

In March 2020, healthcare systems across the country, including those in areas hit hard by COVID-19 like New York and Los Angeles, reported receiving many broken ventilators. Like John Deere tractors and consumer electronics products, ventilators are controlled by “software locks” that require manufacturer authorization before anyone can repair them.<sup>5</sup> Ventilator manufacturers refused to release design specifications that would allow hospitals to fix their own broken devices. To acquire manuals, manufacturers required technicians to be “certified” by them, and certifi-

<sup>2</sup> Bryan Lufkin, “Right-to-repair movement,” BBC (July 21, 2019), <https://www.bbc.com/worklife/article/20190719-right-to-repair-movement>.

<sup>3</sup> Jason Koebler, “Why American Farmers are Hacking Their Tractors with Ukrainian Firmware,” VICE (Mar. 21, 2017), [https://www.vice.com/en\\_us/article/xykkkd/why-american-farmers-are-hacking-their-tractors-with-ukrainian-firmware](https://www.vice.com/en_us/article/xykkkd/why-american-farmers-are-hacking-their-tractors-with-ukrainian-firmware).

<sup>4</sup> Tik Root, “Apple effectively has a monopoly on fixing your iPhone. There’s now a fight to change that.” VOX (July 3, 2019), <https://www.vox.com/the-goods/2019/7/3/18761691/right-to-repair-computers-phones-car-mechanics-apple>.

<sup>5</sup> Jason Koebler, “Hospitals Need to Repair Ventilators. Manufacturers Are Making That Impossible,” VICE (Mar. 18, 2020), [https://www.vice.com/en\\_us/article/wxekgx/hospitals-need-to-repair-ventilators-manufacturers-are-making-that-impossible](https://www.vice.com/en_us/article/wxekgx/hospitals-need-to-repair-ventilators-manufacturers-are-making-that-impossible).

cations programs are pricey, costing up to \$7,000 for a single program.<sup>6</sup> The problem is amplified because hospitals can have ventilators made by different manufacturers, requiring technician certification from each company. And, just to maintain access to the manuals, hospitals need to pay multiple annual subscription fees.

In response to hospital complaints, right to repair advocates crowdsourced manuals online. Under pressure from these groups and politicians from several states, some manufacturers relented and made manuals available online,<sup>7</sup> or waived training requirements. GE Healthcare announced that it would provide access “temporarily” to its technical reference manual and PC service application for its ventilators without conditioning access on the otherwise required four days of in-person training.<sup>8</sup> The dispensations are not permanent, however.

Similarly, in Italy a hospital needed replacement valves for breathing devices used to treat COVID-19 patients.<sup>9</sup> The valves were not then available anywhere, and the manufacturer refused to provide the hospital with the technical 3D print files needed to produce the valves. Hospital doctors found a pharmaceutical worker with the necessary 3D printer, who also was able to reverse-engineer a 3D print design from scratch. He printed a batch of valves for the hospital free of charge. The cost: about €1 each — compared to the manufacturer’s reported list price of €10,000. Perversely, IP and other repair restrictions stood in the way of continued production.

These COVID-19 examples drive home that protecting the right to repair is not simply a matter of consumer cost savings or environmental conservation, but, indeed, one with critical human health implications. Ideas of “ownership” — that bundle of rights that the law recognizes — are at the heart of the issue. With companies placing increasingly stricter repair monopolies on their products, it has become correspondingly more difficult for customers to exercise time-honored prerogatives of ownership. Customers of items they believe they have purchased meet manufacturer assertions that the items were “licensed.” Insofar as the “license” view prevails, “owners” may be barred from doing what they want with their devices. Contrary to their expectation upon purchase, they may need “permission” from the manufacturer to fix, service, or improve their device.

By making it harder for an owner to fix her products, manufacturers encourage her to opt to replace them. The environmental impact of this induced obsolescence is dramatic:

All that unfixable stuff doesn’t disappear when we are forced to replace it. It piles up. Electronic waste is the fastest growing part of our waste stream. It is often toxic and poses grave health risks. The increase in this kind of waste is fed both by the growing number of products with electronics in them and the shrinking lifespan of those products.<sup>10</sup>

Sometimes, the “stuff” doesn’t just pile up, but is, instead, shipped abroad to poorer countries.<sup>11</sup>

This article explores the ramifications of repair monopolies. We first overview the right to repair movement, and thereafter summarize its anchor in antitrust law. After that, we discuss the far-reaching effects of repair monopolies, including their risks to health and safety and their negative effects on innovation and social welfare.<sup>12</sup>

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6 Isaac Scher, “Hospitals need ventilators to keep severe COVID-19 patients alive. They might not be able to fix them without paying the manufacturer \$7,000 per technician,” *Business Insider* (June 3, 2020), <https://www.businessinsider.com/ventilator-manufacturers-dont-let-hospitals-fix-coronavirus-right-to-repair-2020-5>.

7 Matthew Gault, “Ventilator Companies Finally Make the Life Saving Devices Easier to Repair,” *VICE* (Apr. 23, 2020), [https://www.vice.com/en\\_us/article/884zvx/ventilator-companies-finally-make-the-life-saving-devices-easier-to-repair](https://www.vice.com/en_us/article/884zvx/ventilator-companies-finally-make-the-life-saving-devices-easier-to-repair).

8 GE Healthcare, “COVID-19 Ventilator Support,” <https://services.gehealthcare.com/gehcstorefront/repair/VentilatorSupport>.

9 Glyn Moody, “Volunteers 3D-Print Unobtainable \$11,000 Valve For \$1 To Keep Covid-19 Patients Alive; Original Manufacturer Threatens To Sue,” *Techdirt* (Mar. 17, 2020), <https://www.techdirt.com/articles/20200317/04381644114/volunteers-3d-print-unobtainable-11000-valve-1-to-keep-covid-19-patients-alive-original-manufacturer-threatens-to-sue.shtml>; Jay Peters, “Volunteers produce 3D-printed valves for life-saving coronavirus treatments,” *The Verge* (Mar 17, 2020), <https://www.theverge.com/2020/3/17/21184308/coronavirus-italy-medical-3d-print-valves-treatments>.

10 Nathan Proctor, “Right to Repair Is Now a National Issue,” *Wired* (Apr. 1, 2019), <https://www.wired.com/story/right-to-repair-elizabeth-warren-farmers/>.

11 Editorial, “Warren and Sanders Say We Need a ‘Right To Repair’ Tractors. Here’s Why That’s Important,” *In These Times* (Aug. 1, 2019), <https://inthesetimes.com/article/21952/right-to-repair-technology-apple-manufacturing>.

12 See generally Daniel A. Hanley *et al.*, “Fixing America: Breaking Manufacturers’ Aftermarket Monopoly and Restoring Consumers’ Right to Repair,” *Open Market Institute* (Apr. 13, 2020), <https://www.openmarketsinstitute.org/publications/fixing-america-breaking-manufacturers-aftermarket-monopoly-restoring-consumers-right-repair>.

## II. THE RIGHT TO REPAIR MOVEMENT CHALLENGES ANTI-CONSUMER RESTRICTIONS

The current right to repair movement has its roots in the response to restrictions on automobile repair, which developed about a decade ago. Following public support, in 2012 Massachusetts passed the first automotive right to repair bill. The legislation's popularity with consumers was evident, as the bill passed with 86 percent of voters approving the measure. Under the Massachusetts law, an automobile manufacturer must make available to owners and independent repair shops "the same diagnostic and repair information, including repair technical updates, that such manufacturer makes available to its dealers through the manufacturer's internet-based diagnostic and repair information system or other electronically accessible manufacturer's repair information system."<sup>13</sup> In 2014, various auto industry groups pledged support for the Automotive Right to Repair Memorandum of Understanding, a nationwide policy based on the Massachusetts law.<sup>14</sup>

Around this same time, advocacy groups, such as the Repair Association (formerly known as the Digital Right to Repair Coalition) and iFixit, began to promote right to repair legislation that extended beyond the automobile industry and into consumer electronics and other digital products. The groups' stated goals are representative of the right to repair movement. The Repair Association advocates for: (1) "equal access" to "the same diagnostics, information, and parts available to" dealers; (2) the public availability of service manuals and schematics; and (3) the availability of parts and tools at non-discriminatory prices.<sup>15</sup> iFixit advocates for the same policies. However, it has also posted online materials needed for individuals to repair their own broken devices. On its website, iFixit crowdsources and publishes manuals for different devices whose manufacturers do not provide them publicly. No good deed goes unpunished, of course: at least one manufacturer, Steris, has asserted that iFixit is infringing its copyright.<sup>16</sup>

In 2015, the Repair Association and other groups worked to introduce "Fair Repair" legislation in New York, Massachusetts, and Michigan, which would require electronics manufacturers to provide owners and independent repair businesses with access to service information, security updates, and replacement parts. By 2019, twenty states had bills related to the right to repair electronics, modeled on the Massachusetts automobile law.<sup>17</sup> Massachusetts is once again leading the legislative charge. In February 2020, the Digital Right to Repair Act moved out of committee in both the Massachusetts House and Senate, making it farther along than the bills pending in other states.<sup>18</sup> Under the bill, manufacturers of digital electronic products sold in the state must:

- (1) make available to independent repair facilities or owners of products manufactured by the manufacturer the same diagnostic and repair information, including repair technical updates, diagnostic software, service access passwords, updates and corrections to firmware, and related documentation, free of charge and in the same manner the manufacturer makes available to its authorized repair providers; and
- (2) make available for purchase by the product owner, or the authorized agent of the owner, such service parts, inclusive of any updates to the firmware of the parts, for purchase upon fair and reasonable terms.<sup>19</sup>

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<sup>13</sup> Mass. Gen. Laws ch. 93K (2012); see generally Daniel Cadia, *Fix Me: Copyright, Antitrust, and the Restriction on Independent Repairs*, 52 U.C. DAVIS L. REV. 1701, 1706 (2019).

<sup>14</sup> *Id.*

<sup>15</sup> The Repair Association, "Policy Objectives," available at <http://repair.org/policy>.

<sup>16</sup> Kevin Truong, "A Medical Device Maker Threatens iFixit Over Ventilator Repair Project," Motherboard (June 16, 2020), [https://www.vice.com/en\\_us/article/akze8j/a-medical-device-maker-threatens-ifixit-over-ventilator-repair-project](https://www.vice.com/en_us/article/akze8j/a-medical-device-maker-threatens-ifixit-over-ventilator-repair-project).

<sup>17</sup> "California Becomes 20th State in 2019 to Consider Right To Repair Bill," U.S. PIRG (March 18, 2019), <https://uspig.org/news/usp/california-becomes-20th-state-2019-consider-right-repair-bill>.

<sup>18</sup> Matthew Gault and Jason Koebler, "A Right to Repair Law Is Closer Than Ever," VICE (Feb. 5, 2020), [https://www.vice.com/en\\_us/article/k7e7xm/a-right-to-repair-law-is-closer-than-ever](https://www.vice.com/en_us/article/k7e7xm/a-right-to-repair-law-is-closer-than-ever).

<sup>19</sup> H.B. 218 (Mass. 2019).

### III. PROPOSED LEGISLATION IN OTHER STATES IS SIMILAR

At the national level, the Federal Trade Commission held a hearing on repair restrictions in mid-2019.<sup>20</sup> And, during their Democratic presidential nomination campaigns, Senators Sanders and Warren and former Colorado Governor Hickenlooper all called for federal legislation designed to protect the right to repair in the agricultural industry.<sup>21</sup> The Copyright Office opined in 2016 that, while software is embedded in many consumer products, “faithful application of existing copyright law doctrines *should* provide no barrier” to resale and repair, security research, and tinkering to permit interoperability.<sup>22</sup> The Office’s opinion is nice. But as Steris’ more recent infringement letter to iFixit demonstrates, legislation protecting these uses would be even better.

Right to repair activism is not confined to the United States. Earlier this year, the European Commission announced its intent to introduce a right to repair policy for electronic devices. The focus of the Commission’s policy is a reduction of electronic waste by extending the lifespan of electronic products through repair and recycling of parts.<sup>23</sup>

Unsurprisingly, product manufacturers that have encumbered their items with repair monopolies have pushed back against legislative initiatives. For instance, Apple, Verizon, Toyota, Medtronic, and other large companies and trade organizations lobbied against a New York right to repair bill, paying lobbyists \$366,634 between January and April 2017.<sup>24</sup> By comparison, the only group publicly lobbying in favor of the legislation spent just \$5,042.<sup>25</sup> The bills’ opponents do not always make public their reasons for opposition — no doubt to avoid coming across as anti-consumer — but when they do, they generally focus on nebulous concepts of safety and privacy. Speaking against a bill introduced in Nebraska, Apple told legislators that if the bill passed, Nebraska would become a “mecca for bad actors” and “that doing this would make it very easy for hackers to relocate to Nebraska.”<sup>26</sup> One cannot help but ask: what sort of firewall has Nebraska thrown up that requires out-of-state hackers to relocate in-state in order to ply their trade?

A director of the Security Innovation Center, a tech company coalition opposing right to repair bills, has similarly said that “tinkerers and amateur repairers could expose devices to hacks that might divulge personal information or increase the risk of fires.”<sup>27</sup> John Deere has stated that it “supports the right to repair but not the right to modify” because “[a]llowing untrained individuals to modify equipment software can endanger operators, bystanders, dealers, mechanics, customers, and others and may result in equipment that no longer complies with industry and safety standards or environmental regulations.”<sup>28</sup> One can search their opposition in vain, however, for specifics to back up this parade of horrors.

Right to repair advocates have typically casted off these remarks as pretextual. As one right to repair group has said in its statement of principles:

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20 Federal Trade Commission, “Nixing the Fix: A Workshop on Repair Restrictions” (July 16, 2019), <https://www.ftc.gov/news-events/events-calendar/nixing-fix-workshop-repair-restrictions>.

21 Matthew Gault, “Bernie Sanders Calls for a National Right-to-Repair Law for Farmers,” Motherboard (May 5, 2019), [https://www.vice.com/en\\_us/article/8xzqmp/bernie-sanders-calls-for-a-national-right-to-repair-law-for-farmers](https://www.vice.com/en_us/article/8xzqmp/bernie-sanders-calls-for-a-national-right-to-repair-law-for-farmers).

22 U.S. Copyright Office, “Software-Enabled Consumer Products” ii (Dec. 2016) (emphasis added), <https://www.copyright.gov/policy/software/software-full-report.pdf>.

23 Natasha Lomas, “European lawmakers propose a ‘right to repair’ for mobiles and laptops,” Tech Crunch (Mar. 11, 2020), <https://techcrunch.com/2020/03/11/european-lawmakers-propose-a-right-to-repair-for-mobiles-and-laptops/>.

24 Jason Koebler, “Apple Is Lobbying Against Your Right to Repair iPhones, New York State Records Confirm,” VICE (May 18, 2017), [https://www.vice.com/en\\_us/article/nz85y7/apple-is-lobbying-against-your-right-to-repair-iphones-new-york-state-records-confirm](https://www.vice.com/en_us/article/nz85y7/apple-is-lobbying-against-your-right-to-repair-iphones-new-york-state-records-confirm).

25 *Id.*

26 Jason Koebler, “Apple Tells Lawmaker that Right to Repair iPhones Will Turn Nebraska Into a ‘Mecca’ for Hackers,” VICE (Feb. 17, 2017), [https://www.vice.com/en\\_us/article/pgxgpg/apple-tells-lawmaker-that-right-to-repair-iphones-will-turn-nebraska-into-a-mecca-for-hackers](https://www.vice.com/en_us/article/pgxgpg/apple-tells-lawmaker-that-right-to-repair-iphones-will-turn-nebraska-into-a-mecca-for-hackers).

27 Elaine S. Povich, Tech Giants Fight Digital Right-to-Repair Bills, PEW (Oct. 16, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/10/16/tech-giants-fight-digital-right-to-repair-bills>.

28 *Id.*

Arguments that seek to conceal the workings of a product in the name of security so as to undermine the rights of owners or their agents to service, repair or modify their property are *prima facie* false and should be rejected as such. True, verifiable security is the product of secure design and thorough testing and improvement, not secrecy.<sup>29</sup>

A policy analyst for Consumers Union has similarly pointed out that there was no uptick in safety problems attributed to passage of the Massachusetts automobile bill.<sup>30</sup> Automobiles certainly seem to present more safety concerns than do iPhones or computers.

But if these anti-repair companies had disclosed their real basis for opposition — creating or maintaining lucrative repair monopolies — their objections would likely not have been so successful.

## IV. REPAIR MONOPOLIES INTERSECT THE ANTITRUST LAWS: IMPAIRMENT OF COMPETITION

Although the right to repair controversy has emerged from the recent generation of electronic products and the software that runs and interacts with them, its seeds were planted much earlier — back at the time that IBM dominated the market for early-generation computers. In 1956, IBM entered into an Antitrust Division consent decree directed in part to stimulating competition in the market for *used* IBM machines. Because used machines “would not be attractive to own unless good service was obtainable at reasonable price,”<sup>31</sup> the decree ordered IBM:

to offer to sell at reasonable and nondiscriminatory prices and terms, to owners of IBM . . . machines (whether or not the purchaser receives IBM repair and maintenance service) and to persons engaged in the business of maintaining and repairing such machines . . . repair and replacement parts and subassemblies for any . . . machines manufactured by IBM.<sup>32</sup>

Consistent with the goal of contemporary right to repair advocates, this decree provision “was intended to ‘establish an independent repair and maintenance service industry’ and to ensure that purchasers of IBM machines would have access to ‘necessary repair and maintenance service and replacement parts and sub-assemblies until alternate sources for such repair and maintenance and replacement parts [became] established.”<sup>33</sup> The IBM decree operated for 40 years, until 1996, when, after industry changes, the company and the Antitrust Division agreed to phase out the remedy.<sup>34</sup>

A few years before the IBM decree ended, the Supreme Court examined a different repair monopoly in *Eastman Kodak Co. v. Image Tech. Servs., Inc.*<sup>35</sup> At the time, Kodak provided 80-95 percent of the service for its own copying and micrographic equipment.<sup>36</sup> The remainder was performed by independent service organizations (“ISOs”) at lower prices than Kodak charged.<sup>37</sup> Beginning in 1985, Kodak adopted a policy of selling replacement parts for its machines only to buyers of Kodak equipment who also used Kodak services, thereby impairing the ISOs’ ability to compete with Kodak in the market for servicing the company’s machines.<sup>38</sup> Eighteen ISOs sued Kodak under the Sherman Act, alleging that “Kodak had unlawfully tied the sale of service for Kodak machines to the sale of parts . . . and had unlawfully monopolized and attempted to monopolize the sale of service for Kodak machines . . . .”<sup>39</sup>

29 SecuRepair, “Statement of Principles,” available at <https://securepairs.org/statement-of-principles/>.

30 Povich, *supra* note 27.

31 Peter Passell, “I.B.M. and the Limits of a Consent Decree,” *The New York Times* (June 9, 1994), <https://www.nytimes.com/1994/06/09/business/ibm-and-the-limits-of-a-consent-decree.html>.

32 Consent Decree, Section VI, *United States of America v. International Business Machines Corp.*, No. 72-344 (S.D.N.Y. Jan. 25, 1956).

33 Public Comment of Independent Service Network International on the Parties’ Proposed Modifications to the Consent Decree, *United States of America v. International Business Machines Corp.*, No. 72-344 (S.D.N.Y. Sept. 30, 1996) (quoting statements from IBM at January 25, 1956 hearing on consent decree), 1996 WL 33671059.

34 Bart Ziegler, “IBM Reaches Settlement To End Consent Decree,” *The Wall Street Journal* (July 3, 1996), <https://www.wsj.com/articles/SB836341174520145000>.

35 504 U.S. 451(1992).

36 *Id.* at 457.

37 *Id.*

38 *Id.* at 458.

39 *Id.* at 459.

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The Ninth Circuit denied Kodak's motion for summary judgment, and the Supreme Court affirmed. Regarding the tying claim, the Court held that a reasonable trier of fact could find that service for Kodak's machines and the parts for the machines were two distinct products, and that Kodak had tied their sale: "Kodak would sell parts to third parties only if they agreed not to buy service from ISOs."<sup>40</sup> To succeed on a tying claim, however, the ISOs also had to show that Kodak had "appreciable economic power in the tying market" — here, the product parts market, available to customers only if they used Kodak services (the "tied" product).<sup>41</sup> The Supreme Court found it "reasonable to infer that Kodak has market power to raise prices and drive out competition in the aftermarkets, since [the ISOs] offer direct evidence that Kodak did so."<sup>42</sup>

On the monopolization claims, the ISOs presented genuine issues of fact whether Kodak monopolized, or attempted to monopolize, the service and parts markets. Kodak's control of "nearly 100% of the parts market and 80% to 95% of the service market" sufficed to establish market power.<sup>43</sup> That the relevant products — service and parts — both came from a single brand, Kodak, was not determinative. Additionally, evidence further showed that to maintain its monopolies, Kodak excluded the ISOs from both markets. Kodak offered business justifications for its exclusionary conduct, including that its actions were designed to maintain high quality servicing.<sup>44</sup> However, the Supreme Court held that record evidence supported a conclusion that Kodak's justifications were pretextual. On remand, the case was tried by a jury, which returned a verdict for the ISOs, who were awarded damages and an injunction. The Ninth Circuit affirmed in substantial part.<sup>45</sup>

Decades after *Eastman Kodak*, in *Red Lion Safety, Inc. v. General Electric Company*,<sup>46</sup> ISOs who provided service, maintenance, and repair for GE gas anesthesia equipment sued GE for unlawful monopolization.<sup>47</sup> First, the ISOs alleged that, by designating a single distributor of replacement parts, GE unlawfully slowed down their ability to get parts on a timely basis and increased their costs.<sup>48</sup> Second, the ISOs asserted that GE barred them from attending the training classes necessary to service GE's machines.<sup>49</sup> The case went to trial, with the jury finding that GE violated Section 2 and awarding the ISOs damages of \$43.8 million (before trebling).<sup>50</sup> After the court directed a new trial limited to damages, the parties settled.<sup>51</sup>

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40 *Id.* at 463.

41 *Id.* at 464.

42 *Id.* at 477.

43 *Id.* at 480.

44 *Id.* at 484.

45 *Image Tech. Serv., Inc. v. Eastman Kodak Co.*, No. C 87-1686 AWT, 1996 WL 101173, at \*1 (N.D. Cal. Feb. 28, 1996), *aff'd in part, vac'd in part*, 125 F.3d 1195, 1228 (9th Cir. 1997).

46 Complaint, *Red Lion Med. Safety, Inc. v. Gen. Elec. Co.*, No. 2:15-CV-308 (E.D. Tex. Mar. 3, 2015), ECF 1.

47 Memorandum and Opinion, *Red Lion Med. Safety, Inc. v. Gen. Elec. Co.*, No. 2:15-CV-308 (E.D. Tex. Mar. 30, 2018), ECF 247 at 3.

48 *Id.* at 20.

49 *Id.* at 23.

50 *Id.* at 3.

51 *Id.* ECF 347.

## V. REPAIR MONOPOLY IMPLICATIONS: HEALTH AND SAFETY CONCERNS

By restricting product servicing, repair monopolies restrain competition in the “aftermarket,” thereby increasing product customer costs and encouraging wasteful product replacement instead of repair. Equally important, however, as the COVID-19 pandemic has demonstrated, repair monopolies can have potentially life-threatening implications. As summarized earlier, repair monopoly restrictions have hindered the ability of hospitals to repair their own broken ventilators — devices crucial to keeping infected patients in critical condition alive. Ventilator manufacturers have (1) refused to release design schematics and manuals<sup>52</sup>; (2) limited and controlled the distribution of repair parts<sup>53</sup>; and (3) required technicians to attend hard-to-get-into certification programs.<sup>54</sup> Lacking enough working ventilators, doctors confront the gut-wrenching choice of which patients must go without.<sup>55</sup> While some manufacturers loosened their rules, these measures have been described as temporary. That exigencies of the worst healthcare crisis in 100 years produced temporarily relaxed restrictions does not detract from the anticompetitive effects of the restraints.

Cases such as *Kodak* and *Red Lion* offer an antitrust blueprint for challenging ventilator manufacturers’ repair restraints. These restrictions are comparable to those successfully attacked in *Kodak* and *Red Lion* as monopolization violations. Since replacement parts and technician training are likely brand-specific, single brand repair and maintenance services are a plausible product market. A technician certified on a GE ventilator model cannot service a Dräger model without a Dräger certification.

And, for certain, ventilators are not unique among the healthcare products subject to repair monopolies; nor are they the only devices where inability to service can cause foreseeable harm to others. Repair monopolies injure not only competing service providers, but also hospitals and other healthcare providers and, indeed, patients who suffered worse outcomes — including death — because operable device supply was unlawfully reduced.<sup>56</sup> Injured hospitals that purchase directly from a manufacturer whose restraints create a repair monopoly clearly have an antitrust claim.<sup>57</sup> Insofar as *Illinois Brick’s* “direct purchaser” rule makes federal antitrust litigation more problematic for indirect purchaser hospitals and patients, state laws in “repealer” states can fill the vacuum.<sup>58</sup>

Moreover, manufacturer arguments based on insufficiently close causation, albeit predictable, are hardly slam dunks when a repair restraint has forced a hospital to turn patients away or denied a critically-ill patient access to indicated medical treatment. “Congress designed the Sherman Act,” the Supreme Court has reminded, “as a consumer welfare prescription.”<sup>59</sup>

Equally important, ventilators and other healthcare devices are simply the currently visible tip of the product iceberg. Consider the role “tethering” can play on everyday consumer devices. Tethering is a “strategy of maintaining an ongoing connection between a consumer good and its seller that often renders that good in some way dependent on the seller for its ordinary operation.”<sup>60</sup> For example, Apple has used teth-

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52 Jason Koebler, “Hospitals Need to Repair Ventilators. Manufacturers Are Making That Impossible,” VICE (Mar. 18, 2020), [https://www.vice.com/en\\_us/article/wxekgx/hospitals-need-to-repair-ventilators-manufacturers-are-making-that-impossible](https://www.vice.com/en_us/article/wxekgx/hospitals-need-to-repair-ventilators-manufacturers-are-making-that-impossible).

53 *Id.*

54 Scher, *supra* note 6.

55 See Kadia Goba, “I’ve Never Seen Anything Like This’: Doctors Without Enough Ventilators Are Being Told Whom To Save During The Coronavirus Pandemic,” BuzzFeed (April 4, 2020), <https://www.buzzfeednews.com/article/kadiagoba/ventilator-shortage-new-york-hospitals-coronavirus>.

56 After the *Red Lion* verdict, healthcare providers brought a class action against GE to challenge GE’s gas anesthesia machine service monopoly. *RGOI ASC, LTD. v. Gen. Elec. Co.*, No. CV 18-12624-RGS, 2019 WL 1992436 (D. Mass. May 6, 2019). The court ordered mediation, which eventually resulted in a confidential agreement and voluntary dismissal. *Id.*, ECF 62.

57 See, e.g. *Apple Corp. v. Pepper*, 587 U.S. \_\_\_, 139 S.Ct. 1514 (2019). Cf. IIA Phillip E. Areeda & Herbert Hovenkamp, *et al.*, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶1345, at 179 (4th ed. 2014) (“standing to recover for an overcharge paid directly to an illegal cartel or monopoly is seldom doubted.”).

58 *Illinois v. Illinois Brick Co.*, 431 U.S. 720 (1977). See generally Am. Bar. Ass’n, INDIRECT PURCHASER LITIGATION HANDBOOK (2d ed. 2016).

59 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (internal quotation marks omitted). Cf. Rebecca Crootof, *The Internet of Torts: Expanding Civil Liability Standards to Address Corporate Remote Interference*, 69 Duke L.J. 583, 588-92 (2019) (in response to physical harm caused by manufacturer-imposed restraints on product operability, expanded civil liability should recognize “broader relational duties,” such as “a new implied warranty, a new products liability claim, or a new informal fiduciary duty; and extending proximate cause standards.”).

60 Chris Jay Hoofnagle *et al.*, *The Tethered Economy*, 87 GEO. WASH. L. REV. 783, 785 (2019).



ering to shut down or “brick” iPhones that were repaired by independent repair shops.<sup>61</sup> Code in the phone’s software detects the presence of an unauthorized replacement connector in the device and, once detected, stops the phone from working. While losing access to an iPhone can be a mere “inconvenience,” if the phone’s owner suddenly cannot make a call in an emergency situation, inoperability can be life-threatening.

Likewise, a driver can be left stranded after the engine in her tethered car shuts off because it was serviced by an “unauthorized” repair-person or because the owner otherwise flouted the terms of service for the software embedded in the car.<sup>62</sup> Just changing a tire on a Tesla is fraught with risk: “If you jack that car in the wrong place, you’re damaging the battery, 100 percent.”<sup>63</sup> Local repair shops are disadvantaged “[b]ecause the car company makes the information hard to find.”<sup>64</sup> And as the “internet of things” develops, the potentially mischievous effects of tethering expand exponentially. A tethered refrigerator could lock the owner out — perhaps, again, only an “inconvenience” where food is sought, but potentially life-threatening if refrigerated medication is needed.

Indeed, even the U.S. armed forces cannot escape these repair monopolies. One Marine Corps captain described an experience in South Korea where a maintenance Marine said he “couldn’t fix a broken generator . . . ‘Because of the warranty, ma’am’.”<sup>65</sup> She recounted another experience in Japan, “watching as engines were packed up and shipped back to contractors in the United States for repairs because ‘that’s what the contract says.’ The process took months.”<sup>66</sup>

Right to repair opponents are inclined to argue that removing or loosening repair restrictions encumbering products would do more harm to the public than good. Thus, in a letter concerning proposed right to repair legislation, AdvMed, a medical device manufacturer trade group representing more than 400 companies, argued that all medical devices should be excluded from such legislation.<sup>67</sup> AdvMed’s stated primary concern was that right to repair legislation could result in “maintenance and repairs of medical devices being performed by untrained personnel and that inappropriate replacement parts may be used.”<sup>68</sup> Moreover, it claimed that it is “difficult to quantify the potential impact to patient safety from maintenance or repairs being done by improperly trained personnel or from the use of unapproved parts” because “it may not be obvious how the unauthorized repair contributed to the event.”<sup>69</sup> However, these protestations are unpersuasive.

In May 2018, the FDA published a report that found “currently available objective evidence is not sufficient to conclude whether or not there is a widespread public health concern related to servicing, including by third party servicers, of medical devices.”<sup>70</sup> Instead, “the objective evidence indicates that many OEMs and third party entities provide high quality, safe, and effective servicing of medical devices.”<sup>71</sup> This conclusion make sense. Technicians have hands-on training and generally have at least an associate’s degree. As a spokesperson for iFixit put it, “[a] biomedical technician is not just somebody walking in off the street.”<sup>72</sup> The military, in particular, are well-versed in maintenance and repair: “Marines have the ability to manufacture parts using water-jets, lathes and milling machines (as well as newer 3-D printers), but . . . these tools often sit idle in maintenance bays alongside broken-down military equipment.”<sup>73</sup>

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61 *Id.* at 819.

62 *Id.* at 821.

63 Neil Gladstone, “We need right-to-repair laws now more than ever,” *Digital Trends* (July 18, 2020), <https://www.digitaltrends.com/features/right-to-repair-legislation-now-more-than-ever/> (quoting Rich Benoit, host of the “Rich Rebuilds” YouTube channel).

64 *Id.*

65 Elle Ekman, “Here’s One Reason the U.S. Military Can’t Fix Its Own Equipment,” *New York Times* (Nov. 20, 2019), <https://www.nytimes.com/2019/11/20/opinion/military-right-to-repair.html>.

66 *Id.*

67 Copy of letter available in Koebler, *supra* note 52.

68 *Id.* at 1.

69 *Id.* at 2-3.

70 FDA Report on the Quality, Safety, and Effectiveness of Servicing Medical Devices 23 (May 2018), <https://www.fda.gov/media/113431/download>.

71 *Id.*

72 Scher, *supra* note 6.

73 Ekman, *supra* note 63.

Opponents have also put forward hypotheticals (essentially the inverse of the tethering hypos above). At a 2019 hearing concerning a New Hampshire right to repair bill, Sarah Pierce, director of Government Relations at the Association of Home Appliance Manufacturers, warned that owners or independent repair technicians might disable software safety features: washing machines, for instance, use software to disable the spin cycle when a safety latch on the washer lid is opened.<sup>74</sup> Pierce also warned of flaming coffee pots and spoiled food that the right to repair bill could produce.

These excuses should be seen for what they are: a “land grab” by product manufacturers seeking to plant their stake in the service market. Repair monopolies exclude service market rivals and injure downstream users. Thus, they fly in the face of this nation’s commitment to robust competition. In 1978, the Supreme Court invalidated a prohibition of bidding for professional engineering services, writing in language equally applicable to opponents of the right to repair:

Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute. In our complex economy the number of items that may cause serious harm is almost endless — automobiles, drugs, foods, aircraft components, heavy equipment, and countless others, cause serious harm to individuals or to the public at large if defectively made. The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers.<sup>75</sup>

So far as we know, buildings and bridges have not since fallen down more frequently than before the Court’s ruling.

## VI. REPAIR MONOPOLIES: SAND IN THE SADDLE-BAGS OF INNOVATION

Besides excluding rivals, increasing user costs, and producing environmental waste, repair monopolies also inhibit innovation by blocking, throttling, or channeling device improvements. Professor Pamela Samuelson argues that “preserving a substantial zone of liberty within which users are free to tinker with existing artifacts is essential to innovation and the health of the creative ecosystem.”<sup>76</sup> Individuals should be free to improve the things they own without asking permission from the product’s manufacturer. As the breathing machine valve episode illustrates, the greater the protection given to repair monopolies, the greater the hit to innovation and the social benefit it brings.

In his landmark *Alcoa* opinion, Judge Learned Hand wrote:

Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.<sup>77</sup>

These observations apply just as much to repair monopolies as they do to product monopolies.

The competition at stake is not just about preventing secondary (aftermarket) repair or preserving a used product market to constrain new product prices and reduce needless replacement of items long before their life cycle ends — features of static competition. It is also about competition in innovation itself — the source of dynamic competition. It is the difference between incremental change—doing essentially the same thing with greater efficiency — and discovering the game-changer — the new approach that does something so differently as to leapfrog the status quo with far-reaching consequences.<sup>78</sup>

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74 Paul Roberts, “In Granite State: Industry Groups Paint Dark Picture of Right to Repair,” *The Security Ledger* (Feb. 11, 2019), <https://securityledger.com/2019/02/in-granite-state-industry-groups-paint-dark-picture-of-right-to-repair/>.

75 *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 695-96 (1978).

76 Pamela Samuelson, *Freedom to Tinker*, 17 *THEORETICAL INQUIRIES L.* 563, 565 (2016).

77 *United States v. Aluminum Co. of America*, 148 F. 2d 416, 427 (1945).

78 See generally Michal S. Gal, “3D Challenges: Ensuring Competition and Innovation in 3D Printing,” 22 *VAND. J. ENT. & TECH. L.* 1, 19 (2019) (noting that 3D printing, as an example, could “completely upend[] cost and quality of life considerations in remote areas . . . [and] might affect population distributions, settlement patterns, housing costs, business models, and even equality of opportunity”).

## VII. CONCLUSION

In recent years, manufacturers have spent a great deal of time and money to establish and entrench repair monopolies. At the same time, purchasers have paid more than they should have for repair or replacement of items purchased. Meanwhile, remedial bills languish in state houses as manufacturers resist proposed legislation. Accordingly, victims should challenge repair monopolies under the antitrust laws. The threat of civil liability, including antitrust treble damages, should help persuade manufacturers to change course.

In the midst of the COVID-19 pandemic, repair monopolies are having a particularly pernicious effect. They are not only injuring healthcare providers economically, but also endangering patients and public safety generally. Eventually, the pandemic will pass. But unless we recall the lessons of competition, the repair monopolies that remain will continue to exact an economic and environmental toll — until the next health crisis reminds us that competition is not just about protecting the value of the customer's dollar or preserving the environment from manufacturer-induced obsolescence, but also about protecting our very physical well-being.



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