Requests/Comments [and responses from Senator Sollman's staff] from the Consumer Technology Association on LC 0111 (Draft Digital Repair Bill)
February 1, 2024

1. Parts pairing prohibition (Page 6 Line 15-31) – please delete this section.
a. Justification for deletion: Parts pairing is the latest mechanism to assure that replacement parts are not counterfeit and support the continued functionality and security of the device. There is not even a prohibition in this bill for installing counterfeit spare parts, only the disclosure by independent repair providers of the use of parts not approved by the OEM. This changes the market for used devices from one in which purchasers of used devices can expect that only the OEM or their authorized repair provider has undertaken any sophisticated repairs.
b. **Alternative suggested bill language**: Add language requiring any independent repair provider operating as a business who uses non-OEM approved spare parts to permanently affix their logo to the device at least as prominently as the original manufacturer's.
c. An **additional alternative fallback option** could be this language added as a proviso to Section 1(2)(c):

i. Provided that nothing shall prevent original equipment manufacturers from requiring repair providers and owners to agree to provide clear and prominent disclosures regarding the use of non-genuine parts in connection with the repair of any consumer electronic equipment.

We've discussed why parts pairing is an important issue to address. The parts pairing provision in SB 1596 is narrow and only focused on specific anti-consumer behavior.
The bill already requires independent repair providers to give notice to consumers before installing non-OEM parts. Regarding attaching a sticker, does Chevrolet require independent mechanics to put a logo of the mechanic's business on the car after doing work on it? Of course not. The owner of the product should decide what stickers to put on it.

[CTA comment – we remain concerned that this provides a state blessing of the use of not just non-OEM parts, but also counterfeit parts. The Chevrolet example is an excellent example of the differences between cars and consumer technology devices – the expectation of someone acquiring a used vehicle are completely different than someone acquiring a used digital device. For cars independent parts of varying quality are to be expected, but not so for digital devices like smart phones. This changes that reality and not to the benefit of the person acquiring a used smart phone.]

2. Retroactivity (Page 12 Line 15-23) – please make applicability consistent with law's effective date.
a. Justification for change: Manufacturers need to align their supply chain contracts with this requirement, and retroactively contracting with suppliers creates difficulties and complexities because the supply chain is extremely competitive and constantly evolving. And laws requiring manufacturers to do things going forward for products previously produced and sold prior to the law is subject to constitutional challenge.
b. **Alternative suggested bill language**: Align with California, apply to products put on the market July 1, 2021 and later.

i. Section 4(1) should be amended to say that "section 1 of this 2024 Act applies to consumer electronic equipment that was first sold in the State on or after July 1, 2021."
ii. Section 6 should be amended to strike "on the 91st day" and replace with "one year".

2015 is important for products that last longer like computers and appliances. And importantly it only applies if the manufacturer is already providing replacement parts and repair services to the public

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either directly or through an authorized repair provider. So if they don't already have supply chains to sell parts, they wouldn't have to do anything. We are planning on pushing out implementation until Jan 1, 2025.

[CTA comment – in addition to the concerns expressed above we continue to have serious doubts about the legality of the retroactive application of such a law.]

3. Most favorable terms for parts (Page 3 Lines 21-30) – please replace "most favorable" with a requirement that parts be available on "reasonable costs and terms."

a. Justification for change: First, this undermines the authorized repair providers who have invested in the training and infrastructure development necessary for becoming authorized. Second, such "most favorable" language treats spare parts for covered devices in a vacuum in which they do not exist – some device manufacturers establish costs and terms across a wide range of products for a variety of legitimate business reasons that should not be handcuffed but such a legal requirement. Third, many manufacturers subsidize repairs and repair products at a loss so the construct of a "most favored" provision is not sensible. Finally what do "most favorable terms" mean for a manufacturer that only does limited repairs internally without an authorized network? And is most favorable the wholesale costs/terms or what the customer sees?

b. **Alternative option** is to amend Section 1(1)(e)(C)(i) as follows: Instead of "at costs and on terms that are equivalent to the most favorable costs and terms," insert "at costs and on terms that are reasonably equivalent to the costs and terms. . . ." This language and the subsections that follow in the current draft of the bill should be sufficient to address the concern that OEMs will significantly prioritize one repair option.

This is intended to prevent a potential loophole whereby OEMs can raise the price exorbitantly to everyone but their "premium" authorized repair providers and essentially prevent everyone else from actually being able to access parts.

[CTA comment – a "reasonable costs and terms" provision would prevent such a scenario without using the term "most favorable," which carries the issues raised above.]

4. Allocation limitations (Page 4 Lines 11-18) – remove allocation references: *In response to CTA's concerns about enabling one service provider to corner the market for a non-counterfeit part, PIRG said allocation limits would be allowed unless it's to inhibit independent repair. Want to discourage malicious compliance; would rely on AG to determine whether allocation limits are malicious.*

a. Justification for change: This language would undermine the ability of OEMs to reasonably manage the inventory of spare parts in the marketplace to ensure that repair options are widely available. In fact this provides legal cover for any independent repair provider to try to corner the market for any or every OEM-approved replacement part – at a cost that must be the "most favorable" cost/terms for an authorized provider and at an unlimited supply enforced by law. How is this in the consumer interest? The allocation language should be removed the standard should be "fair and reasonable" (see item #3 above)

b. **Alternative option** is slightly edit Section 1(1)(e)(C)(ii(I), which currently reads:
"Imposing allocation limitations or advertising restrictions upon the authorized service provider as a means of retaliation or as a means of hindering the authorized service provider in selling parts by any means;" to "Imposing allocation limitations or advertising restrictions upon the authorized service

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provider for the purpose and with the effect of subverting the availability of parts for independent repair providers."
As part of the malicious compliance companies have taken after Right to Repair has started to become enacted, the OEMs are asking service vendors to limit how many parts they can sell -- even requiring they log each phone ID# when conducting a repair. In some cases they are only allowed to sell 1 part, after getting the IMEI, which ruins any kind of same-day service and prevents repair companies from stocking spare parts for any length of time.
The language is intended to prevent this and is narrow such that companies are only prohibited from setting allocation limits as " a means of retaliation or as a means of hindering the authorized service provider in selling parts by any means"
So if OEMs set limits merely as a result of shortages, etc as long as they are not doing it as retaliation or to hinder authorized providers from selling parts then they are fine.

[CTA comment – the language is the bill is broader than the concern raised about "malicious activities" and would still result in the unintended consequences described above. The CTA suggestion in Alternative B above would address this scenario without the unintended consequences.]

5. Preassembled parts or components (Page 6 starting at Line 27) – add new exclusion for preassembled parts.
a. Justification for change: Bill allows for preassembled components if there is parity between ASP (or internal manufacturer) and Independents/Device Owners. However, some manufacturers have parts assembly that in itself is a trade secret and is share that with authorized specialty firms that also do repair, but to avoid confusion there should be an explicit exclusion for preassembled parts when parity would jeopardize trade secrets.
b. To implement, add under Section 1(3), as a new (e) or (f):
i. Prevent an original equipment manufacturer from providing parts, such as integrated batteries, to independent repair providers or owners pre-assembled with other parts rather than as individual components, provided that those pre-assembled parts or their equivalents are also available to authorized repair providers.
This isn't necessary and would potentially be problematic.
It's unnecessary because of the clause that only requires OEMs to provide what they already give to authorized repair providers. OEMs are only required to provide parts that "the original equipment manufacturer makes available to an authorized service provider for the purpose of diagnosing, maintaining, repairing or updating consumer electronic equipment" so if all they give out their authorized providers are "preassembled parts or components" then that's all they'd have to give to independent repair providers or owners.
It's potentially problematic because if they are giving individual components to authorized repair providers then this would actually mean they are giving less to independents/owners than they are to authorized providers.

[CTA comment – thank you for the clarification.]

6. Internally-Performed Repairs (Page 2 Line 16-21) – should not be treated the same as external authorized repairs, please remove.
a. Justification for change: This provision should be struck as it will create a disincentive for

manufacturers supporting any repair. It also departs from the principle of parity between authorized and independent repair providers, in terms of what parts, tools, and documentation repair providers receive. This provision would require OEMs to provide parts, tools, and documentation to independent repair providers, even if they do not provide them to authorized providers and instead do all their repairs in-house. That would substantially disadvantage OEMs that do their own repairs - a process that some of these manufacturers incorporate into R&D activities - while giving IRPs access to parts, tools, and documentation that are often not distributed or prepared for distribution outside the OEM at all. Other OEMs perform only support limited internal repair functions for lower value products and will simply stop providing any repair services to avoid the cost and hassle associated with this proposed mandate.

b. Additionally, some repairs that are carried out in factories, but are not carried out by ASPs, involve extremely expensive or heavy equipment, and it's not practical or to provide this equipment to end customers or independent repair shops, nor would customers or independent repair shops be likely to want it due to cost. Furthermore, the types of parts that are made available for use by ASPs in repair have often been intentionally designed with repair in mind.

c. As an alternative, this provision can be added to Section 1(3) ("This section does not….":

i. Require an original equipment manufacturer to provide or make available a part, tool, or documentation to any repair provider or owner, if:

(A) the part, tool, or documentation is not, or is no longer, provided by the original equipment manufacturer or made available to authorized repair providers of the original equipment manufacturer, including where the original equipment manufacturer performs related repairs solely in-house or through a corporate affiliate;

(B) the part, tool, or documentation is no longer available to the original equipment manufacturer;

(C) the documentation or tool is used by the original manufacturer itself only to perform, at no cost, diagnostic services virtually through telephone, internet, chat, email, or other similar means that do not involve the manufacturer physically handling the customer's equipment, unless the manufacturer also makes the documentation or tool available to an individual or business that is unaffiliated with the manufacturer.

This would be a major loophole. Is the Apple store, for example, classified as in-house? What about manufacturers that only offer mail-in repair, would they be essentially off the hook? A lot of concern is referring to work done by OEMs that isn't repair, but is actually taking products apart to reuse parts to resell used products. The bill only requires OEMs to make available parts, tools, and information "only in instances where the original equipment manufacturer … offers the services of diagnosing, maintaining or repairing consumer electronic equipment that the original equipment manufacturer makes or sells." So unless the OEM is offering direct repairs to consumers (rather than using internal refurbishing processes), they would not be covered. And if they do offer repairs, the whole point of the bill is to allow more repair options so they would have to provide the parts, tools, and information to consumers and independent repair providers.

[CTA comment – we remain concerned that this will disincentivize manufacturers from doing any post-warranty repairs, especially for lower value products where manufacturers have provided such repairs as a courtesy to customers. This would result in the unintended consequence of reducing repair options for consumers residing in states that equate internal repairs with third party independent repair.]

7. Attachment or installation in real property (Page 3 Line 1-2) – remove references.

a. Justification for change: This provision about "capable of attachment to or installation in real property" is confusing as part of the definition of "consumer electronic equipment," and seems to reach

different kinds of electrical equipment outside the traditional scope of a device. It should be deleted for clarity. Electrical equipment and appliances are a totally different industry.
b. Additionally, to ensure home appliances with electronic components are not covered, add as a new Section 1(3)(e)(B)(vii): "Is a home appliance that has a digital electronic product embedded within it, including, but not limited to, refrigerators, ovens, microwaves, air conditioning, heating units, motorized shades, lighting control systems, and security devices or alarm systems, including any related software and components.
The intent of the bill is to cover appliances. This would simply exempt products that we want to be covered.

8. Trade secret protection (Page 6 Line 18-3) – problem provision should be removed.
a. Justification for change: This section provides that OEMs do not need to divulge trade secrets, but the following language should be struck: "except as necessary to provide, on fair and reasonable terms, any documentation, tool, part, or other device or implement used to diagnose, maintain or repair consumer electronic equipment." That language creates a potentially enormous loophole to the trade secret exclusion, which does not appear in any existing state repair law. It would require OEMs to divulge highly protected information that the bill itself categorizes as a trade secret, which would penalize OEMs and undermine their valuable IP protections. Additionally, OEM/authorized service provider arrangements are respected in the bill with adequate caveats, why not trade secrets? Legal arrangements with third parties, intellectual property rights, and trade secrets are consequential and are essentially rendered meaningless if repair can be used as a pretext to circumvent them.
b. To implement, in section 1(3)(a), strike: "except as necessary to provide, on fair and reasonable terms, any documentation, tool, part, or other device or implement used to diagnose, maintain or repair consumer electronic equipment."
This language is based off of and is nearly identical to California and all other states that have passed right to repair laws.
California language: "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"
Complying with this section means "providing sufficient documentation and functional parts and tools, inclusive of any updates, on fair and reasonable terms, to effect the diagnosis, maintenance, or repair of a product"
The intent and effect of both sections are the same.

[CTA comment – we continue to believe that broader trade secret protection should be used consistent with the New York repair law, and that this proposal should more clearly support valid IP protection goals.]

9. No Private Right of Action (Page 12 Line 14) – clarity is needed to avoid confusion experienced in Minnesota.
a. Justification for change: To add as an additional Section 3(4), in order to be completely clear that there is no private right of action: *The Attorney General shall have exclusive authority to enforce the provisions of this 2024 Act. Nothing in this 2024 Act shall be construed to create an individual or private right of action, or to provide the basis for, or be subject to, an individual or private right of action for violations of any parts of this 2024 Act, including under any other law.*
Not necessary. The AG already is the enforcement agency.

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[CTA comment – thank you for this. We welcome any efforts to make sure this is clear in the law.]

10. Liability protection (page 7, lines 12-22) – should be amended to include liability protections consistent with other state laws.

a. **Justification for change:** All three previously passed state laws have variations on the same liability protection language but this version pares it back quite a bit and overly limits the liability protection.

b. To implement, edit Section 1(3)(c) as follows. "Impose liability upon an original equipment manufacturer for *any damage or injury to any digital electronic equipment, person, or property that occurs as a result of repair, diagnosis, maintenance, or modification performed by an independent repair provider or owner, or any other use of parts, tools, or documentation provided by an original equipment manufacturer, including but not limited to, any indirect, incidental, special or consequential damages; any loss of data, privacy or profits; or any inability to use, or reduced functionality of, the digital electronic equipment,* except that an original equipment manufacturer remains liable to the extent that the laws of this state provide for strict liability for defects in the design or manufacture of the consumer electronic equipment."

SB 1596 already has strong liability protection so this additional language is unnecessary. If needed, something can be read into the record.

[CTA comment – thank you for acknowledging that limitations on liability are an important component. We continue to believe the language we propose is consistent with other state repair laws but support any effort to make clear the limits of manufacturer liability.]

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