

Right to Repair: Legislative and Budgetary Solutions to Unfair Restrictions on Repair

Testimony Before the Committee on Rules' Subcommittee on Legislative and Budget Process
United States House of Representatives

September 21, 2022

Sandeep Vaheesan
Legal Director
Open Markets Institute

Thank you Chairman Morelle, Ranking Member Burgess, and the other members of the Subcommittee for the opportunity to participate in this hearing. My name is Sandeep Vaheesan. I am the Legal Director at the Open Markets Institute.¹

Manufacturers of goods ranging from automobiles to tractors to ventilators have tried to monopolize markets for repair (commonly called aftermarket). Their motivations are not hard to divine. The public spends tens of billions of dollars on repairs and maintenance every year. For instance, the annual revenue from auto collision repairs alone was \$33 billion in 2018.² The profits and profit margins on parts and service are substantial, and sometimes higher than on the sale of original equipment.³ Original equipment manufacturers (OEMs) such as Apple, Ford, and John Deere employ a variety of unfair competitive tactics to lock up parts and service markets and lock in their customers.⁴

Aftermarket monopolization subverts common notions of ownership. It prevents car owners from making routine repairs in their garages, computer aficionados from upgrading their machines at home, and millions of others from patronizing independent service centers. Owners of appliances, electronic devices, farm equipment, and vehicles are made captive to manufacturers and their network of service providers and have no option but to pay their inflated prices. The economic effects are especially severe for lower-income households who may have little financial cushion to pay, for instance, overcharges for car repairs, while also covering their rent and meeting other financial obligations.

¹ The Open Markets Institute is a non-profit organization dedicated to promoting fair competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

² Claire Bushey, *Why Deere and Cat Don't Want Customers to Do It Themselves*, CRAIN'S CHI. BUS. (May 10, 2019), <https://www.chicagobusiness.com/manufacturing/why-deere-and-cat-dont-want-customers-do-it-themselves>.

³ *Id.*; *Where Does the Car Dealer Make Money?*, EDMUNDS (June 13, 2019), <https://www.edmunds.com/carbuying/where-does-the-car-dealer-make-money.html>.

⁴ See generally DANIEL A. HANLEY, CLAIRE KELLOWAY & SANDEEP VAHEESAN, OPEN MARKETS INSTITUTE, *FIXING AMERICA: BREAKING MANUFACTURERS' AFTERMARKET MONOPOLY AND RESTORING CONSUMERS' RIGHT TO REPAIR* (2020), https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ea8a6d93b485d0feb9b5d6b/1588111098207/Report_RightToRepair_HanleyKellowayVaheesan-1.pdf.

In some cases, the dearth of independent repair options can force people to delay essential service. In rural and other less densely populated parts of the country, many OEMs do not have a service presence. This can compel owners of tractors and other machinery to wait extended times for repair, which is something they cannot afford during harvest season and other critical points in the agricultural calendar. The stakes are so high that one survey found that 77% of farmers have intentionally purchased older farm equipment to avoid the risk of repair delays due to new equipment embedded with software locks.⁵ In health care, delayed repairs on ventilators and other life-supporting equipment can have dire consequences.

Monopolization of aftermarkets also chokes off an important entrepreneurial opportunity for many Americans. Servicing durable goods is a major channel for entrepreneurial activity. Through monopolization of aftermarkets, manufacturers deny aspiring businesspeople the freedom to establish their own service center to repair cars or to set up a kiosk at the mall to fix smartphones. These business opportunities may be especially valuable for people of color, who frequently face discrimination and exclusion in labor markets.

Aftermarket monopolization has deleterious effects on the environment. By substantially raising the cost of repairs, manufacturers can encourage and effectively force many customers to purchase new products, instead of repairing what they have. This means reduced longevity for appliances, cars, and smartphones and greater production of replacement items. Reduced effective longevity for products translates to more waste sent to landfills and increased greenhouse gas emissions and natural resource extraction.

Congress must restore and protect Americans' right to repair their cars, farm equipment, and smartphones, just to name a few examples. Chairman Morelle's Fair Repair Act would be a major advance and ensure the wide availability of parts, for both independent servicers and consumers.⁶ Through such measures, Congress can end manufacturers' ongoing monopolization of aftermarkets for many goods. The benefits of such legislative action are manifold: restoration of rights traditionally associated with ownership, lower priced and more timely repairs, more entrepreneurial opportunities, and a cleaner environment.

I. How Manufacturers Monopolize Aftermarkets

Equipment manufacturers use an array of unfair competitive practices to monopolize and otherwise dominate aftermarkets. While the unfair tactics are many, five practices are worth highlighting. Through these methods, manufacturers have shut out independent parts manufacturers and service providers and reserved lucrative aftermarkets for themselves and their network of authorized and controlled technicians.

OEMs have restricted the sale of parts and tools for serving their products. Instead of selling these items to all comers, manufacturers limit their sale to authorized dealers and technicians and withhold them from independent repair shops. For instance, camera-maker Nikon stopped selling

⁵ KEVIN O' REILLY, U.S. PIRG EDUCATION FUND, DEERE IN THE HEADLIGHTS II 7 (2022), <https://publicinterestnetwork.org/wp-content/uploads/2022/02/Deere-In-The-Headlights-II.pdf>.

⁶ Press Release, Congressman Joe Morelle Introduces the Fair Repair Act, Congressman Joseph Morelle (June 17, 2021), <https://morelle.house.gov/media/press-releases/congressman-joe-morelle-introduces-fair-repair-act>.

parts to independent repair shops in 2012 and subsequently its authorized service shops too.⁷ To prevent the “leakage” of parts and tools to independent firms, manufacturers also restrict the resale of parts and tools. For example, a manufacturer may coax distributors and product owners not to sell parts to independent technicians.⁸ Moreover, OEMs may assert patents and trademarks to prevent independent manufacturers from making replacement parts and tools and use exclusive contracts to prevent authorized dealers from purchasing them from “non-authorized” sources.⁹

In some cases, manufacturers have designed products to restrict independent repairs. For example, smartphone makers glue components together or use unusual screws to make opening devices very difficult without damaging them.¹⁰ Even experienced independent technicians may not have the know-how or the specialized tools to open and repair these devices. The integration of software in many goods has given manufacturers another design weapon to thwart self-repair and independent service. Independent technicians may not be able to service cars because manufacturers refuse to give them the proprietary codes needed to access the vehicle’s software and diagnose the problem.¹¹ Further, software can detect non-OEM parts and prevent appliances, devices, and vehicles from functioning if they feature these components.¹² For example, on one occasion, “when users updated to the latest operating system, Apple disabled iPhones that had installed third-party parts.”¹³

Manufacturers have also conditioned warranties on the use of their parts and service. They have voided warranties when product owners used non-authorized parts for repair. Through this practice, manufacturers strongly steer owners toward using only their authorized parts and service and not doing business with independents. In effect, manufacturers are tying warranty coverage to the use of their parts and service and restricting product owners from using independent alternatives.

Although this practice is generally against the law,¹⁴ many manufacturers condition the effectiveness of warranties on the use of branded parts and service. For example, many car owners have complained that auto dealers invalidated their warranties when they discovered they had used non-OEM parts for repairs.¹⁵ According to the Federal Trade Commission (FTC), Harley-Davidson, in its written warranty, told owners of its motorcycles that “the use of parts

⁷ Kevin Purdy, *Nikon is Killing its Authorized Repair Program*, iFIXIT (Dec. 9, 2019), <https://www.ifixit.com/News/nikon-is-killing-its-authorized-repair-program>.

⁸ *See, e.g.*, *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 458 (1992) (“Kodak also pressured Kodak equipment owners and independent parts distributors not to sell Kodak parts to ISO’s.”).

⁹ FED. TRADE COMM’N, *NIXING THE FIX: AN FTC REPORT TO CONGRESS ON REPAIR RESTRICTIONS 22* (2021); Daniel A. Hanley, *The First Thing a Biden FTC Should Tackle*, SLATE, Nov. 18, 2020, <https://slate.com/technology/2020/11/biden-ftc-right-repair-exclusive-contracts.html>.

¹⁰ iFIXIT, *REPAIR MARKET OBSERVATIONS* (2019), <https://www.ifixit.com/Document/5572/.pdf>.

¹¹ Norman Hawker, *Under Threat: Competition in the Automotive Service Aftermarket 9, 13* (Am. Antitrust Inst., Working Paper No. 08-05), https://www.antitrustinstitute.org/wp-content/uploads/2018/08/AAIworking-paper-08-05_122920081621.pdf.

¹² FTC, *supra* 9, at 23.

¹³ HANLEY, KELLOWAY & VAHEESAN, *supra* note 4, at 11.

¹⁴ 15 U.S.C. § 2302(c).

¹⁵ FTC, *supra* note 9, at 8.

and service procedures other than Harley-Davidson approved parts and service procedures may void the limited warranty.”¹⁶ U.S. PIRG found that out of 50 surveyed home appliance manufacturers 45 indicated they voided warranties in the event of unauthorized repairs.¹⁷

In addition to these tactics, manufacturers have disparaged independent parts makers and service providers. They have alleged that they are inferior in quality and could compromise the reliability of the product. The potential dangers of using parts and service not authorized by manufacturers have been a recurring theme. For instance, appliance and electronics manufacturers have alleged that independent repair of their devices increases the risk of fire and other property damage due to technician negligence and the use of “non-genuine” parts. On this particular claim and general safety claims, the FTC found that the manufacturers provided little or no substantiating evidence.¹⁸

Through these practices, manufacturers create and maintain a closed system of repair and maintenance. They marginalize and exclude independent parts manufacturers and service providers.

II. Destabilizing the Meaning of Ownership and the Many Adverse Effects on Customers

Manufacturers’ monopolization of aftermarkets has destabilized and narrowed our common-sense understandings of ownership. They have deprived product owners of the right to repair items at home and tinker with their appliances, devices, and vehicles—a traditional right of ownership in the United States and throughout the world. For instance, the monopolization of aftermarkets for cars prevents mechanically minded and curious owners from attempting to perform simple (and not so simple) repairs in their garages. Further, it robs owners of the ability to patronize independent shops and technicians. By compelling product-owners to do business with them and their network of approved technicians for the life of a product, which can be many years, OEMs have blurred what was once “a clear line between products and services.”¹⁹

By undercutting the rights that traditionally came with ownership,²⁰ manufacturers have forced product owners into high-cost manufacturer-controlled service networks. By eliminating or marginalizing independent competitors in aftermarkets, manufacturers can coerce customers into a captive service relationship. Further, in the absence of effective price competition from independents, manufacturers and their service providers can raise prices for parts and service. Given the size of these aftermarkets, a five or ten percent inflation in prices for parts and service can mean consumers collectively paying millions or billions of dollars more annually.

¹⁶ Complaint at 2, In the Matter of Harley-Davidson Motor Co. (FTC 2022), Matter No. 212 3140.

¹⁷ NATHAN PROCTOR, U.S. PIRG EDUCATION FUND, WARRANTIES IN THE VOID 10 (2018), <https://publicinterestnetwork.org/wp-content/uploads/2018/10/Warranties-in-the-Void-U.S.-PIRG-Education-Fund-Oct2018.pdf>.

¹⁸ FTC, *supra* 9, at 28.

¹⁹ AARON PERZANOWSKI, THE RIGHT TO REPAIR: RECLAIMING THE THINGS WE OWN 7 (2022).

²⁰ AARON PERZANOWSKI & JASON SCHULTZ, THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY 122 (2016).

Higher prices for parts and service for cars and appliances hit lower-income households hardest. They typically do not have savings or other liquid assets to cover emergency expenses. In a survey, the Federal Reserve found that nearly 40% of adults in the United States in 2019 could not cover a \$400 emergency expense without borrowing money or selling a possession.²¹ For many low-income households, meeting such an emergency expense means turning to predatory credit, such as a payday or title loan. A nontrivial fraction of payday loan borrowers reported taking out these loans to cover an unexpected car repair.²² Given these realities, more expensive auto repairs can mean the difference between paying for a muffler replacement out of pocket and paying for it by taking a payday loan with an annual percentage rate of upwards of 400%.²³

Aftermarket monopolization can also impose service delays on product owners. Whereas independent repair shops were and still are in large and small communities alike, manufacturers and their service networks are frequently absent in rural areas.²⁴ Manufacturers may require owners to drive their vehicles or transport their home appliances and farm equipment a long distance for service or mail their electronic devices. This can mean waiting days for an authorized technician to repair a broken tractor. One farmer reportedly drove four hours to obtain a replacement part for his combine and waited another day for installation.²⁵

The consequences of delayed repairs can be severe. Consider the economic and social costs in agriculture and healthcare. Without a functioning combine, farmers may not be able to harvest crops. Postponing harvesting can mean losing a year's crop or harvesting a lower quality crop, diminishing farmers' annual income.²⁶ Without functioning ventilators, hospitals may be unable to operate at capacity and treat all seriously ill COVID-19 patients in their community.²⁷

Due to higher prices for parts and service, many consumers may opt not to repair damaged or worn-out products. They may make do with a broken but still functional item for an extended period. An everyday example is broken smartphone screens: More than 60% of Americans do not get them fixed.²⁸ And the high cost of repairs may compel earlier replacements of products. The collective dollars at issue are huge: U.S. PIRG estimated that "Americans would save \$40 billion (\$330 per family) per year if we repaired more products and used them longer."²⁹

²¹ BD. OF GOVERNORS OF FED. RES. SYS., ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2020 – MAY 2021, <https://www.federalreserve.gov/publications/2021-economic-well-being-of-us-households-in-2020-dealing-with-unexpected-expenses.htm>.

²² PEW CHARITABLE TRUSTS, PAYDAY LENDING IN AMERICA: WHO BORROWERS, WHERE THEY BORROW, AND WHY 5 (2012), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes_assets/2012/pewpaydaylendingreportpdf.pdf.

²³ *What is a Payday Loan?*, Consumer Fin. Protection Bureau, <https://www.consumerfinance.gov/ask-cfpb/what-is-a-payday-loan-en-1567/>.

²⁴ HANLEY, KELLOWAY & VAHEESAN, *supra* note 4, at 16.

²⁵ Mae Anderson, *Without 'Right to Repair,' Businesses Lose Time and Money*, ASSOC. PRESS (Aug. 10, 2021), <https://apnews.com/article/technology-business-9f84a8b72bb6dd408cb642414cd28f5d>.

²⁶ HANLEY, KELLOWAY & VAHEESAN, *supra* note 4, at 16.

²⁷ PERZANOWSKI, *supra* note 19, at 43.

²⁸ Jared Gilmour, *Americans Break Two Smartphone Screens Each Second, Costing \$3.4 Billion a Year, Report Says*, MIAMI HERALD (Nov. 21, 2018 5:51 PM), <https://www.miamiherald.com/news/nation-world/national/article222040170.html>.

²⁹ Nathan Proctor, *Right to Repair Off to the Races in 2021 with 14 Active States*, U.S. PIRG (Jan. 22, 2021), <https://pirg.org/articles/right-to-repair-off-to-the-races-in-2021-with-14-active-states/>.

III. Suppression of Valuable Entrepreneurial Opportunities

Maintenance and repair are promising business opportunities for millions of Americans. In many instances, they require modest upfront capital and technical know-how. Think of kiosks at the mall that repair smartphones. They can be a path to wealth and genuine independence.

These entrepreneurial opportunities appear especially important for people of color. Whether on account of racial discrimination or uncertain immigration statuses, many are shut out of the traditional labor market. As a result, opportunities to start shops to service electronics, appliances, and vehicles are especially valuable to Black and brown Americans.³⁰

Aftermarket monopolization closes off an important avenue for entrepreneurship. By withholding parts and tools and discouraging customers from patronizing unaffiliated service providers, manufacturers can eliminate or marginalize independent firms and deter new entrants in aftermarkets. The suppression of these entrepreneurial opportunities hurts all Americans, and the impacts may fall disproportionately on people of color.

IV. Environmental Degradation

More expensive parts and service can change the repair versus replacement calculation. Easy and affordable repairs promote the longevity of durable goods. Owners of cars, farm equipment, and smartphones are likely to keep them for a longer time if they can repair them and maintain their functionality at a reasonable expense. In contrast, costly or difficult repairs encourage customers to replace existing products more quickly. For instance, more expensive car repairs are more likely to mean a car is “totaled”—the cost of repair is greater than the vehicle’s value—in the event of a crash.³¹

By encouraging replacement over repair, manufacturers’ monopolization of aftermarkets contributes to environmental damage and resource depletion. Decreasing the average life cycle of a car by just a year can mean millions of more cars are sent to landfills and manufactured over a decade. That means more land devoted to storing waste, more energy and natural resources consumed, and more greenhouse gases emitted.

Electronic waste or e-waste is especially harmful. Millions of computers, phones, and televisions are sent to landfills in the United States and abroad every year, especially to countries in the Global South. This e-waste is a small fraction of all solid waste but is exceptionally damaging to the environment. These products contain toxic metals, such as lead and lithium.³² They can leach

³⁰ FTC, *supra* 9, at 3. *See also* GRAHAM WRIGHT ET AL., REDEFINING RISK: RACIAL DISPARITIES IN ENTREPRENEURSHIP AND FINANCIAL WELLBEING 1-2 (2019), <https://heller.brandeis.edu/iere/pdfs/racial-wealth-equity/racial-wealth-gap/redefining-risk-racial-disparities.pdf> (“There are over two and a half million Black owned businesses in the United States, a rate that increased by over one-third between 2007 and 2012. These businesses are primarily (more than 95 percent) sole ownerships with no paid employees. These businesses are largely concentrated in social assistance, health care, and *repair, maintenance*, personal and laundry services.”) (emphasis added).

³¹ PERZANOWSKI, *supra* note 19, at 22.

³² Amy Yee, *Electronic Marvels Turn into Dangerous Trash in East Africa*, N.Y. TIMES (May 12, 2019), <https://www.nytimes.com/2019/05/12/climate/electronic-marvels-turn-into-dangerous-trash-in-east-africa.html>.

into groundwater supplies and contaminate water used for drinking and agricultural purposes. When these electronics are incinerated, the toxins are released into the air and contribute to an assortment of serious ailments, including cancer.³³

V. Conclusion

The law structures business practices and competition.³⁴ It can encourage the marketing of high-quality goods and fair treatment of customers or encourage the opposite. In 1975, Congress passed the Magnuson-Moss Warranty Act, which generally prohibits manufacturers from conditioning the effectiveness of their product warranties on consumers' use of their parts and service.³⁵ The current FTC has made enforcing this law a priority and brought multiple actions against manufacturers that violated it.³⁶ Members of this Subcommittee should urge the FTC to press ahead with this enforcement effort and use its full suite of statutory authorities to protect the public's right to repair.³⁷

In addition to calling for more and broader FTC action, this Subcommittee and Congress can directly rein in aftermarket monopolization by original equipment manufacturers and restore and protect fair, open markets for parts and service for all durable goods. Congress should strengthen the Magnuson-Moss Warranty Act by empowering the FTC to seek monetary penalties, not just injunctions, against violators. But more action from Congress is necessary to protect the public's right to repair. Toward this end, the Fair Repair Act introduced by Chairman Morelle would be an important step forward in the fight for open aftermarkets. His bill would ensure the wide availability of parts on fair and reasonable terms and permit independent technicians and shops to flourish again. And without a captive customer base for parts and service and an easy source of revenues and profits, OEMs may have a stronger incentive to design, manufacture, and market high-quality appliances, electronics, equipment, and vehicles.

³³ Hannah Beech & Ryn Jirenuwat, *The Price of Recycling Old Laptops: Toxic Fumes in Thailand's Lungs*, N.Y. TIMES, Dec. 8, 2019, <https://www.nytimes.com/2019/12/08/world/asia/e-waste-thailand-southeast-asia.html>.

³⁴ Sandeep Vaheesan, *The Morality of Monopolization Law*, 63 WM. & MARY L. REV. 119 (2022).

³⁵ 15 U.S.C. § 2302(c).

³⁶ Lesley Fair, *FTC Announces Three Right-to-Repair cases: Do Your Warranties Comply with the Law?*, FED. TRADE COMM'N (July 7, 2022), <https://www.ftc.gov/business-guidance/blog/2022/07/ftc-announces-three-right-repair-cases-do-your-warranties-comply-law>.

³⁷ The FTC Act prohibits "unfair methods of competition" and "unfair or deceptive acts or practices." 15 U.S.C. § 45.