

Nixing the Fix: An FTC Report to Congress on Repair Restrictions



**FEDERAL TRADE
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EXECUTIVE SUMMARY

The Federal Trade Commission (“FTC” or “Commission”) submits this report pursuant to Congress’s directive for the Commission to report to the Committees on Appropriations of the House and Senate regarding anticompetitive practices related to repair markets.¹ When directing the Commission to issue this report, Congress noted that it “is aware of the FTC’s ongoing review of how manufacturers—in particular mobile phone and car manufacturers—may limit repairs by consumers and repair shops, and how those limitations may increase costs, limit choice, and impact consumers’ rights under the Magnuson-Moss Warranty Act.” Congress specifically directed the FTC to include recommendations on how to best address these problems.²

To fulfill this Congressional directive, the Commission has synthesized the knowledge gained from its July 16, 2019 workshop titled “Nixing the Fix: A Workshop on Repair Restrictions” (the “Workshop”), public comments, responses to a Request for Empirical Research and Data,³ and independent research. This report examines consumer protection and antitrust issues relating to repair restrictions, with particular emphasis on those imposed by mobile phone and car manufacturers.

Congressional interest in the competition and consumer protection aspects of repair restrictions is timely. Many consumer products have become harder to fix and maintain. Repairs today often require specialized tools, difficult-to-obtain parts, and access to proprietary diagnostic software. Consumers whose products break then have limited choices.

Furthermore, the burden of repair restrictions may fall more heavily on communities of color and lower-income communities.⁴ Many Black-owned small businesses are in the repair and maintenance industries,⁵ and difficulties facing small businesses can disproportionately affect small businesses owned by people of color.⁶ This fact has not been lost on supporters of

¹ House Report 116-456 published in the Congressional Record on Dec. 27, 2020 (at <https://www.congress.gov/116/crpt/hrpt456/CRPT-116hrpt456.pdf>) that accompanied H.R. 7668, Financial Services and General Government Appropriations Bill, 2021.

² *Id.*

³ The full docket of public comments and empirical research submissions is available at <https://www.regulations.gov/docket/FTC-2019-0013/document> and <https://www.regulations.gov/document/FTC-2019-0013-0001/comment>. Citations in this report to the public comments or empirical research submitted in connection with the Workshop provide the submitter’s name and whether the document was submitted as a comment or empirical research.

⁴ Commissioners Phillips and Wilson note that the claim suggested in this paragraph, *i.e.*, that the burden of repair restrictions at issue in this Report will fall more heavily on minority communities, is not supported by the evidence cited. That may very well be the case, as the Report’s caveats with words like “may” and “can” denote. But the claim is a conclusion drawn by authors of the Report from citations to evidence of other things.

⁵ See, e.g., *Interesting Facts & Statistics About Black-Owned Businesses*, <https://www.blackbusiness.com/p/facts-statistics-black-owned-businesses.html> (last visited Mar. 19, 2021) (stating that nearly 38 percent of Black-owned businesses are in health care, social assistance, repair and maintenance, and personal and laundry services).

⁶ The pandemic offers a troubling example: “Nationally representative data on small businesses indicate that the number of active business owners fell by 22 percent from February to April 2020 — the largest drop on record. While the overall decline is noteworthy, differences among closure rates across racial and ethnic groups are even more striking. Black businesses experienced the most acute decline, with a 41 percent drop. Latinx business owners

prior right to repair legislation, who have highlighted the impact repair restrictions have on repair shops that are independent and owned by entrepreneurs from underserved communities.⁷ Repair restrictions for some products—such as smartphones—also may place a greater financial burden on communities of color and lower-income Americans.⁸ According to Pew Research, Black and Hispanic Americans are about twice as likely as white Americans to have smartphones, but no broadband access at home.⁹ Similarly, lower-income Americans are more likely to be smartphone-dependent.¹⁰ This smartphone dependency makes repair restrictions on smartphones more likely to affect these communities adversely.

The pandemic has exacerbated the effects of repair restrictions on consumers. As noted by Pew Research, “The pandemic has made living without a computer harder than ever. Employees are working remotely, kids are going to school via laptop, and grandparents are visiting with their grandkids on screens. At the same time, the pandemic has made it harder to get broken devices fixed, as many big chain stores have ceased offering on-site repairs. As a result, people have been forced to send their devices to authorized repair facilities—often waiting weeks for them to be returned.”¹¹

The pandemic also has revealed a drastic shortage in the availability of new laptops for students. An Associated Press examination of the availability of school laptops found that the

fell by 32 percent and Asian business owners dropped by 26 percent. In contrast, the number of white business owners fell by 17 percent.” Claire Kramer Mills, Ph.D., and Jessica Battisto, *Double Jeopardy: COVID-19’s Concentrated Health and Wealth Effects in Black Communities*, Federal Reserve Bank of New York (Aug. 2020), https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2020/DoubleJeopardy_COVID19andBlackOwnedBusinesses; *See also* Lydia DePillis, *How the Pandemic Economy Could Wipe Out a Generation of Black-Owned Businesses*, *Pro Publica* (Mar. 4, 2021), <https://www.propublica.org/article/the-pandemics-existential-threat-to-black-owned-businesses> (stating that “[a]s of 2012 — the most recent data the Census Bureau has collected — average annual sales for a Black-owned business came to about \$58,000, compared to nearly 10 times that amount for the average white-owned enterprise” and arguing that “years of compounding disadvantage have been exacerbated by the pandemic”).

⁷ aftermarketNews Staff, *Reps. Towns and Sanchez Call Say Right to Repair Needed to Save Independent, Minority-Owned Repair Shops*, (Feb. 16, 2006), <https://www.aftermarketnews.com/reps-towns-and-sanchez-call-say-right-to-repair-needed-to-save-independent-minority-owned-repair-shops-jobs/>.

⁸ According to U.S. PIRG, “Repair could reduce household spending on electronics and appliances by 22 percent, which would save an average family approximately \$330 per year.” Alex DeBellis and Nathan Proctor, *Repair Saves Family Big*, U.S. PIRG, 4 (Jan. 2021), https://uspig.org/sites/pirg/files/reports/RepairSavesFamiliesBig/Repair-Saves-Families-Big_USP_Jan2021_FINAL1a.pdf; *see also infra* note 237.

⁹ Mobile Fact Sheet, Pew Research Center, (June 12, 2019) <https://www.pewresearch.org/internet/fact-sheet/mobile/#who-is-smartphone-dependent>.

¹⁰ According to Pew Research: “With fewer options for online access at their disposal, many lower-income Americans are relying more on smartphones. As of early 2019, 26% of adults living in households earning less than \$30,000 a year are ‘smartphone-dependent’ internet users—meaning they own a smartphone but do not have broadband internet at home. This represents a substantial increase from 12% in 2013. In contrast, only 5% of those living in households earning \$100,000 or more fall into this category in 2019.” Monica Anderson and Madhumitha Kumar, *Digital divide persists even as lower-income American make gains in tech adoption*, Pew Research Center, (May 7, 2019), <https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/>.

¹¹ Elaine S. Povich, *Pandemic Drives Phone, Computer ‘Right-to-Repair’ Bills*, (Mar. 11, 2021), <https://pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/03/11/pandemic-drives-phone-computer-right-to-repair-bills>.

increased demand for computers and supply chain challenges posed by the pandemic had resulted in laptop shortages in school districts around the country.¹² For instance, California has reported the need for 1 million laptops for students and Alabama was waiting on 33,000 student computers.¹³ Kinks in the semiconductor supply chain are now posing an additional threat to the supply of new laptops.¹⁴ Reducing barriers to repair may permit older laptops to be refurbished more easily, thereby expanding the supply of available laptops.

The Commission’s concern with repair restrictions¹⁵ dates back more than forty years, to when the Commission’s then-Chairman testified in favor of the anti-tying provision of the Magnuson-Moss Warranty Act (the “MMWA”).¹⁶ The anti-tying provision, Section 102(c) of the MMWA, prohibits a warrantor of a consumer product from conditioning its warranty on the consumer’s using any article or service which is identified by brand name unless the article or service is provided for free or the warrantor obtains a waiver from the Commission. This provision, for example, bars an automobile manufacturer from voiding a warranty if a consumer has scheduled maintenance performed by someone other than the dealer, prohibits a printer manufacturer from conditioning its warranty on the purchaser’s use of the manufacturer’s branded ink, and forbids a smartphone manufacturer from voiding a warranty when a consumer has a new battery installed at a kiosk at the mall. In short, the anti-tying provision bars manufacturers from using access to warranty coverage as a way of obstructing consumers’ ability to have their consumer products maintained or repaired using third-party replacement parts and independent repair shops.¹⁷ As discussed in Section I, below, the Commission has actively enforced the anti-tying provision of MMWA and will continue to address illegal practices in the marketplace.

In the 44 years since the enactment of the MMWA, technological developments have introduced new challenges that warrant a reconsideration of whether the anti-tying provision has

¹² Jocelyn Gecker and Michael Liedtke, *AP Exclusive: US Faces Back-To-School Laptop Shortage*, (Aug. 22, 2020), <https://apnews.com/article/01e9302796d749b6aac35ddc8f4c946>.

¹³ Mackenzie Hawkins, *California is short 1 million laptops and hot spots for kids as it prepares online school*, Sacramento Bee, (July 22, 2020) <https://www.sacbee.com/news/politics-government/capitol-alert/article244418057.html>.

¹⁴ Hyunjoo Jin, Douglas Busvine, and David Kirton, *Analysis: Global chip shortage threatens production of laptops, smartphones and more*, Reuters, (Dec. 17, 2020), <https://www.reuters.com/article/us-chip-shortage-analysis/analysis-global-chip-shortage-threatens-production-of-laptops-smartphones-and-more-idUSKBN28R0ZL>.

¹⁵ We use the term “repair restriction” to refer to any practice that has the effect of limiting consumers’ ability to repair products that they own. In using this term, we focus on the impact of practices that limit consumer choice regarding repairs rather than on the intent of manufacturers. Due to this focus, the report does not delve into the subject of “planned obsolescence”—the argument that manufacturers intentionally design products to fail in order to encourage future replacement purchases.

¹⁶ Then-Chairman Lewis Engman testified:

This provision addresses the anticompetitive practice which the Commission has opposed in numerous court actions wherein a manufacturer uses a warranty unreasonably to tie his supplementary products or services to the warranted product. This leaves the consumer in the undesirable posture of losing his warranty protection if he purchases the supplementary items from another and perhaps less expensive source—even if he does so in complete ignorance of the warranty’s provisions.

Statement of Hon. Lewis A. Engman, Chairman, Federal Trade Commission, included in H. Rep. No. 93-17, at 58 (1973).

¹⁷ Independent repair shops are also referred to as independent service organizations (“ISOs”).

kept pace with the evolving consumer goods repair market. Even when a warranty does not explicitly require that repairs be performed by the original equipment manufacturer (OEM) using OEM parts, many manufacturers restrict independent repair and repair by consumers through:

- Product designs that complicate or prevent repair;
- Unavailability of parts and repair information;
- Designs that make independent repairs less safe;
- Policies or statements that steer consumers to manufacturer repair networks;
- Application of patent rights and enforcement of trademarks;
- Disparagement of non-OEM parts and independent repair;
- Software locks and firmware updates; or
- End User License Agreements.

Manufacturers explain that these repair restrictions often arise from their desire to protect intellectual property rights and prevent injuries and other negative consequences resulting from improper repairs.

The report is divided into nine sections. The first describes Section 102(c) of the MMWA and the Commission's record of enforcing this provision. Section Two provides an analysis of the competition issues related to repair markets. Section Three describes staff's information gathering efforts, including a description of the Workshop and comments. Section Four catalogues the types of repair restrictions employed by manufacturers. Section Five describes the explanations manufacturers offer for repair restrictions. Section Six examines the arguments of repair advocates.

The final sections of this report propose ways to expand consumers' repair and maintenance options. Section Seven describes several approaches that could increase consumers' choice in repair markets. Section Eight focuses on challenging issues that would need to be considered by industry, regulators, and legislators that attempt to expand consumers' repair choices.

Finally, in Section Nine, we conclude by explaining that, based on the record before us, it is clear that repair restrictions have diluted the effectiveness of Section 102(c) and steered consumers into manufacturers' repair networks or to replace products before the end of their useful lives. Based on a review of comments submitted and materials presented during the Workshop, there is scant evidence to support manufacturers' justifications for repair restrictions.¹⁸ Moreover, the specific changes that repair advocates seek to address manufacturer repair restrictions (e.g., access to information, manuals, spare parts, and tools) are well supported by comments submitted for the record and testimony provided at the Workshop. While the car manufacturing industry has taken important steps to expand consumer choice, other industries that impose restrictions on repairs have not followed suit. The Commission will consider reinvigorated regulatory and law enforcement options, as well as consumer education. In addition to the FTC's pursuit of efforts under its authority, the Commission stands ready to work

¹⁸ Commissioner Wilson and Commissioner Phillips note that the report excludes from the scope of its coverage an analysis of manufacturers' intellectual property rights, which may provide legitimate justification for some repair restrictions.

with legislators, either at the state or federal level, to ensure that consumers and independent repair shops have appropriate access to replacement parts, instructions, and diagnostic software.