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“Fair Repair” Legislative Template

Fair Repair legislation is based on the Massachusetts Automotive Right to Repair Law passed in August of 2012 and the subsequent national agreements reached between Automotive (2014) and Truck (2015) manufacturers and their aftermarket counterparts.

Under MA statute H.4362 and subsequent voluntary agreements, automobile and truck manufacturers provide consumers and independent repair businesses the same diagnostics, tools, service documentation and firmware as to their authorized service providers.

Bills for Fair Repair are the logical extension of automotive right to repair treating other digitally enabled assets equally with those mounted on a chassis. Fair Repair includes an additional requirement for provision of spare parts, provided those parts are available to the manufacturer.

**Unfair and Deceptive Trade Practices**

Repair has always been legal under both Copyright and Patent law. The problem for states to address is one of unfair and deceptive contracts removing these rights – often without the consent of the buyer. It has been normal for consumers to be presented with an End User License Agreement (“EULA”) that must be accepted before the purchase can be used. The EULA is the contract that prevents consumers from repairing, customizing, enhancing or even reselling purchased equipment without the intrusion of the manufacturer.

EULAs are extremely difficult to negotiate even for major corporations that could be in an equal bargaining position. Consumers are helpless and need the support of the state to prevent abuse.

**Scope**

Fair Repair legislation applies widely because digital components are being included in a wide variety of products. Physical products are being sold, but with hidden terms that interfere with the basic concepts of ownership.

The principle behind Fair Repair is not technology – but fairness in contracts and honesty in marketing. Manufacturers remain in control of protecting their IP, Patents and Trade Secrets. They just cannot use deceptive contracts.

**Section 1 – Fair Repair Act**

***(Insert: Reference general business law statute and add new paragraph)***

**Section 2 - Definitions:** [in alphabetical order]

For purposes of the Fair Repair Act:

(1)” Authorized repair provider” means i) a person or business that has an arrangement for a definite or indefinite period with an original equipment manufacturer “OEM” in which the OEM grants to a person or business license to use a trade name, service mark, or related characteristic for the purposes of offering repair services under the name of the OEM or ii) a person or business retained by the OEM to provide refurbishing services for the OEM’s product of products.

(2) “Embedded software” means any programmable instructions provided on firmware delivered with the equipment for the purposes of equipment operation, including all relevant patches and fixes made by the original equipment manufacturer for this purpose, including, but not limited to synonyms ”Basic internal operating system”, “Internal operating system”,”Machine code”, ”Assembly code”,”Root code”, and ”Microcode”;

(3)”Equipment” means digital electronic equipment or a part for such equipment originally manufactured for distribution and sale in the United States;

(4) “Fair and reasonable terms” means an equitable price in light of relevant factors, including, but not limited to:

(a) The net cost to the authorized repair provider for similar information obtained from an OEM, less any discounts, rebates, or other incentive programs;

(b) The cost to the OEM for preparing and distributing the information, excluding any research and development costs incurred in designing and implementing, upgrading, or altering the product, but including amortized capital costs for the preparation and distribution of the information;

(c) The price charged by other OEMS for similar information;

(d) The price charged by OEMS for similar information prior to the launch of OEM web sites;

(e) The ability of aftermarket technicians or shops to afford the information;

(f) The means by which the information is distributed;

(g) The extent to which the information is used, which includes the number of users, and frequency, duration, and volume of use; and

(h) Inflation;

(5) “Firmware” means a software program or set of instructions programmed on a hardware device to allow the device to communicate with other computer hardware;

(6) “Independent repair provider” means a person or business operating in this state which is not affiliated with an OEM or an OEM’s authorized repair provider, which is engaged in the diagnosis, service, maintenance, or repair of equipment; provided, however that for the purposes of this section, an OEM shall be considered an independent repair provider for purposes of those instances when such OEM engages in the diagnosis, service, maintenance, or repair of equipment that is not affiliated with the original equipment manufacturer;

(7) “Medical Device” means and instrument, apparatus, implement, machine, contrivance, implant or other similar or related article, including a component part, or accessory, as defined in the Federal Food, Drug and Cosmetic Act, 21 USC, Secion 321 (H) as amended from time to time, which is intended for use in the diagnosis or disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals.

(8) “Motor vehicle” means any vehicle that is designed for transporting persons or property on a street or highway and is certified by the motor vehicle manufacturer under all applicable federal safety and emissions standards and requirements for distribution and sale in the United States. Motor vehicle does not include:

(a) A motorcycle;

(b) A recreational vehicle or manufactured home equipped for habitation;

(9) “Motor vehicle dealer” means any person or business who, in the ordinary course of business, is engaged in the business of selling or leasing new motor vehicles to a person or business pursuant to a franchise agreement, who has obtained a license under the Motor Vehicle Industry Regulation Act, and who is engaged in the diagnosis, service, maintenance, or repair of motor vehicles or motor vehicle engines pursuant to such franchise agreement;

(10-) “Motor vehicle manufacturer” means any person or business engaged in the business of manufacturing or assembling new motor vehicles;

(11) “Original equipment manufacturer” (“OEM”) means any person or business who, in the ordinary course of its business, is engaged in the business of selling or leasing new equipment to any person or business and is engaged in the diagnosis, service, maintenance, or repair of equipment;

(12) “Owner” means a person or business who owns or leases a digital electronic product purchased or used in this state;

(13) “Part” or “Service Part” means any replacement part, either new or used, made available by the original equipment manufacturer to the authorized repair provider for purposes of effecting repair; and

(14) “Remote Diagnostics” means any remote data transfer function between equipment and the provider of repair services including for the purposes of remote diagnostics, settings controls, or location identification;

 (15) “Service Parts” or “Parts” means any replacement parts, either new or used, made available by the OEM to the Authorized Repair Provider for the purposes of effecting repair.

**Section 3 - Requirements**

(1) For equipment and parts sold and used in this state, the OEMS of such equipment and parts shall:

(a) Make available to independent repair providers or owners of equipment manufactured by such OEM the same diagnostic and repair information, including repair technical updates, schematic diagrams, updates, corrections to embedded software and safety and security patches timely, and for no charge or for the same charge and in the same format such OEM makes available to its authorized repair provider and subcontract repair of refurbishment facilities ; and

b) Make available for purchase by the owner, his or her authorized agent, or independent repair provider, equipment or service parts, inclusive of any updates to the embedded software of the equipment or parts, upon fair and reasonable terms.

c) Nothing in this section shall require the original equipment manufacturer to sell equipment or service parts if the parts are no longer available to the OEM or the authorized repair provider of the OEM.

(2) Any OEM that sells any diagnostic, service, or repair documentation to any independent repair provider or to any owner in a format that is standardized with other OEMS, and on terms and conditions more favorable than the manner and the terms and conditions pursuant to which the authorized repair provider obtains the same diagnostic, service, or repair documentation, shall be prohibited from requiring any authorized repair provider to continue purchasing diagnostic, service, or repair documentation in a proprietary format, unless such proprietary format includes diagnostic, service, or repair documentation or functionality that is not available in such standardized format.

(3) Each OEM of equipment sold or used in this state shall make available for purchase by owners and independent repair providers all diagnostic repair tools incorporating the same diagnostic, repair, and remote communications capabilities that such OEM makes available to its own repair or engineering staff or any authorized repair provider.

Each OEM shall offer such tools for sale owners and independent repair providers upon fair and reasonable terms. Each OEM that provides diagnostic repair documentation to aftermarket tool, diagnostics, of third party service information publications and systems shall have fully satisfied its obligations under this section and thereafter not be responsible for the content and functionality of such aftermarket diagnostic tools, diagnostics, or service information systems.

(4)OEM equipment or parts sold or used in this state for the purpose of providing security-related functions may not exclude diagnostic, service, and repair information necessary to reset a security-related electronic function from information provided to owners and independent repair facilities. If excluded under this paragraph, the information necessary to reset an immobilizer system or security-related electronic module shall be obtained by owners and independent repair facilities through the appropriate secure data release systems.

**Section 4 – Limitations**

1. Notwithstanding any law, rule or regulation to the contrary, no provision in this section shall be read, interpreted, or construed to abrogate, interfere with, contradict, or alter the terms of any agreement executed and in force between an authorized repair provider and an original equipment manufacturer, including, but not limited to, the performance or provision of warranty or recall repair work by an authorized repair provider on behalf of an original equipment manufacturer pursuant to such authorized repair agreement, except that any provision in such an authorized repair agreement that purports to waive, avoid, restrict, or limit an original equipment manufacturer's compliance with this section shall be void and unenforceable.
2. Nothing in this section shall be construed to require OEMS or authorized repair providers to provide and owner or independent repair provider access to non-diagnostic and repair information by an OEM to an authorized repair provider pursuant to the terms of an authorizing agreement.

**Section 5 - Exclusions**

Nothing in this section shall apply to motor vehicle manufacturers, any product or service of a motor vehicle manufacturer, or motor vehicle dealers as defined in this section.

Nothing in this section shall require a manufacturer of a medical device as defined in this section to implement any provision of this section that is not permitted under the Federal Food, Drug, and Cosmetic Act or any other Federal law, rule, or regulation that supersedes this section.

**Section 6 - Enforcement**

A violation of the Fair Repair Act shall be a [***insert enforcement mechanism and statute]***

*(We recommend a $500 per incident fine and enforcement by the state attorney general with funds going to the treasury.)*

**Section 7 – Effective Date**

Beginning in calendar year two thousands twelve, and unless otherwise specified, the provision of this section shall apply to any equipment and parts sold or used in this state for not less than five years following the last date such equipment and parts were manufactured.

***(Insert the effective date of the legislation (example: 60 days following passage)***