

MOTOR VEHICLE OWNERS' RIGHT TO REPAIR ACT

LEGISLATION AIMED AT PRESERVING COMPETITION FOR
CONSUMERS IN THE VEHICLE REPAIR MARKET

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ISSUE

Today's vehicles are highly sophisticated machines with virtually every system controlled by computers. While the use of electronics and computers on late model vehicles has brought about major benefits in terms of safety, environment, comfort and convenience, it also threatens the competitiveness of the repair market for consumers. Car companies regularly withhold information, diagnostic tools, and software from independent repair shops making it impossible in many circumstances for these shops to complete repairs without sending the vehicle to the dealer. Should this trend continue, car owners will experience a significant increase in repair costs along with reduced reliability.

This scenario does not need to play out if Congress takes action to enact legislation that will ensure that independent shops have access to the same information, tools and software available to new car dealers. Such action is not without precedent. In 1990, Congress, as part of the 1990 Clean Air Act Amendments, passed similar legislation for emissions-related systems based on concerns that vehicle computers controlling emissions could reduce choices for consumers.¹

The following white paper will provide an overview of the repair market; a history of this issue; a review of the problems facing the industry; and how Right to Repair legislation could be implemented to solve this problem.

INDEPENDENT VEHICLE REPAIR INDUSTRY

The independent automotive aftermarket includes all companies that produce, distribute, retail and install parts that are independent of the new car manufacturer and its franchised dealers. The independent aftermarket is a large industry with nearly \$300 billion in sales, employing 4.5 million people in nearly every city and town in the United States. The industry contributes 2.2 percent to U.S. Gross Domestic Product.

There are approximately 200,000 independent repair shops (not including body shops) located in virtually every city and town in the United States. Nearly all of these shops are small and many are family owned. Independent repair shops provide a convenient alternative to the franchised new car dealer by offering motorists a competitive choice in vehicle repair. Most studies indicate that 75 percent of motorists chose to patronize independents once their new car warranty expires.² A study produced by *Consumer Reports* found that 71 percent of consumers that patronized independents were very satisfied with their experience, where as only 51 percent of car owners going to dealers were very satisfied. Cost also is a major factor leading consumers to chose independents over franchised dealers. A study performed for the Automotive Aftermarket Industry Association (AAIA) by Lang Research found that on average, vehicle repairs cost 34 percent more at new car dealerships than at independent repair shops.

¹ 48 U.S.C. 7401-7467-09

² 2009 *Aftermarket Factbook*; Automotive Aftermarket Industry Association

REAL WORLD REPAIR SHOP PROBLEMS

Independents are facing serious issues due to the highly-computerized nature of today's vehicles. While these problems are wide ranging, the following are three major issues now faced by independent repair shops in attempting to obtain the information and tools needed to work on today's and tomorrow's vehicles:

1. Codes needed to reinitialize vehicle computer systems are not made available;
2. Information provided to new dealers is more effective than what is provided to independents; and
3. The growing use of telematic systems by car companies that will permit critical marketing and repair information to flow wirelessly to the dealer, leaving the independents out of the loop.

1. ANTI-THEFT SYSTEMS

Vehicles today have anti-theft systems that require that a computer placed in the vehicle's engine system be able to communicate with the vehicle's ignition. While this system is intended to prevent vehicle theft, it also prevents many repair shops from completing vehicle repairs. Often, the computers installed on vehicles must be reinitialized following a repair in order for the car to be restarted. These codes are only available to the new car dealer and not the aftermarket, except in limited circumstances.

A memo issued by Mercedes USA in November 2008 demonstrates the problem faced by independents. In the memo, Mercedes announces that they are expanding the definition of "theft-related parts" beyond keys and locks to include "electronic control units, SRS components (airbags), body components and service documentation." By designating these items as theft-related, the memo states that "all delivery installation and coding must be done by an authorized Mercedes-Benz dealer without exception." By restricting access to these systems, Mercedes will prevent a large number of repairs from being performed at independents. While Mercedes is among the most restrictive, they are by no means the only car company that is withholding these codes.

The use of these anti-theft systems is a reflection of how control over access to a vehicle's computers is no longer with the vehicle owner, but with the company that produced the car. If a similar system were in place in the financial industry, the banks would determine whether a customer could access the money in his or her account by holding their PIN code as a secret. This might prevent theft, but it also would keep the customer from obtaining use of their money for their own purposes. Consumers should have control over access to their vehicles whether it is for entry or for purposes of repair.

2. DIFFERENCES IN DIAGNOSTIC INFORMATION

Car company Web sites, which contain diagnostic information for repair shops, often provides different levels of access based on whether a shop is a dealership or in some cases, a major purchaser of car company replacement parts. Those shops that do not fit into those two categories are often relegated to the most basic sites. While car companies claim that the dealer sites are the same, side by side views indicate that the dealer site has additional diagnostic information that is not available to the independent shops. In addition, dealerships often have access to information off of car company telephone hotlines. The hotlines permit the dealer technician to obtain the latest diagnostic information that the car company has developed based on their field experience. Independents will not see this kind of information for months or years.

The differences in information access provide dealers with an important competitive advantage since it can provide critical steps that could be taken to complete a repair on a timely basis. Sometimes information accessible through hotlines or Web sites can mean the difference for replacement parts operating correctly or not. The bottom line is that the additional access provided to dealers helps them reduce their costs and increase efficiency, providing them with an unfair competitive advantage.

3. TELEMATICS

Another important development in the repair industry is the development and installation of telematic systems on late-model vehicles. While the technology is still in development, these systems will permit vehicles to communicate directly with vehicle manufacturers and dealerships through the use of cell phone communications technology. Thus, diagnostic information can be sent directly to repair facilities from the vehicle on-board computers, permitting the dealer service bay to know what is likely to be wrong with the vehicle and to have the necessary parts, tools and software ready in anticipation of the vehicle coming into the dealership. Telematics also will permit the dealership to know the exact mileage of the vehicle, thus permitting the dealership to send messages to the car owner as to the need for regular maintenance. In addition, the vehicle system will connect the driver directly to a close-by dealer facility, while the car is on the road to set up an appointment.

No doubt the use of telematics will have consumer benefits. However, the independent service industry is concerned that motorists will have no choice as to where the information off their telematic systems is sent. Since car owners purchase the vehicle, they should be able to direct the information that comes off their diagnostic system to the shop that they choose and not the one selected by the vehicle manufacturer.

RIGHT TO REPAIR LEGISLATION

The solution to ensuring competition in the repair industry is to level the playing field as far as access to vehicle on-board computers. The core idea behind Right to Repair is that all repair shops, whether dealer or independent, have the same access to information, tools and software necessary to work on vehicles. The ultimate goal of the Right to Repair requirements is to ensure that motorists continue to be the driving force in deciding where their vehicle is repaired, and not the car company or its franchised dealership.

1. HISTORY

As stated at the outset, the Right to Repair concept is not without precedent in the U.S. This issue was first addressed by Congress 20 years ago when the House Energy and Commerce Committee approved amendments to Clean Air Act legislation that required all 1994 and later vehicles to be equipped with emission control computers that monitored and controlled nearly every emissions-related function. The committee was concerned that unless steps were taken to ensure competition, car companies would make access to these on-board diagnostic (OBD) systems proprietary, thus increasing the cost to car owners for maintaining their emissions systems. The act required all emissions-related information made available to franchised dealers by car companies, to also be available to all individuals engaged in the repair of vehicles. Similar service information availability rules were enacted in the state of California in 2000.³

As currently implemented, car companies are required by the U.S. Environmental Protection Agency (EPA) to make all emissions-related information available over Web sites that are accessible to the independent vehicle repair shops. Car companies are also required to make their emissions-related diagnostic tools available to the aftermarket. Further information must be provided to companies supplying diagnostic tools to the aftermarket so that their tools have the same repair capabilities as the tools available to the new car dealer.⁴

The emissions-related information and tools that are required to be made available under both Federal and California laws does not have to be free, but must be available at a fair, reasonable and non-discriminatory price. The rules promulgated by EPA provide certain guidelines that are to be used by regulators in determining whether the price charged by a car company is in compliance with EPA regulations.⁵

Manufacturers are able to protect proprietary information, however if the information is made available either directly or indirectly to the dealer than that information cannot be withheld.⁶

³ Cal Health and Safety Code, SEC. 43605.5

⁴ 40 C.F.R. SEC. 86.094-38 (2009)

⁵ 40 C.F.R. SEC. 86.094-38 (2009)

⁶ 40 C.F.R. SEC. 86.094-38 (2009)

While the promulgation of the service information regulations has led to a significant improvement in information and tool availability, vehicle technology has changed as well. Now, the computers required under the Clean Air Act monitor much more than emissions. These highly-sophisticated computers control virtually every vehicle system including brakes, air bags, suspension, climate control and entertainment. However, EPA service information rules do not extend beyond non-emissions-related systems.

It is for this reason that the Motor Vehicle Owners' Right to Repair Act was first introduced in 2001—to ensure that the actions undertaken to preserve competition for car owners on emissions-related repairs, also carry forward for non-emissions-related systems.

Right to Repair legislation also has been introduced in several states including Massachusetts and New Jersey, which currently have active efforts underway. The New Jersey Assembly passed its own Right to Repair by an overwhelming majority in October 2008. That bill is now pending in the New Jersey Senate.

Massachusetts passed a bill in 2008 out of the joint committee on consumer protection and professional licensure. The bill was placed on the House agenda, but failed to come up in the closing days of the state legislature. Right to Repair has been reintroduced in both the Massachusetts Senate and House in 2009.

2. IMPACT ON CAR COMPANY INTELLECTUAL PROPERTY

One of the major complaints raised by car companies regarding the Right to Repair issue is that it exposes their intellectual property. Specifically, the car companies charge that Right to Repair would make it easier for companies that build replacement parts to obtain the blue prints, schematics and parts specifications, and thus provide them with a competitive advantage. While these arguments resonate with many legislators, there is little basis for concern regarding car company trade secrets.

The Right to Repair legislation only applies to information necessary to repair a vehicle. The information needed to produce replacement parts is very different from the information used to repair a vehicle. Unlike a parts producer, repair technicians do not need to know the internal software codes or specifications of a part. They only need to know the information that comes off the diagnostic systems in order to understand where a failure has occurred and how to repair that malfunction. The bill ensures that the information that comes off the computer is owned by the car owner, while the internal codes used to develop the software is owned by the vehicle manufacturer.

Further, Right to Repair legislation permits car companies to withhold any information that is a trade secret and is not made available to the new car dealer for purposes of repairs. Therefore, any information that is not necessary for repairs and is not provided to the franchised dealer would not need to be made available.

The intellectual property arguments raised by the car companies are a red herring and are meant to distract legislators from the fact that the manufacturers do not want to ensure that independent shops have access to the information and tools needed to compete with their dealership parts and service departments. The car companies have yet to produce a single shred of evidence that would back up their assertion that this legislation will make it any easier to design and produce replacement parts.

An important point to remember is that the trade secret protections in Right to Repair are similar to those provided in the service information regulations promulgated by EPA. However, there has never been an intellectual property dispute between the aftermarket and car companies over implementation of these regulations.

3. NON-LEGISLATIVE RESOLUTION OF RIGHT TO REPAIR

The car companies have attempted to derail Right to Repair efforts in Congress by pointing to the work of the National Automotive Service Task Force (NASTF). NASTF was established in 2000 to resolve service information issues raised by the independent service industry. In reality, NASTF has acted as a clearinghouse by taking specific information complaints brought by independent vehicle repair shops and funneling them to the appropriate vehicle manufacturer. Unfortunately, this effort has fallen far short of what is needed and has not been used to any great extent by the independent service industry for the following reasons:

- In many cases, information resolution by NASTF can take weeks and even months. An independent repair shop with a car in a service bay needs that information the same day that the vehicle is in the shop or will lose that customer to the dealer competition.
- While NASTF is a noble effort for the service industry and the car companies to cooperatively resolve information issues, car companies are not subject to any fines for failure to make information or tools available.
- NASTF has no anti-trust exemption and therefore cannot address issues where car companies are charging too much for needed information or tools. This is a major problem for independent shops that could be unfairly priced out of the market for many types of tools and information.

- A cooperative approach works only if both sides have something to gain and there is third-party enforcement. However, many manufacturers and their franchised dealer networks feel that they have much to gain from retaining control of the parts and service market. According to the National Automobile Dealers Association (NADA), even though dealership parts and service department sales comprise just 11.8 percent of typical dealer's total sales, it contributes 48 percent of the total operating profit. New car sales make up 60 percent of total sales, but only contribute 35 percent of total profit. The dramatic drop in new car sales over the past several months has only placed more pressure on dealerships to make up the difference through their repair shop business. History has shown that the marketing and competitive interests of the manufacturers will override their current promise to make all information available once the legislation has disappeared from their radar screen.
- The truth is that NASTF will become a much more effective organization if Right to Repair legislation is enacted. Once car companies know that they could be subject to federal and state action if they do not fully comply with information requests, the incentive for cooperation will be much greater.
- The aftermarket entered into the negotiations with the vehicle manufacturers back in 2005 under the auspices of the Better Business Bureau in an attempt to improve the effectiveness of NASTF. However, after weeks of difficult negotiations, the talks fell apart when manufacturers were unwilling to provide NASTF with a balanced governing board and sufficient enforcement powers should the car companies fail to make the needed information available.

4. ROLE OF FEDERAL TRADE COMMISSION

The Federal Trade Commission (FTC) based on its consumer protection charter was tailor made to oversee the implementation of Right to Repair legislation. Fortunately, due to the work by EPA relative to emissions-related information, much of the infrastructure for ensuring that service information and tools are available to independents already exists. It is assumed that FTC will be able to enact regulations that would require the car companies to make their information available over the same Web sites that are required by EPA for emissions-related information. Further, the industry agreements that relate to the sharing of tool information between car companies and the tool manufacturers would simply be extended to non-emissions-related tool information.

In addition, while NASTF has not been an effective organization, with the passage of strong legislation, NASTF or an entity like it could be utilized to oversee the day-to-day activities related to availability of repair information. This would mean that the FTC would assume the role of oversight and mediation when disputes arise that cannot be settled by the industry organization put in place by the legislation. Based on its work with other industry organizations such as the National Advertising Board, FTC should be well positioned to ensure effective implementation of Right to Repair legislation with a minimum of federal intrusion in the market.

5. IMPACT ON CONSUMERS OF DEALERSHIP CLOSINGS

The recent decline in dealer franchises further adds to the importance of independents to consumers. Currently, there are about 21,000 dealer franchises in the U.S. However, a 2008 report by Grant Thornton predicts that the number of dealerships could decline by 12 percent in 2009. The decline in dealers is due mostly to the current steep decline in new car sales. The result of this decline is that motorists wishing to use dealers will drive further, wait longer for appointments and pay more for repairs.

Clearly, the decline in numbers of dealerships and the sizable differential in prices charged by dealers over independents should lead many car owners to patronize independent repair shops. However, independent shops attempting to compete with dealers will find that despite the fact that independent repair facilities provide better service, prices and convenience, they will not be able to complete many repairs and will lose the competitive battle to the dealer based solely on the fact that the new car dealer has the inside track on gaining the information and technology needed to work on today's and tomorrow's vehicles.

6. INTERNATIONAL DEVELOPMENTS

Like the auto industry, Right to Repair has a global aspect. The battle for Right to Repair legislation is also moving forward simultaneously in Europe and Canada.

- Canada is particularly interesting since the vehicles sold there are similar to vehicles sold in the United States. However, unlike the Clean Air Act here, which contained service information availability provisions, Canada never enacted any such protections for the aftermarket. Hence, many of the car company Web sites that were created in the U.S. by virtue of the EPA regulations, are not accessible to service facilities in Canada because there are no laws requiring that they be provided. The independent service industry in Canada is currently attempting to obtain enactment of Right to Repair legislation, but is also being strongly opposed by the new car dealers and vehicle manufacturers.

- The European Union (EU) has requirements as part of the Block Exemption that mandates information be made available to the independent aftermarket. In fact, the EU two years ago required four car companies to sign agreements to make information and tools available following an investigation that concluded that they were withholding information from the independent repair shops. However, the Block Exemption expires this year. While there is new legislation that will ensure for 2011 model years and beyond information will be made available, requirements for information for pre-2010 vehicles will no longer exist. Aftermarket groups in the EU are fighting to ensure that car companies will be required to make information available for vehicles that are currently on the road, as well as those that will be introduced in the future.

CONCLUSION

The motoring public in the United States has been fortunate to have access to the most competitive and effective vehicle repair market in the world. This competition has meant lower prices, increased convenience and strong service for car owners. It has helped make car ownership more affordable to all Americans. However, technology threatens this free market and could mean fewer repair choices rather than more in the repair market. By requiring equal access to the information and tools needed to work on new technology vehicles, Congress can ensure that consumers can reap the benefits of these advances, while not giving up access to a competitive repair market.