

HOUSE BILL REPORT

E2SHB 1392

As Passed House:

March 4, 2023

Title: An act relating to promoting the fair servicing and repair of digital electronic equipment in a safe, secure, reliable, and sustainable manner to increase access to appropriate and affordable digital electronic equipment, support small businesses and jobs, and enhance digital connectivity in Washington state.

Brief Description: Promoting the fair servicing and repair of digital electronic equipment.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Gregerson, Kretz, Ryu, Dent, Berry, Fitzgibbon, Reed, Ramel, Pollet and Macri).

Brief History:

Committee Activity:

Consumer Protection & Business: 2/1/23, 2/8/23 [DPS];

Appropriations: 2/20/23, 2/23/23 [DP2S(w/o sub CPB)].

Floor Activity:

Passed House: 3/4/23, 58-38.

Brief Summary of Engrossed Second Substitute Bill

- Requires manufacturers of digital electronic equipment to make available to independent repair providers (IRPs) certain parts, tools, and documentation on fair and reasonable terms for the diagnosis, maintenance, and repair of digital electronic equipment.
- Contains certain exceptions for when parts, tools, and documentation do not have to be made available to IRPs.
- Makes a violation of the Fair Repair Act a violation of the Consumer Protection Act and enforceable only by the Attorney General.

HOUSE COMMITTEE ON CONSUMER PROTECTION & BUSINESS

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Walen, Chair; Reeves, Vice Chair; Chapman, Donaghy, Hackney, Ryu and Santos.

Minority Report: Do not pass. Signed by 3 members: Representatives Corry, Ranking Minority Member; Connors and Volz.

Minority Report: Without recommendation. Signed by 3 members: Representatives McClintock, Assistant Ranking Minority Member; Cheney and Sandlin.

Staff: Megan Mulvihill (786-7304).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Consumer Protection & Business. Signed by 18 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Berg, Chopp, Davis, Fitzgibbon, Lekanoff, Pollet, Riccelli, Ryu, Senn, Simmons, Slatter, Springer, Stonier and Tharinger.

Minority Report: Do not pass. Signed by 7 members: Representatives Stokesbary, Ranking Minority Member; Corry, Assistant Ranking Minority Member; Chandler, Connors, Couture, Sandlin and Steele.

Minority Report: Without recommendation. Signed by 5 members: Representatives Chambers, Assistant Ranking Minority Member; Dye, Harris, Rude and Schmick.

Staff: Jessica Van Horne (786-7288).

Background:

Modern digital electronic equipment often has technology, such as microprocessors, that has become harder for consumers to fix and maintain because of specialized tools, difficult-to-obtain parts, and access to proprietary diagnostic software. Manufacturers generally have control over repairs by restricting access to information, components, and tools necessary to diagnose, service, and repair their products, such as with application of patent rights, enforcement of trademarks, software locks, firmware updates, and end user license agreements. Consumers can attempt to repair their own digital electronic products, or use the services of an authorized repair provider or independent repair provider. Authorized repair providers are merchants that have an arrangement with a manufacturer to service their products. Independent repair providers provide similar services, but are not affiliated with a manufacturer.

The Magnuson-Moss Warranty Act (Act) is enforced by the Federal Trade Commission (Commission) and was passed in 1975 to clarify how written warranties may be used when

marketing products to consumers. The Act has an anti-tying provision which prohibits manufacturers from using access to warranty coverage as a way of obstructing consumers' ability to have their products maintained or repaired using third-party replacement parts and independent repair shops. Manufacturers may seek a waiver from the Commission from the prohibition if: (1) the warrantor satisfies with the Commission that the manufacturer's parts or services are necessary for the product to function; and (2) the waiver is in the public interest.

Summary of Engrossed Second Substitute Bill:

Fair Repair Act.

Definitions.

"Digital electronic equipment" includes desktop computers, laptop computers, tablet computers, cell phones, or smart phones containing a microprocessor and originally manufactured for distribution and sale in the United States for general consumer purchase.

"Original Manufacturer" (manufacturer) means an individual or business that, in the normal course of business, is engaged in the business of selling or leasing digital electronic equipment manufactured by or on behalf of itself.

"Authorized Repair Provider" (ARP) is an individual or business that:

- is unaffiliated with a manufacturer and has an arrangement with the manufacturer to use the manufacturer's trade name, service mark, or other proprietary identifier for the purpose of offering the services of diagnosis, maintenance, or repair of digital electronic equipment under the manufacturer's name; or
- has an arrangement with the manufacturer under which the individual or business offers the services of diagnosis, maintenance, or repair of digital electronic equipment on behalf of the manufacturer.

"Independent Repair Provider" (IRP) means an individual or business that obtains and maintains a repair certification and engages in the services of diagnosis, maintenance, or repair of digital electronic equipment in Washington without an arrangement with the manufacturer or an affiliation with an ARP. An IRP also means a manufacturer or the manufacturer's ARP that obtains and maintains a repair certification and engages in the services of diagnosis, maintenance, or repair of digital electronic equipment that is not manufactured by or on behalf of, sold by, or supplied by such manufacturer.

"Fair and reasonable terms" means making parts, tools, and documentation used in effecting the services of diagnosis, maintenance, or repair of digital electronic equipment as follows:

- Parts for equipment must be made available by the manufacturer to the IRP at reasonable costs and terms, and which: (1) are not conditioned on or imposing a substantial obligation or restriction that is not reasonably necessary for enabling the IRP to engage in the diagnosis, maintenance, or repair of digital electronic equipment made by or on behalf of the manufacturer; and (2) are not conditioned on an ARP

arrangement.

- Tools for equipment must be made available by the manufacturer or an authorized third-party provider: (1) without requiring authorization for use or operation of the tools; (2) without imposing impediments to access or use of the tool to diagnose, maintain, or repair and enable full functionality of digital electronic equipment; (3) in a manner that does not impair the efficient and cost-effective performance of any such diagnosis, maintenance, or repair; and (4) at no charge, except for the reasonable, actual costs of preparing and sending tools that are requested in physical form.
- Documentation for such equipment must be made available by the manufacturer or an authorized third-party provider at no charge, except for the reasonable, actual costs of preparing and sending documentation that is requested in printed form.
- Parts, tools, and documentation for equipment that are made available to an ARP must further be made available by an ARP to any IRP, provided that such ARP is contractually and practically permitted by the manufacturer to sell such parts, tools, and documentation to any IRP, and the manufacturer must not: (1) retaliate against or hinder the ability of any ARP to sell such parts, tools, or documentation through any means, including advertising restrictions or product allocation limitations unrelated to legitimate product shortages; or (2) condition or impose a substantial obligation or restriction that is not reasonably necessary for enabling the IRP to engage in the diagnosis, maintenance, or repair of digital electronic equipment made by or on behalf of the manufacturer.

The following terms are also defined: diagnosis, documentation, maintenance, modifications, owner, part, repair, repair certification, tool, and trade secret.

Requirements.

Beginning January 1, 2024, a manufacturer of digital electronic equipment and parts that are manufactured for the first time and first sold or leased in Washington on or after July 1, 2023, must make available to IRPs, on fair and reasonable terms, any parts, tools, and documentation required for the diagnosis, maintenance, or repair of such equipment and its parts. The parts, tools, and documentation may be made available either directly from the manufacturer, an ARP, or an authorized third-party provider. The manufacturer may offer parts, such as integrated batteries, to IRPs preassembled with other parts rather than as individual components, provided that the preassembled parts are functionally equivalent to corresponding parts provided to ARPs.

Security-Related Functions.

For equipment with a security lock or security-related function, the manufacturer must make available any special parts, tools, and documentation needed to access and reset the lock or function when disabled during diagnosis, maintenance, or repair. Manufacturer equipment or parts sold or used for the purpose of providing security-related functions may not exclude diagnostic, maintenance, and repair information necessary to reset a security-related electronic function from the information that is provided to IRPs. If excluded from

this requirement, the information necessary to reset an immobilizer system or security-related electronic module may be obtained by IRPs through the appropriate secure data release systems.

Standardized and Proprietary Formats.

When a manufacturer sells any parts, tools, or documentation to any IRP in a standardized format and on more favorable terms than which the ARP obtained the same diagnostic, maintenance, or repair documentation, the manufacturer is prohibited from requiring ARPs to continue purchasing documentation in a proprietary format, unless the proprietary format includes documentation or functionality that is not available in a standardized format.

Not Liable for Repairs or Functionality.

Manufacturers and ARPs are not liable for services performed by IRPs, and manufacturers do not warrant services provided by IRPs. In addition, while manufacturers must offer tools upon fair and reasonable terms, the manufacturer is not responsible for the content and functionality of such tools.

Customer Education and Notice.

Before repairing digital electronic equipment, ARPs and IRPs must provide to a customer, publish on their website, or post at their business a written notice which:

- outlines the steps taken by the repair provider to ensure the privacy and security of the device;
- provides recommended steps for the customer to take to safeguard device data, including backing up data, sharing only those passwords necessary for repairs, and logging out of applications or websites that contain sensitive data or pose a security risk; and
- includes a statement about the customer's legal right to privacy, which is protected under the constitution and Washington law, including that violations may be referred to law enforcement and violators may be liable for damages.

Enforcement.

Violations of the Fair Repair Act are deemed to affect public interest and constitute an unfair or deceptive act in trade or commerce for purposes of the Consumer Protection Act. Violations are only enforceable by the Attorney General.

Fair Repair Act Exceptions.

- A manufacturer is not required to sell parts if the parts are no longer available to the ARP of the manufacturer.
- A manufacturer is not required to divulge trade secrets or license intellectual property, except as necessary to provide parts, tools, and documentation on fair and reasonable terms.
- The Fair Repair Act is not intended to alter an agreement between a manufacturer and an ARP.
- A manufacturer or an ARP are not required to provide an IRP access to information,

other than documentation, that is provided by the manufacturer to the ARP pursuant to their agreement.

- A manufacturer does not need to make parts, tools, and documentation available for the purpose of making modifications to digital electronic equipment.
- The following entities or equipment are excluded from the Fair Repair Act:
 - manufacturers and distributors of medical devices or digital electronic products or embedded software manufactured for use in a medical setting;
 - vehicle manufacturers, manufacturers of motor vehicle equipment, motor vehicle dealers acting in that capacity, or any product or service of such an entity;
 - manufacturers, distributors, importers, or dealers of any power generation or storage equipment, or equipment for fueling or charging motor vehicles; and
 - public safety communications equipment which is intended for emergency response or prevention purposes by an emergency service organization.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed. However, the bill is null and void unless funded in the budget.

Staff Summary of Public Testimony (Consumer Protection & Business):

(In support) This is a well negotiated proposal that has been taken very seriously and reviewed by multiple stakeholders over multiple years. Competition and choice are important for the consumer, and the state needs to preserve competition. The current landscape has monopolistic practices. Many repairs require special tools or diagnostic equipment, and this is happening with all sorts of items, including vehicles, tractors, smart phones, computers, and dishwashers. In small rural communities, there may be limited repair options in town. This proposal allows small electronic repair businesses to operate fairly by giving them access, at fair market rates, to the tools, parts, and instructions needed. These IRPs are capable and well regarded. A training certification from Apple can cost \$5,000, and an individual needs this to repair a shattered screen or bent port.

There is a massive waste problem, and the majority of this waste comes from small devices, like cell phones. Society used to fix everything, and it has only been in the last decade or so that the most profitable companies have taken this away. Now Americans have a throw away culture. Rather than buying something new, people could repair or refurbish devices. Refurbished devices could be donated to help others rather than being thrown away. The global e-waste calculator estimates 50 million metric tons of electronic waste globally. Society is on an upward trend of using more and more digital devices, so consumers need more options to help limit waste. The Washington E-Cycle program only covers certain devices, and cell phones are not included. This proposal ensures consumers can extend the

life of their electronics and keep them in circulation longer.

It is easy to use jargon to confuse and exhaust people to get them to give in. The lack of parts, the design, and the use of glue can all inhibit repair. It is technologically trivial to lock up a device so only the manufacturer can repair it. Intellectual property is one of the tools that manufacturers leverage when they want to restrict repair. This is a weak argument and usually based on misrepresentations of the law. It is invoked to persuade lawmakers that the right to repair will run into an intellectual property roadblock. All forms of intellectual property are subject to exhaustion. Owning a patented device carries with it the right to use it as the owner sees fit. This goes for copyright law as well. When consumers go to repair shops to have their devices fixed, they are in crisis mode. These individuals cannot wait for days or weeks to mail their device in to the manufacturer to have it fixed. They need IRPs who can fix it in a couple of hours. If a consumer does not have the right to repair their device, they should be told that when they buy it. Adding a computer to a consumer device does not make it magical. It is just a machine.

A woman might be more harassed at a mechanic, but that does not mean she should lose her right to use a mechanic to repair a device. Privacy concerns do not exist solely with IRPs. Apple settled a lawsuit when one of their ARPs leaked photos of a female consumer. With the proper documentation and parts, people who have privacy concerns can do the repairs themselves. This legislation creates a level playing field for all, and there is consumer support for it. A survey conducted found only 18 percent of people were opposed to this type of legislation.

Access to digital electronic products is increasingly necessary to succeed. The ability to complete school is dependent on having access to a computer or phone as all work is done online, especially since the pandemic. Student budgets rarely have space to repair or replace a device. The right to repair can help close the technology gap.

(Opposition) There are safety and privacy risks associated with repairing some of these devices. Manufacturers have relationships with ARPs, which have the appropriate training, to ensure that repairs are done properly and safely. There are walk-in options, mail-in options, and insurance options. Consumers can use IRPs today; however, the manufacturer cannot guarantee the work. There is sensitive data on a computer or phone. There are privacy and cybersecurity concerns when seeking repairs, especially for women. Personal data can be accessed, copied, and put on the personal devices of the technicians. In addition, some types of repairs are dangerous, like when replacing high energy lithium ion batteries. Consumers need reasonable assurance about the people who are repairing their devices.

This proposal would sever the accountability link by requiring manufacturers to provide information to IRPs. The market for IRPs is expanding without legislation, so this is not necessary. The market is taking care of itself. This proposal should be done by a national memorandum of understanding so there are not laws on a state-by-state basis. New York

state adopted legislation, and Washington should use something that is more like New York. The substitute bill was only negotiated with one company.

E-waste in Washington is already recycled through the program adopted a decade ago that resulted in 25 million pounds in reduction. The national e-waste data does not apply to Washington.

(Other) There are concerns regarding the definition of digital electronic equipment. A clarifying amendment to exclude digital electronic equipment in vehicle charging stations would be appreciated. New York's right to repair law had similar language.

Staff Summary of Public Testimony (Appropriations):

(In support) Washington residents, consumers, and governments spend lots of money on digital devices. Many products do not last, and repairs are difficult to obtain. There are negative economic and environmental impacts from devices breaking. Making it easier to repair, rather than replace devices, will save the public, and potentially the state, money. This bill will support small businesses and independent repair shops. Current practice is monopolistic. Repair shops do not become certified or authorized unless they pay the manufacturers a significant amount of money. Manufacturer-run programs are not profitable for independent shops. Small businesses want to be able to pay fair market prices to purchase tools, instructions, and other materials to safely and responsibly repair digital devices. Legislation is necessary because there are so many manufacturers of devices. A bill will ensure clear ground rules. The main fiscal impact is for the Attorney General's Office to ensure compliance.

(Opposed) Manufacturers offer safe and secure repair options through existing authorized networks. Most consumer technology products are complex, and require training and sophisticated instruments to repair properly. Manufacturers want to ensure that professionals are servicing devices. Authorized programs also allow for accountability. Many digital devices contain sensitive personal data. There is a risk of privacy violations by technicians. This bill would remove current accountability tools. Consumers currently have options. Nothing is preventing consumers from taking their devices to third party repair shops, doing self-service repairs, or utilizing mail-in and walk-in services currently offered.

(Other) Motor vehicles are not the focus of the bill, but could be impacted by the bill, especially for things like touch screens in vehicles and electric vehicle chargers. The industry would appreciate an exemption to exclude motor vehicles and related devices from the scope of the bill.

Persons Testifying (Consumer Protection & Business): (In support) Representative Mia Gregerson, prime sponsor; Travis Dutton, Washington State Association of Counties and Washington Association of County Solid Waste Managers; Andrew Villeneuve, Northwest

Progressive Institute; Patricia Boiko; Representative Joel Kretz; Nathan Proctor, PIRG; Mitch Kramer, FixCO; Heather Trim, Zero Waste Washington; Noquisi Christian-Smith; McKenna Morigan, Seattle Public Utilities; Aaron Perzanowski; Patrick Connor, National Federation of Independent Business; Tarah Wheeler, Red Queen Dynamics; and Kyle Wiens, iFixIt.

(Opposed) Melissa Gombosky, CTIA; Dustin Brighton, Repair Done Right; Charlie Brown, Consumer Electronics Association; and Ashley Sutton, TechNet.

(Other) Devin Gombosky, Tesla Motors.

Persons Testifying (Appropriations): (In support) Representative Mia Gregerson, prime sponsor; Patrick Connor, National Federation of Independent Business; Nathan Proctor, Public Interest Research Group; and Mitch Kramer, FiXCO.

(Opposed) Dustin Beighton, Repair Done Right Coalition; Ashley Sutton, TechNet; and Melissa Gombosky, CTIA.

(Other) Devin Gombosky, Tesla Motors.

Persons Signed In To Testify But Not Testifying (Consumer Protection & Business):
None.

Persons Signed In To Testify But Not Testifying (Appropriations): None.