

**THE MOTOR VEHICLE OWNER'S RIGHT
TO REPAIR ACT OF 2003**

July 15, 2003

The proposed bill, to be known as “The Motor Vehicle Owner’s Right to Repair Act of 2003,” protects the rights of American consumers to diagnose, service, repair and choose the replacement parts for their own motor vehicles. This legislation is a response to current automotive technology which is effectively “locking out” car owners from repairing and maintaining their own vehicles as well as from choosing their own automotive technician or the parts to make such repairs. This technology involves the use of “on-board diagnostic” (“OBD”) computers and memory systems which monitor and control all the parts and systems in a motor vehicle, including the emissions, transmission, brakes, electronic and mechanical, heating and air-conditioning, sound and steering systems. The proposed bill would require that automobile manufacturers disclose to consumers all information necessary to diagnose, and properly service, repair and choose the parts for their motor vehicles.

This would assure new car owners that the well-established right to repair their own vehicles, or have them repaired by a technician of their choice, would be respected in the context of modern automobile technology. This memorandum will provide: (1) a brief background to the bill, (2) a brief summary of the main provisions in the bill and (3) an analysis of the legal implications of the bill.

I. BACKGROUND OF THE BILL

In 1981, vehicle manufacturers began equipping their newer modeled vehicles with computers that are designed to monitor many of the vehicle’s engine systems to

assure that certain air emission standards are met.¹ By use of these computers (onboard devices or OBDs), when the monitoring system detects a problem in one of the engine's systems, a warning light is illuminated on the dashboard of the vehicle, called a malfunction indicator light ("MIL"), to alert the driver of the malfunction. The computer then stores a "fault code" to be used by automotive technicians to aid in diagnosing and repairing the malfunction. In 1994, the California Air Resources Board ("CARB") issued state regulations, known as OBD II, which require car manufacturers to install anti-tampering devices to prevent access to the OBD codes and electronic information other than that authorized by the manufacturer.

Shortly thereafter, vehicle manufacturers began designing their newer vehicle models to meet California's regulations. Thus, for these newer vehicle models, once the OBD computer detects a problem in a vehicle's engine system and a MIL becomes illuminated, the vehicle owner is "locked out" of ensuring a certain part is safely repaired or replaced without access to the proper computer code. Currently, vehicle manufacturers release this vital information to their dealerships, but refuse to fully disclose the same information to the consumer, especially information regarding replacement parts. As a result, manufacturer-authorized dealerships now have a lock-hold on automobile diagnosis, service and repairs.

¹ In 1990, the Clean Air Act ("CAA") was amended to require that OBD computers be installed in all "light duty" vehicles and trucks. These amendments also provided that the "automotive service industry" would have unrestricted access to OBD information and that such access would not require the use of manufacturer-specific tools or codes. *See* 42 U.S.C. § 7521(m)(5); *see also* 40 C.F.R. § 86.094-38(g). These amendments to CAA and their corresponding regulations, however, pertain only to the "automotive service industry" and do not affect the rights of the consumer, which are the subject of the present bill. Furthermore, the present bill is not intended, in any way, to affect the provisions of these amendments. Thus, this memorandum will not address the CAA amendments (or regulations). It should also be noted that section 107 of the present bill contains a savings clause: "Nothing in this Act shall be construed to interfere with the authority to grant to the U.S. Environmental Protection Agency under the Clean Air Act, §§ 7401-7671q (1997), or to affect in any way on board devices for air pollution control."

The big loser in this situation is the automobile owner, the consumer, who has lost the right to choose who is going to service and repair his or her car as well as what replacement parts may be used in that repair. The modern use of computers in cars is rendering obsolete the idea that car owners can take a vehicle down to a local gas station or convenient automobile shop for service and repair or work on the car themselves in their own garages. Later model vehicles can only be serviced and repaired at dealerships, which makes shopping for the best prices and most convenient service locations impossible. Needless to say, many consumers may put off making critical safety repairs because it is expensive and inconvenient to take the car in for service to the dealership.

II. PROVISIONS OF THE BILL

The stated purposes of the proposed bill are to:

- Ensure the safety and well-being of all owners of a motor vehicle by requiring disclosure of all information necessary for the diagnosis, service, repair and choice of replacement parts for a vehicle in a timely, affordable and reliable manner;
- Encourage competition in the diagnosis, service, repair and replacement of parts of motor vehicles; and,
- Require the Federal Trade Commission to promulgate and enforce rules necessary to ensure the right of a motor vehicle owner to obtain all information required for the diagnosis, service, and repair of the motor vehicle:

The main provisions of the bill include: (1) a requirement of disclosure, (2) a grant of enforcement authority to the Federal Trade Commission and (3) a grant of a private cause of action to motor vehicle owners. Under the disclosure requirement, section 104 of the bill, the manufacturer of any motor vehicle sold in the United States

shall disclose to the owner of any such motor vehicle any information necessary to diagnosis, service, and repair of any such motor vehicle.” Any failure to make such a disclosure will be considered an “unfair method of competition and unfair or deceptive acts or practices in commerce.”

Section 105 of the bill grants to the Federal Trade Commission “procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements of this Act, to further define terms used in this Act, and to require the filing of reports, the production of documents, and the appearance of witnesses.” The bill also sets forth that the FIC will promulgate rules in accordance with this proposed bill within six months of its enactment.

Finally, the bill provides, in section 106, a private cause of action for any “aggrieved person . . . to enforce the terms of the Act in any United States District Court where the owner of the motor vehicle resides.”

III. BECAUSE THE PURCHASER OF A MOTOR VEHICLE ACQUIRES THE RIGHT TO REPAIR IT, THIS BILL DOES NOT TAKE THE INTELLECTUAL PROPERTY RIGHTS OF AUTOMOBILE MANUFACTURERS.

Some may argue that requiring automobile manufacturers to disclose to automobile purchasers information about the computerized systems will result in the taking of the manufacturers’ intellectual property rights. In point of fact, however, when a consumer purchases a new car, the consumer also purchases the intellectual property rights required to maintain the car by making repairs and replacing worn-out or broken parts as necessary to keep the car operational.

The right of the consumer to repair a piece of equipment that he or she purchased, even if such information is protected against disclosure to a competitor under the patent

or copyright laws, was established early on in the industrial revolution. In the landmark case, *Wilson v. Simpson*, 50 U.S. 109 (1850), the United States Supreme Court established the right to repair doctrine, holding that a consumer who purchases a new product or good has the right to repair or replace parts in that product or piece of machinery when they had become broken or worn-out.

Wilson involved a claim of patent infringement. In this historic case, an owner of a planing machine was sued for patent infringement because the owner had replaced worn-out cutter knives that were part of the machine. The Supreme Court held that the owner had a right to repair or replace parts of the machine, even if the machine, as a whole, was subject to a patent:

It is the use of the whole of that which a purchaser buys, when the patentee sells to him a machine; and, when he repairs the damages which may be done to it, it is no more than the exercise of that right of care which every one may use to give duration to that which he owns, or has a right to use as a whole. . . . The right to repair and replace in such a case is either in the patentee, or in him who has bought the machine. Has the patentee a more equitable right to force the disuse of the machine entirely, on account of the inoperativeness of a part of it, than the purchaser has a right to repair, who has, in the whole of it, a right to use?

Id. at 123. The Court emphasized the fact that the planing machine was designed to last for several years, while cutter-knives, which are a part of the planing machine, were designed to last only sixty to ninety days. Thus:

The right of the assignee to replace the cutter-knives is not because they are perishable materials, but because the inventor of the machine has so arranged them as a part of its combination, that the machine could not be continued in use without a succession of knives at short intervals. Unless they were replaced, the invention would have been but of little use to the inventor or to others.

Id. at 125.

Justice Oliver Wendall Holmes subsequently applied this doctrine in *Heyer v. Duplicator Manufacturing Company*, 263 U.S. 100,101 (1923). In *Heyer*, the Supreme Court reviewed another patent infringement case involving the patent for “improvements in multiple copying machines.” One part of that machine was a band of gelatine attached to a spool or spindle that fit into the machine and allowed a print to be multiplied up to about a hundred times. The Court upheld the right of the consumer to replace the bands explaining that “[t]he owner when he bought one of these machines had a right to suppose that he was free to maintain [its] use, without the further consent of the seller, for more than the sixty days in which the present gelatine might be used up. The machine lasts indefinitely, the bands are exhausted after a limited use and manifestly must be replaced.” *Id.* at 101-02. *See also Schayer v. R.K.O. Radio Pictures*, 56 F. Supp. 903 (S.D.N.Y. 1944) (holding repair and maintenance of machine did not constitute patent infringement); *Westinghouse Electric & Mfg. Co.*, 131 F.2d 406 (6th Cir. 1942) (holding that replacing parts of an “automatic progressive-feed stoker” did not constitute patent infringement); *F.F. Slocomb & Co. v. A.C. Layman Mach. Co.*, 227 F. 94 (D. Del. 1915) (holding that both owner of machine and third party effecting repair of machine have right to replace parts of the machine); and, *Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co.*, 75 F. 1005 (2d Cir. 1896) (upholding the right to replace trolley stands as not violative of patent holder’s rights).

In 1935, the U.S. Court of Appeals for the Second Circuit again applied the “right of repair” to two separate suits involving the repair and use of replacement parts of a motor vehicle. In *Electric Auto Lite Company v. P. & D. Manufacturing Company*, 78 F.2d 700, 703-4 (2d. Cir. 1935), the court reviewed a lower court decision that found no

patent infringement where the defendant was merely providing replacement parts for a patented ignition system in a motor vehicle. The Second Circuit upheld the lower court's decision and in so doing, left no doubt that a car owner has the right to repair his or her car by replacing broken or worn-out parts:

A purchaser of a car having an ignition system made pursuant to any of these patents was entitled to have it repaired when necessary or replaced as to any of the parts in issue, in order to enjoy the continued usefulness of this ignition system. The car owner could repair or replace the part and would not be guilty of infringement if he did so. In like manner, he had the right to obtain the necessary part when his own need therefor arose. Indeed, the ignition apparatus is so designed and built as to make it possible to quickly and simply detach, for replacement purposes, the parts referred to and thus to meet the demands of wear or destruction.

Id. at 703.

In the second case, *General Motors Corporation v. Preferred Electric & Wire Corporation*, 79 F.2d 621 (2d Cir. 1935), the Second Circuit Court of Appeals again upheld a vehicle owner's right to replace the parts of an ignition system in his or her motor vehicle. The court stated that the right to repair or replace such parts is:

an incident of the rightful use of the purchased car. After purchase, the car owner has an apparatus wholly free from the limits of a monopoly. That it is no infringement to make ordinary repairs or replacements that may reasonably be expected as necessary during the life of the car as a whole has been established by authorities.

Id. at 623 (citations omitted). The court further noted that such vehicle parts are "intentionally made so that they might be quickly detached and replaced when worn.

They were relatively perishable and wore out before the device as a whole was worn and, moreover, it was the custom of the trade to effect repairs by replacement of the defective parts." *Id.*

More recently, in *Aro Manufacturing Company v. Convertible Top Replacement Company*, 365 U.S. 336 (1961), the Supreme Court applied the right to repair doctrine in

a patent infringement suit regarding a certain patented folding top for a convertible motor vehicle. The defendant manufactured and sold replacement fabrics to be put into the patented combination. The Court concluded that the replacement of the fabric was a “permissible repair.” *Id.* See also *Hewlett Packard Co. v. Repeat-O-Type Stencil Mfg. Co.*, 123 F.3d 1445 (Fed. Cir. 1997), *rehearing denied, suggestion for in banc declined* (Oct. 14, 1997) (quoting *Mitchell v. Hawley*, 83 U.S. (16 Wall.) 544,547 (1872) (“[T]he rule is well established that the patentee must be understood to have parted to that extent with all his exclusive rights and that he ceases to have any interest whatever in the patented machine so sold and delivered.”); *R2 Medical Systems, Inc. v. Katecho, Inc.*, 931 F. Supp. 1397, 1442 (N.D. Ill. 1996) (“Once a patent owner sells a patented article, the purchaser also acquires an implied right to use and maintain that article continually. . . . The right to repair extends to the replacement of perishable components whose useful life is regularly exhausted by the proper use of the article.”); *Sage Products, Inc. v. Devon Indus., Inc.* 45 F.3d 1575 (Fed. Cir. 1995) (holding doctrine of repair is not limited to temporary or minor repairs; it encompasses any repair that is necessary for maintenance of use or use of the whole of patented combination through replacement of spent, unpatented element.); *FMC Corp. v. Up-Right, Inc.*, 21 F.3d 1073, 1077 (Fed. Cir. 1994) (“[M]ere replacement of broken or worn-out parts, one at a time, whether of the same part repeatedly or of a different part successively, is not more than the lawful right of the owner to repair his property.”).

Although the right to repair doctrine is well established at common law, the use of computers in the modern automobile truncates the automobile owner’s ability to exercise his or her right to actually repair the automobile. Without the information necessary to

access the computer in the vehicle, the owner cannot accurately diagnose repair symptoms. Without the ability to access the computer in the vehicle, cheaper and more readily available replacement parts cannot be installed in a car because the computer may be programmed to reject them, even though they are of superior quality.

Thus, The Motor Vehicle Owner's Right to Repair Act of 2000 ensures that this well-established common law "right to repair" doctrine will continue to apply even in the digital age.

IV. THE FEDERAL TRADE COMMISSION, WHICH ALREADY HAS BROAD JURISDICTION TO PROMULGATE RULES TO PROMOTE COMPETITION AND TO PROTECT CONSUMER SAFETY, IS THE APPROPRIATE AGENCY TO ENFORCE THIS BILL.

This bill authorizes the Federal Trade Commission ("FTC"), which is the nation's lead consumer protection agency, to promulgate regulations ensuring that new motor vehicle owners have all the information necessary at their disposal for diagnosing, servicing, repairing and choosing the replacement parts for their vehicles. The Federal Trade Commission has in place broad statutory authority to enforce a variety of federal antitrust and consumer protection laws. The two separate missions of the FTC are part of the FTC's original mandate from Congress, the Federal Trade Commission Act of 1914, which granted the Commission the power to determine and prevent "unfair deceptive acts or practices in commerce" (consumer protection mission) and "unfair methods of competition (antitrust mission)." *See* 15 U.S.C.A. § 45(a)(1) (West 1999).

In 1938, the Wheeler-Lee Amendment broadened the FTC's jurisdiction and stated, in relevant part, that "[t]he Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in

commerce and unfair or deceptive acts or practices in commerce.” Wheeler-Lee Amendment, ch. 49, § 3,52 Stat. 111 (1938).

The Magnuson-Moss Act of 1974 further expanded the FTC’s power to promulgate substantive rules regarding consumer protection. As a result of the Magnuson-Moss Act, section 18 was added to the FTC Act authorizing the Commission to prescribe:

- (A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), and
- (B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title) . . . Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

See 15 U.S.C.A. § 57a (West 1999). This Act also altered the language of section 5(a)(1) of the FTC Act which now reads: “[t]he Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in *or affecting* commerce and unfair or deceptive acts or practices in *or affecting* commerce.” See 15 U.S.C.A. § 45(a)(1) (West 1999) (emphasis added to indicate amended language).

In addition to its original mandate to protect consumers against unfair or deceptive acts or practices under the FTC Act and its amendments, the FTC has also been given authority under several consumer protection statutes to prohibit specifically-defined trade practices and, as the present bill does, require disclosure of certain information to consumers. For example, under the Wool Products Labeling Act, 15 U.S.C. §§ 68-68j, the Fur Products Labeling Act, 15 U.S.C. §§ 69-69j, the Textile Fiber Products Identification Act, 15 U.S.C. §§ 70-70k, the Federal Cigarette Labeling and

Advertising Act of 1966, 15 U.S.C. §§ 1331-1340, and the Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451-1461, the FTC has been given the authority to mandate content disclosure in the labeling, invoicing and advertising of certain products. Similarly, under the Truth in Lending Act, 15 U.S.C. §§ 1601-1667f, the FTC has been granted the authority to require all creditors who deal with consumers to make certain written disclosures concerning finance charges and other aspects of financial transactions, and under the Fair Credit and Charge Card Disclosure Act, 15 U.S.C. 1637(c)-(g), the FTC can require credit and charge card issuers to provide certain disclosures in applications and solicitations.

The FTC has been given specific authority under the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667(f), to require that certain automobile lease costs and terms be disclosed. Also, under the Energy Policy Act of 1992, 42 U.S.C. §§ 6201, the FTC is authorized to issue requirements for the labeling of certain fuels and to issue other energy-efficient rules regarding lamps, transformers and small electric motors.

The purposes of the present bill are to protect American consumers from the unfair and deceptive practice of vehicle manufacturers in refusing to disclose certain information necessary for the repair, service and diagnosis of their motor vehicles and to ensure that American consumers have the opportunity to choose their own vehicle repair technician. The goals of this bill, to be known as the Motor Vehicle Owner's Right to Repair Act of 2003, directly parallel the two missions of the FTC to protect consumers and encourage competition in commerce. Furthermore, as shown above, the FTC has been given a broad grant of authority, under the FTC Act, to accomplish its missions and promulgate corresponding rules and regulations. Similar to the above-mentioned statutes

which authorize the FTC to prohibit certain trade practices, the present bill would authorize the FTC to prohibit the unfair practice of “locking out” consumers from their own vehicles by requiring disclosure of information necessary to ensure that their vehicles are maintained and repaired accurately and safely.