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Title: Under Threat: Competition in the Automotive Service Aftermarket

Author: Norman W. Hawker*

Author contact: norman.hawker@wmich.edu

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Abstract

This paper examines the access of independent service providers to the information, parts, and tools that automobile manufacturers make available to their authorized dealers. The increased use of information technology in automobiles has created opportunities for manufacturers to reduce competition faced by dealers in the market for automotive repair and maintenance. Manufacturers have economic incentives to reduce competition, including the ability to get dealers to purchase parts from the manufacturer. Independent service providers, unlike dealers, can purchase many parts from sources other than the automobile manufacturer. Reduction of competition in automotive service and repairs can be expected to result in higher prices, less convenience, and less innovation for consumers. The Motor Vehicle Right to Repair Act currently under consideration by Congress provides an imperfect solution to this problem.

Keywords: aftermarkets, automobiles

* Professor, Haworth College of Business, Western Michigan University, and Senior Fellow, American Antitrust Institute. Professor Hawker wishes to thank the American Antitrust Institute for making this research possible and participants at the AAI's 2007 Annual Conference for their helpful comments and suggestions.

I. Introduction

Markets for durable goods such as automobiles include not only the primary market where new products are purchased sold, but also aftermarkets, where consumers purchase the goods and services necessary to maintain and repair the primary product. The increased use of information technology in automobiles, protected in part by intellectual property law, has created new opportunities for automotive manufacturers to reduce competition in the aftermarket for repair and services by excluding non-dealer mechanics and garages from access to tools, information, training and parts. Manufacturers as well as their dealers have economic incentives to reduce competition in the aftermarket, and they appear to be doing so at the cost of higher prices, less convenience, and less innovation for consumers.

II. The Automotive Markets

A. Overview

The automotive aftermarket for service and repairs has long presented serious concerns for consumers and the original automobile equipment manufacturers (OEMs). Consumers have generally preferred independent mechanics over the OEM dealers for non-warranty work on their cars.[1] OEMs, however, have strived to make dealers a more attractive option for consumers, partly as an effort to increase OEM sales of parts and tools.[2] OEMs have had the ability to

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[1] *See* Stephen L. McIntyre, *The Failure of Fordism: The Reform of the Automobile Repair Industry, 1913-1940,* 41 Tech. & Culture 269 (2000).

[2] *See* Stephen L. McIntyre, *The Failure of Fordism: The Reform of the Automobile Repair Industry, 1913-1940,* 41 Tech. & Culture 269, 276 (2000) (In the early 1910s, Ford executives "expressed three concerns about dealers' repair work. First, they worried that high prices for repair work would dissuade potential customers with modest incomes from purchasing a Model T. . . . Second, Ford executives believed that poor-quality repair work by dealers damaged the Model T's reputation. . . . Third, company officials feared that customers dissatisfied with dealer repair work or prices would cut into company parts sales by patronizing independent repair shops that used 'pirate parts' not produced by Ford.");

require dealers to use OEM parts, but not independents. While dealers have purchased 75 percent of their parts from OEM manufacturers,"less than one-fifth of the total parts purchase[d] by independent repair shops purchases are assemblers' 'genuine' parts for which there exist competitive alternatives."[3]

Competition from third party parts manufacturers and independent repair service providers, therefore, has checked the ability of OEMs, as well as dealers, to raise prices in the aftermarket. As the demand for repair parts grew in the 1950's and 1960's, non-OEM parts manufacturers entered the market driving down wholesale prices in the channels where independent mechanics, but not dealers, purchased parts. OEMs could "only maintain their high prices to dealers at the cost of inducing consumers to substitute nondealer repair services for those available at the dealer garage," and "prices of repair in nondealer outlets have fallen to levels below those at dealer garages."[4] Independents now account for approximately 75 percent of non-warranty repairs.

B. The Primary Market

The primary market, new car sales, has grown increasingly competitive over the last thirty years, presumably increasing pressure on OEMs to seek profits in other markets, including the aftermarket.[5] For example, "GM earned relatively more profits from $9 billion in aftermarket

[3] Robert W. Crandall, *The Decline of the Franchised Dealer in the Automobile Repair Market,* 43 J. Bus. 19, 25-27 (1970).

[4] Robert W. Crandall, T*he Decline of the Franchised Dealer in the Automobile Repair Market,* 43 J. Bus. 19, 24-25 (1970).

[5] *See* N. Saccani et al., *The Role and Performance Measurement of After-Sales in the Durable Consumer Goods Industry: An Empirical Study,* 55 Int'l J. of Productivity and Performance Measurement 259, 278 (2006)

sales revenues in 2001 than it did from $150 billion of income from car sales."[6] Similarly, to "capture a much larger slice of vehicle life-cycle spending, [Ford] expanded into such ventures such as direct car retailing, an online marketplace for secondhand parts in the US, and a European aftermarket parts and service chain."[7]

C. The Secondary Market

1. Dealers

Dealers, like the OEMs, face increasing competitive pressure in the primary market, and they have come to rely on the aftermarket as a major source of profits. "Dealership profits are no longer driven by new car sales alone but also parts and service revenue. Absent legislation or enforceable agreement AAIA is concerned that car companies will set their promises aside in their drive to maximize profits in their parts and service operations."[8] "According to the National Automobile Dealers Association (NADA), even though dealership parts and service department

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[6] Morris A. Cohen et al., *Winning in the Aftermarket*, 84 Harv. Bus. Rev. 129, 130 (2006)

[7] Thomas Osegowitsch, & Anoop Madhok, *Vertical Integration is Dead, Or is it?*, Business Horizons, March-April, 2003, at 25, 28. This is part of a larger trend of downstream vertical integration by manufacturing firms. Due to "high penetration rates and longer product life spans, the 'installed base' . . . relative to the number of products sold in any year has become very large. As a result, a considerable portion of value-added has shifted away from manufacturing towards maintaining and servicing existing products. This trend has been reinforced with the rise in technical complexity and performance of many manufactured goods, which leads to exponential growth in their service requirements." *Id.* Osegowitsch and Madhok suggest that the automakers have a variety of reasons for downstream vertical integration into retailing, including "a desire to eliminate the unpleasant experience of the car sales process, as performed by independent dealers, and the associated negative consequences for their brands." *Id.* at 29. Given the high rate of customer satisfaction with independents versus dealers for service, *supra*, this does not seem likely as a motivation to deny independents access to the tools and codes needed to service modern cars.

[8] *Right to Repair: Industry Decisions and Legislative Options: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. On Energy and Commerce*, 109th Cong. 68 (2005) (Statement of Aaron M. Lowe, Vice President of Government Affairs for the Automotive Aftermarket Industry Association)

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."[9]

2. Independent Mechanics and Repair Shops

Independent mechanics and repair shops provide the major source of competition to dealers in the aftermarket. Widespread agreement exists that independents provide roughly 75 percent of all non-warranty repairs and service work.[10] Independents achieve higher customer

[9] *Right to Repair: Industry Decisions and Legislative Options: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. On Energy and Commerce,* 109th Cong. 70 (2005) (Prepared Statement of Aaron M. Lowe, Vice President of Government Affairs for the Automotive Aftermarket Industry Association); *see also* William J. Presutti, & John M. Lanasa, *Entrepreneurial Opportunity in the Automotive After-Market,* Review of Business, Spring, 1990, at 7, 8 ("automotive dealerships can no longer primarily concentrate only on new car sales with the projected overcapacity forecast in the 1990s)

[10] *See H.R. 2048, The Motor Vehicle Owners' Right to Repair Act of 2005: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. On Energy and Commerce,* 109th Cong. 1 (2006) (Statement of the Hon. Cliff Sterns, Chairman, Subcommittee on Commerce, Trade and Consumer Protection) ("according to the National Highway Traffic Safety Administration, NHTSA, out of the approximately 250 million vehicles in the United States, about 75 percent are serviced and repaired by the 'mom and pops' to the large franchisees like Midas and Jiffy Lube. It is a market in which Americans alone spend close to $40 billion a year in repair and service of their vehicles. When car manufacturers' warranties run out, usually in 5 years or less, American consumers overwhelmingly choose independent shops."); *Customer Choice in Automotive Repair Shops: Hearing Before the Subcomm. On Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. On Commerce, Science*, 107th Cong. 13-14 (2002) (Prepared Statement of John M. Cabaniss, Jr., Director, Environment and Energy, Association of International Automobile Manufacturers) ("Historically, 70 to 80 percent of the vehicle service and repairs are performed in non-dealer shops."); *see also id.* at 15 (Statement of Dale Feste, Dale Feste Automotive, Hopkins, Minnesota) ("The independent automotive aftermarket repairs over 70 percent of all the nation's vehicles."); *id.* at 19 (Statement of Greg Dana, Vice President, Environmental Affairs, Alliance of Automobile Manufacturers) (Historically, about 70 to 80 percent of vehicle and repairs are performed in non-dealer shops."); *Repairing the 21st Century Car: Is Technology Locking the Consumer Out?: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. On Energy and Commerce,* 108th Cong. 5 (2004) (Statement of Rep. Fred Upton) ("the statistics on post-warranty repairs would indicate that a huge number of repairs, over 75 percent, are done at independent stops [sic] rather than dealers.")

satisfaction than dealers in the aftermarket by offering more convenient locations, better prices and quicker service.[11]

Independents depend on dealers as a source of OEM parts[12] and service information. Consequently, the issue of access to the diagnostic tools and repair codes results from the increasing use of information technology in modern automobiles. The Clean Air Act greatly spurred the adoption of onboard diagnostic and other information technology to control emissions starting in 1996.[13] Since 1995 the Environmental Protection Agency's regulations

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[11] Arlena Sawyers, *Power Study Examines Service Habits,* Automotive News, June, 1, 1998, at 22 ("[T]hough 57 percent of the consumers who to aftermarket service shops say price is among their reasons for not going to the dealership for service, price is not the most important factor when choosing a service provider. Convenient location is most important followed by price and the quickness of service. … One major reason consumers do not return to the dealership for service after their warranties expire is that they are dissatisfied with the service during the warranty period. … Dealership customers said they had to take their vehicles back for the same problem 70 percent of the time vs. 30 percent for aftermarket customers. … Maintenance customers are easier to satisfy than repair customers. Dealerships get more repair work; aftermarket service providers get more maintenance work. … Still, … Lexus dealers rank No. 1 among the top 10 providers in the service satisfaction index, followed by Infiniti dealers and then independent service shops."); *Repairing the 21st Century Car: Is Technology Locking the Consumer Out?: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. On Energy and Commerce*, 108th Cong. 42 (2004) (Statement of William J. Haas, Vice President, Service Repair Markets for the Automotive Service Association) ("In the J.D. Powers and Associates Service Usage and Retention Study independent shops rate exceptionally high in customer service satisfaction. When compared to 56 alternatives, they beat out every aftermarket chain, mass merchandiser and the OEM franchises."); *see also* Tom Nash, *National Grange Supports Right to Repair Act,* Motor, October, 2005, at 26, 27 ("'These nondealership repair options are especially important for people living in rural communities,' [Leroy Watson, Legislative Director, National Grange,] added, 'where licensed automobile dealerships may be located more than 100 miles away from independent repair facilities.'")

[12] *See, e.g.*, Hau Lee et al., Stanford Graduate School of Business Case No. GS-41, Toyota: Service Chain Management 7 (2005) (Toyota "does not supply parts and accessories to independent repair stations, who can only purchase original Toyota parts through a Toyota dealership.");

[13] *See Customer Choice in Automotive Repair Shops: Hearing Before the Subcomm. On Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. On Commerce, Science,* 107th Cong. 9 (2002) (Statement of Bill Haas, Vice President, Technical Division, Education

have required OEMs to provide independents at a reasonable cost the same emissions service information as dealers.[14]

The use of information technology, however, has greatly expanded beyond emissions control.[15] "More than 80 percent of the systems on some cars are controlled or monitored by computer systems,"[16] including "safety systems such as antilock brakes and convenience systems

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and Training, Automotive Service Association) ("The Clean Air Act's emissions requirements compelled the vehicle manufacturers to install much more sophisticated equipment on 1996 and newer vehicles. During the debate of the Clean Air Act Amendments, Congress saw fit to provide language protecting the independent repairer."); *see also* W*ill "Smart" Cars Reduce Emissions?,* USA Today, April, 1998, at 14; Levy Joffrion, Accessing Service Information Today: Do Independent Repairers Have Access to the Information They Need to Fix Newer Model Vehicles? (2004), *at* http://www.asashop.org/autoinc/june2004/mech.htm (last visited June 6, 2007) ("It goes back to the 1990 Clean Air Act, which required that all vehicles built after 1994 include a computer system to measure vehicle emissions.")

[14] *See Customer Choice in Automotive Repair Shops: Hearing Before the Subcomm. On Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. On Commerce, Science,* 107th Cong. 9 (2002) (Statement of Bill Haas, Vice President, Technical Division, Education and Training, Automotive Service Association) ("1995 EPA service information regulation … assured independent repairers the same emissions service information as the new car dealers. It also discussed at length that the vehicle manufacturers should provide this information at a reasonable cost, not free but at a reasonable cost.")

[15] Levy Joffrion, Accessing Service Information Today: Do Independent Repairers Have Access to the Information They Need to Fix Newer Model Vehicles? (2004), *at* http://www.asashop.org/autoinc/june2004/mech.htm (last visited June 6, 2007) ("As technology improved, computer systems took on more and more vehicle functions—including brakes, air bags, steering mechanisms, ignition systems and fuel systems.")

[16] *Customer Choice in Automotive Repair Shops: Hearing Before the Subcomm. On Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. On Commerce, Science*, 107th Cong. 23 (2002) (Statement of John Nielsen, Director, Automotive Services and Repair Network, American Automobile Association (AAA)); *see also* T. Fox, *Reading Automobile Computer-Service Codes,* Electronics Now, December, 1997, at 59 ("Almost all late-model cars on the road today have some form of computer control for their engines. . . . Those systems have made the automotive industry the number one user of microcontroller chips."); Nicholas Von Hoffman, *A Computer is Driving Your Car on the Road With the Latest Automotive Technology,* Architectural Dig., November, 1996, at 126 ("Most cars of whatever price have at least two—one to run the motor and the other to run the brakes.")

such as antitheft alarms."[17] Although the OEMs and some trade associations argue otherwise,[18] considerable anecdotal evidence suggests that independents have not been able to access the information and tools needed to diagnose problems and repair problems related to the increased use of information technology and that they are forced to send customers to dealers to deal with these issues. For example,

- "Franchised Honda dealers purchase a scan tool, which is manufactured for Honda by Vetronix. Honda prevents Vetronix from including information necessary to diagnosis [sic] anti-lock brake systems in the same tool when the tool is purchased by anyone other than the franchise dealer."[19]

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[17] *Repairing the 21st Century Car: Is Technology Locking the Consumer Out?: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. On Energy and Commerce,* 108th Cong. 2 (2004) (Statement of Rep. Clifford Stearns); *see also* Norman Mayersohn, *Beyond the Programmable Car,* Automotive Industries, August, August 1999, at 40 ("[J]ust adding a straightforward accessory such as a trailer hitch brings the necessity to install associated software. … First you must do the mechanical installation, … then the electronic system must be configured to recognize the new pieces.")

[18] The Automotive Service Association believes that as of April 2003, "all OEM service information was available at Web sites." Levy Joffrion, Accessing Service Information Today: Do Independent Repairers Have Access to the Information They Need to Fix Newer Model Vehicles? (2004), *at* http://www.asashop.org/autoinc/june2004/mech.htm (last visited June 6, 2007). Nonetheless, anecdotal evidence suggests the OEM web sites are inadequate. *See e.g.*, Michael V. Freeze, Divided We Stand (2005), *at* http://www.aftermarketnews.com/default.aspx?type=wm&module=4&id=3&state=DisplayFullText&item=5124 (last visited June 6, 2007) ("The vehicle manufacturers have created the repair information Web sites to assist technicians, who are at the core of this debate. More than a few of them, however, take issue with the vehicle manufacturers that provide the data. 'I go on to these information sites and if you can pick your way through the ads, you can get the information,' said Merrill. 'You could spend God-only-knows how long trying to this information and at a very high cost.'").

[19] *Customer Choice in Automotive Repair Shops: Hearing Before the Subcomm. On Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. On Commerce, Science,* 107th Cong. 8(2002) (Statement of Bill Haas, Vice President, Technical Division, Education and Training, Automotive Service Association)

- "If you buy a Volvo Vira tool—that's the tool made available to the independent repairer—it will not allow us to make a complete emission analysis of the vehicle. The Volvo dealer has the Vadis tool. The Vadis tool allows the dealer to make a complete analysis of the vehicle."[20]

- "In April of this year [2002], a long-term customer of mine brought her 1996 Dodge Grand Caravan with an air bag dash light on. We were unable to access any trouble codes to diagnosis [sic] the system, and we had to send our customer to the new car dealer, explaining to her that the dealer was the only place that could access trouble codes for the air bag system. … My friends in the collision repair industry face the air bag situation many times each week."[21]

- For a 2000 Dodge with a check engine light on, "we have paid for the subscriptions, we have bought all the factory necessary equipment, we have the vehicle owner repairing the car and we still could not complete the repair because of the fact that a needed a PIN number" and Chrysler "said they can only provide that to the dealership."[22]

- For a 1998 BMW that failed a pollution test, and therefore covered under the Clean Air Act, the independent was unable to find the needed information at

[20] *Customer Choice in Automotive Repair Shops: Hearing Before the Subcomm. On Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. On Commerce, Science*, 107th Cong. 15 (2002) (Statement of Dale Feste, Dale Feste Automotive, Hopkins, Minnesota)

[21] *Customer Choice in Automotive Repair Shops: Hearing Before the Subcomm. On Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. On Commerce, Science*, 107th Cong. 16 (2002) (Statement of Dale Feste, Dale Feste Automotive, Hopkins, Minnesota)

[22] *Repairing the 21st Century Car: Is Technology Locking the Consumer Out?: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. On Energy and Commerce,* 108th Cong. 12 (2004) (Statement of Dave Scaler, Director, Mechanics Education

BMW's web site "after literally hours and hours of looking." After months of communication with BMW and NASTF, BMW tells the mechanic that he will have to purchase a $15,800 dollar "tester" to obtain the diagnostic information from the car's OBD equipment.[23]

- "In the case of Ford, … there is the Motorcraft website for the Ford aftermarket. Along with the Ford Motorcraft website there is also fmcdealer.com. The technicians at the Ford dealers use fmcdealer.com to repair vehicles, not motorcraft.com." To get information necessary to repair cars that is only available at fmcdealer.com, "I had to make arrangements with friends."[24]

- "The system used by BMW is called TeleService. The driver gets a message indicating what kind of service is needed. But the system also notifies the dealer with an electronic message."[25]

- "[I]n my 10 years on the Board of the Consumer Electronics Industry and my 20 years of manufacturing for the auto companies, I have personally witnessed a

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[23] *Repairing the 21st Century Car: Is Technology Locking the Consumer Out?: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. On Energy and Commerce,* 108th Cong. 12-14 (2004) (Statement of Dave Scaler, Director, Mechanics Education Association)

[24] *Repairing the 21st Century Car: Is Technology Locking the Consumer Out?: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. On Energy and Commerce,* 108th Cong. 14 (2004) (Statement of Dave Scaler, Director, Mechanics Education Association); *see also Repairing the 21st Century Car: Is Technology Locking the Consumer Out?: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. On Energy and Commerce,* 108th Cong. 54 (2004) (Statement of Bob Merill, Horsepower Autocare, National Federation of Independent Businesses)

[25] D. T. Kurylko, *Bumper-to-Bumper Free Maintenance Remains a Part of BMW's Strategy*, Automotive News, February 13, 2006, at 58.

> reluctance and a continued reluctance by the auto companies to provide in an expeditious fashion any technology that would allow anyone to develp a product in competition or even in addition to the auto companies with rare exceptions. So I come here today with concern that … there is a possibility that the auto companies deliver but do not deliver in a timely fashion, and certainly make very [sic] effort to not deliver in a predelivery of vehicle to anyone other than to their authorized dealers."[26]

Very little statistical evidence exists on the issue of access,[27] although what is publicly available suggests that independents do have a serious problem gaining access to the tools and information needed. The Automotive Service Association "surveyed our national leaders from across the country and determined that today 15 percent of all incidents of service are rejected due to a lack of information. This amounts to 161,437,500 rejected incidents of repair annually. The loss to our industry is $18,242,437,500."[28] A Tarrance Group survey shows that 59 percent of respondents "experienced problems in getting access to the repair information or tools

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[26] *Repairing the 21st Century Car: Is Technology Locking the Consumer Out?: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. On Energy and Commerce,* 108th Cong. 8 (2004) (Statement of Rep. Darrell E. Issa)

[27] *See e.g., H.R. 2048, The Motor Vehicle Owners' Right to Repair Act of 2005: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. On Energy and Commerce,* 109th Cong. 30 (2006) (Testimony of the Hon. Deborah Platt Majoras, Chairman, Federal Trade Commission) ("What I have seen is anecdotal evidence. I am very sympathetic to those who had a problem based on that anecdotal evidence. When we have asked to at least drill down on the anecdotes so we could, you know, get both sides of the story and try to figure it out, we have not received that information. So I am just handicapped by not having very much information.")

[28] *Customer Choice in Automotive Repair Shops: Hearing Before the Subcomm. On Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. On Commerce, Science,* 107th Cong. 8(2002) (Statement of Bill Haas, Vice President, Technical Division, Education and Training, Automotive Service Association)

necessary to service and repair vehicles"[29] of which 53 percent were forced to send vehicles to a dealer at least once a month because they lack information and tools from the OEM.[30] According to Congressman Strickland, "independent mechanics may not have access to the necessary software updates that manufacturers share with dealerships. In fact, according to some studies, more than 50 percent of independent mechanics have had to turn a customer away because they simply couldn't access the information they needed to fix the customer's car. therefore, car owners are often forced to choose the dealership for repairs, despite the fact that dealerships can be more expensive and less convenient than local independent mechanics."[31]

The creation of the National Automotive Service Task Force (NASTF) and changes in the policies of OEMs have eased the problem of access in an absolute sense. Volvo, for example, now makes its dealer tools available to independents as well as dealers. OEMs may no longer bar independents from access to tools and information, but the issues of cost and training[32] have

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[29] *Repairing the 21st Century Car: Is Technology Locking the Consumer Out?: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. On Energy and Commerce,* 108th Cong. 76 (2004) (The Tarrance Group, A National Survey of Auto Aftermarket Retail Decision Makers for the Automotive Aftermarket Coalition)

[30] *Repairing the 21st Century Car: Is Technology Locking the Consumer Out?: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. On Energy and Commerce,* 108th Cong. 78 (2004) (The Tarrance Group, A National Survey of Auto Aftermarket Retail Decision Makers for the Automotive Aftermarket Coalition)

[31] *H.R. 2048, The Motor Vehicle Owners' Right to Repair Act of 2005: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. On Energy and Commerce,* 109th Cong. 13 (2006) (Prepared Statement of Ted Strickland, a Representative in Congress from the State of Ohio)

[32] *See, e.g.*, Eric Peters, *Dealer Or Not?,* Consumers' Research Magazine, May, 1988, at 33 ("Your local garage may have a great mechanic, but unless he's been to the technical schools established by the automakers to teach how to find and fix computer/sensor-related maladies, he'll be reduced to the 'hunt-and-peck' method of fixing the problem. . . . General Motors, for example, runs a school for GM dealership mechanics—the GM Institute—that hips these guys to the latest procedures for fixing the gadgets and gizmos being installed on all the new GM cars and trucks.")

increased in importance. Volvo charges independents approximately $15,000 to purchase its Vida scan tool and $8,000 for an annual subscription to the required software.

An OEM can effectively deny independents access to the tools, codes and training needed to diagnose and repair problems by charging cost prohibitive rates.[33] Considerable anecdotal evidence exists for the prices charged by OEMs,[34] but not enough to make comparisons between the prices charged to dealers and independents. Nor are there any accepted benchmarks for what constitutes a reasonable price. Finally, there does not appear to be any statistical studies of OEM pricing to independents or dealers in the aftermarket. Nonetheless, it would appear that OEMs

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[33] Simson Garfinkel, *Deciphering Cars,* Tech. Rev., February, 2004, at 80 (Clearly, by controlling access to this information, automakers can give their own dealers an edge in servicing their own vehicles—or they can force independent garages to sign up for training and pay hefty license fees.")

[34] *See, e.g., Customer Choice in Automotive Repair Shops: Hearing Before the Subcomm. On Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. On Commerce, Science,* 107th Cong. 32 (2002) (Testimony of John Nielsen, Director, Automotive Services and Repair Network, American Automobile Association (AAA)) ("The first thing that we found is to purchase the various equipment each year is roughly $107,000."); A. Sawyers, *Hyundai Diagnostic Computer Doubles as on-Site Training Tool,* Automotive News, May 3, 1999, at 20 ("Hyundai Motor America is upgrading its dealership personal computer-based vehicle diagnostic system, putting more diagnostic and training information at service technicians' fingertips. … [T]he system's $2,300 price tag is relatively inexpensive compared with the $20,000 systems some auto manufacturers recommend to their dealers."); A. Sawyers, *Ford Unveils Worldwide Diagnostic Tool,* Automotive News, February 8, 1999, at 6 ("Ford Motor Co. will use a sophisticated new diagnostic tool in virtually every Ford band dealership around the world by the middle of 2000. … Ford can update the new tool system remotely and download information from dealership units. … It costs $9,475, including warranty and software updates. That compares to about $40,000 for the Service Bay Diagnostic System [the new tool replaces]. … Because of changing technology, the system will not have an indefinite life. ... Dealers should expect to replace it sometime after 2004."); Simson Garfinkel, *Deciphering Cars,* Tech. Rev., February, 2004, at 80 ("Consumers and independent repair shops can purchase three-day access to Ford's Motorcraft Web site for $19.95."); Levy Joffrion, Every Shopowner, Tech Should Attend "You Have the Right to Repair" (2004), *at* http://www.asashop.org/autoinc/june2004/special.htm (last visited June 7, 2007) ("OEM Web site access charges vary, but most companies offer short-term (24 or 72 hours), monthly and annual access. For example, Toyota has been offering 24-access for $10, monthly access for $50 and a year's subscription for $350.")

may have switched from refusing to sell independents diagnostic tools and information to charging the independents a prohibitive price for access.

Unlike dealers, independents must have the tools and information needed to repair a wide variety of OEM brands. Traditionally, independents have third party tools that were compatible with a variety of OEM cars. Although the extent to which OEMs have denied third party tool manufacturers, such as Bosch access to the information needed to compete for the business of independents, if independents are required to purchase a separate set of tools for the cars of each OEM, independents will suffer a significant competitive disadvantage in the repair and service market.[35]

Finally, OEMs can render affordable access meaningless if they do not provide independents with training. Needed training includes not only formal education in how to use the tools, but also informal and timely access to OEM personnel who can instruct them where to locate information needed to diagnose and repair vehicles on the same basis as dealers.

III. Antitrust Analysis of Aftermarkets

Antitrust analysis begins with a recognition of aftermarkets as separate from the primary markets. As a leading treatise states, an "aftermarket is the market for replacement and supplementary parts and/or repair services for a product that the buyer has previously acquired,

[35] *Repairing the 21st Century Car: Is Technology Locking the Consumer Out?: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. On Energy and Commerce,* 108th Cong. 66 (2004) (Statement of Lynne Cardwell, Chief Executive Officer, Car Care Center, on behalf of Coalition for Automotive Equality, Automotive Aftermarket Industry Association and Carquest Tech-Net Professional Auto Service Center) ("If we were to subscribe to just the top 21 auto maker's websites, it would cost a small job, any shop, $37,000 a year. … And, of course, the specialized scan tools are extra on top of that.")

or for products consumed through the use of the original product."[36] From a manufacturer's perspective, aftermarkets are distinct from the primary market since they involve radically different profit margins and skills.[37]

Eastman Kodak Co. v. Image Technical Services,[38] provides the legal precedent for treating aftermarkets as a separate market[39] and for the possibility that a producer may extract monopoly rents from aftermarket even if it faces competition in the primary market.[40] It should be noted that *Kodak* is a controversial decision. Critics associated with the "Chicago School" of antitrust analysis argue that consumers factor aftermarket costs into their purchase decisions in the primary market. A similar argument suggests that "a firm may well refrain from exploiting its installed base for fear of losing future [primary market] sales due to damage to its reputation."[41] Consequently, competition in the primary market may prevent firms from extracting monopoly rents in the aftermarket.

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[36] Lawrence Anthony Sullivan and Warren S. Grimes, The Law of Antitrust : An Integrated Handbook 54 (2d 2006); *see also* M. Theodore Farris et al., *Aftermarket Support and the Supply Chain,* 35 Int'l J. Physical Distribution & Logistics Mgmt. 6, 7 (2005) ("Aftermarket support refers to activities associated with products (e.g. spare parts) and services (e.g. engine overhauls) after the initial sale of a product."); Gregory T. Gundlach, *Aftermarkets, Systems, and Antitrust: A Primer,* 52 Antitrust Bull. 17, 18 (2007).

[37] *See, e.g.,* Morris A. Cohen et al., *Winning in the Aftermarket,* 84 Harv. Bus. Rev. 129 (2006);

[38] 504 U.S. 451 (1992)

[39] Bruce Abramson, *Intellectual Property and the Alleged Collapsing of Aftermarkets,* 38 Rutgers L.J. 399, 424 (forthcoming 2007)

[40] Simply put, *Kodak* stands for the proposition that "when circumstances—which may include imperfect information on the part of buyers, significant buyer investment in primary product, or high switching costs—permit a seller of a primary product to 'lock in' certain buyers, the seller will be able to exploit its market power by charging higher prices for the secondary product." Joseph P. Bauer, *Antitrust Implications of Aftermarkets,* 52 Antitrust Bull. 31, 43 (2007).

[41] Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects,* 8 J. Econ. Perspectives 93, 104 (1994)

However, evidence from business literature suggests that aftermarket sales provide "a way to recover profits lost due to the fierce competition on sales prices of original equipment."[42] Borenstein, et al., found that "once competition in the aftermarket is excluded, a profit-maximizing firm will not maintain competitive prices in the aftermarket, regardless of the degree of competition in the equipment."[43] Lorenzo Coppi's recent survey of the economic literature found that "profits from installed base opportunism tend to outweigh the reduction in profits due to the loss of primary product sales under fairly general general conditions, even in the presence of dynamic considerations such as reputation effects."[44]

As a leading treatise on antitrust law points out, "a seller is constrained by concern with reputation only to the extent of information flow to future buyers."[45] While repeat buyers would become sensitive over time to a manufacturer's exploitation of the aftermarket, they may already be locked in "because of a large investment in training, equipment, and parts."[46] Nor is it clear that experienced buyers would share, or even have an incentive to share, their aftermarket information with first time buyers. Finally, the available empirical evidence reveals that contrary to the Chicago School teachings relied upon by the critics of *Kodak,* consumers focus on the purchase price of the primary product and do not have much sensitivity to aftermarket costs.[42]

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[42] N. Saccani et al., *The Role and Performance Measurement of After-Sales in the Durable Consumer Goods Industry: An Empirical Study*, 55 Int'l J. of Productivity and Performance Measurement 259, 260 (2006)

[43] Severin Borenstein et al., *Exercising Market Power in Proprietary Aftermarkets*, 9 J. Econ. & Mgmt. Strategy 157, 187 (2000)

[44] Lorenzo Coppi, *Aftermarket Monopolization: The Emerging Consensus in Economics,* 52 Antitrust Bull. 53, 58 (2007).

[45] Lawrence Anthony Sullivan and Warren S. Grimes, The Law of Antitrust : An Integrated Handbook 55-56 (2d 2006)

[46] Lawrence Anthony Sullivan and Warren S. Grimes, The Law of Antitrust : An Integrated Handbook 55-56 (2d 2006)

Sellers have incentives to exploit aftermarkets even in the face of competition in the primary market. Consistent with the business literature, Sullivan and Grimes point out that "if the seller is insecure about its own financial prospects, it may seek high short term returns with less concern for its reputation."[47] Regardless of the seller's financial stability, the "higher returns for aftermarket sales are immediate, and are less likely to be offset by the discounted value of lost future sales of original equipment."[48]

Critics of *Kodak* concede that OEMs may use the aftermarket to engage in price discrimination, but argue that price discrimination is not anticompetitive.[49] Whether or not price discrimination causes anticompetitive harm in the economic since of a net welfare loss, a manufacturer's monopolization of its aftermarket for purposes of price discrimination will enable the manufacturer "to obtain greater aggregate revenue from all its customers than it would have, had each of those buyers had the freedom to take the secondary product from any source."[50] Not only will consumers suffer from the transfer of wealth to producers,[51] aftermarket

[47] Lawrence Anthony Sullivan and Warren S. Grimes, The Law of Antitrust : An Integrated Handbook 56 (2d 2006)

[48] Lawrence Anthony Sullivan and Warren S. Grimes, The Law of Antitrust : An Integrated Handbook 56 (2d 2006)

[49] Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice 301 n.8 (3d 2005) ("High repair prices may be a way of engaging in price discrimination. … The price discrimination strategy … would be to charge relatively less for the fixed cost item … , but charge relatively more for the variable cost items … . Such a price discrimination strategy is not anticompetitive, however, and usually results in higher output.")

[50] Joseph P. Bauer, *Antitrust Implications of Aftermarkets,* 52 Antitrust Bull. 31, 44 (2007).

[51] *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust,* 34 Hastings L.J. 65 (1982).

monopolization reduces consumer choice, and the diminished variety of choices may in turn result in less innovation.[52]

Finally, critics of *Kodak* have suggested that buyers can avoid the aftermarket exploitation through contractual adjustments in the primary market. Contractual adjustments may limit the efficacy of aftermarket monopolization, but consumers probably lack sufficient knowledge and bargaining power to negotiate contractual adjustments that would compensate for the extraction of monopoly rents in the aftermarket. At a more general level, contractual adjustments would have to set aftermarket prices at a competitive level, but "it is unreasonable to expect customers to be able to expect customers to be able to figure out what competitive aftermarket prices should like."[53]

IV. Antitrust Analysis applied to Automobile Aftermarket for Repairs

To date, the courts have not provided much in the way of analysis of the issue of access to OEM tools, training and codes under the antitrust laws. *Metzler v. Bear Automotive Service Equipment Co.,*[54] concerned the tying of parts and service in the aftermarket for maintenance of diagnostic tools, a related, but different market.

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[52] Joseph P. Bauer, *Antitrust Implications of Aftermarkets,* 52 Antitrust Bull. 31, 45 (2007) ("Consumer choice will ultimately inevitably be limited as a result of these aftermarket restraints—whether for variations of the secondary product, or just for a different source for that product. And, because the number of firms competing to provide the secondary product to a specific customer will be diminished, there is also likely to be less variety in the kinds of secondary products available and less innovation in the means of their production and distribution.") *See also* Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust Law,* 62 U. Pitt. L. Rev. 503 (2001).

[53] Lorenzo Coppi, *Aftermarket Monopolization: The Emerging Consensus in Economics,* 52 Antitrust Bull. 53, 68 (2007).

[54] 19 F. Supp. 2d 1345 (S.D. Fla. 1998)

A leading critic of *Kodak*, Herbert Hovenkamp, however, has specifically argued that OEMs should not be considered capable of exercising monopoly power in the automotive aftermarket:

> To be sure, someone who already owns a Chrysler that needs a new transmission may be stuck, for only a Chrysler transmission will fit into a Chrysler automobile. But customers purchasing goods in a competitive market will generally regard monopoly prices for services and replacement parts as a higher price for the original good, and normally they buy elsewhere.
>
> However, (1) some customers may not be well informed and Chrysler might be able to charge a higher-than-market price as a result; or (2) Chrysler might change its pricing policy or its policy of dealing with third party suppliers after a significant number of customers are already locked-in to Chrysler automobiles.
>
> "One reason that nonmonopolist Chrysler cannot get away with charging $5,000 for its aftermarket transmission is that most customers are sufficiently knowledgeable about aftermarket prices that they will attribute the monopoly transmission price to the cost of the basic automobile. But suppose there are few customers who are extremely poorly informed. Couldn't Chrysler then profit by charging monopoly prices. Probably not. While Chrysler might get away with charging the poorly informed customers monopoly prices, it would lose? thousands of sales to well-informed customers, who would buy a car whose manufacturer did not charge exorbitant aftermarket prices. The other possibility would be if Chrysler could somehow identify the badly informed customers and price discriminate by charging them a higher price than the well informed customers pay."

Hovenkamp's discussion neatly applies Chicago School analysis to the automotive service aftermarket. In so doing, however, Hovenkamp ignores not only the insights of post-Chicago economic learning, but also the empirical evidence about aftermarkets generally as well the automotive aftermarket in particular.[55]

An antitrust analysis consistent with the empirical evidence and post-Chicago insights would begin with the observation that the American market for new automobiles has become increasingly competitive over the last thirty years such that profit margins on new cars have declined for OEMs such as Chrysler.[56] To increase its overall level of profitability above the competitive levels available in the primary market for new cars, Chrysler must to turn less competitive markets. Since cost of aftermarket parts from OEMs greatly exceeds the relative cost of the same parts as components in a fully assembled vehicle,[57] the aftermarket for parts would be attractive *if* Chrysler did not face competition from the third party parts and tools used by independent service providers. For example, if the transmission referred to by Hovenkamp were out of warranty, the consumer would likely go to an independent mechanic for a new transmission. Chrysler generally does not have an effective way to insist that independent service providers refrain from installing a lower price transmission built by a third party manufacturer.

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[55] In fairness to Hovenkamp, he discusses the automotive aftermarket as a hypothetical to illustrate his larger criticism of *Kodak*. Nonetheless, both post-Chicago theory and empirical studies of aftermarkets demonstrate the error of the general point which Hovenkamp seeks to illustrate. *See supra*, _-_.

[56] For the sake of simplicity as well as consistency with Hovenkamp's hypothetical, this discussion will refer use Chrysler as the illustrative OEM. The author wishes to stress, however, that the available data do not support a conclusion that Chrysler's activities in the aftermarket are or have been more or less anticompetitive than any of its competitors.

[57] Amanda Levin, *OEM Auto Parts Overpriced, Ins. Study Says*, National Underwriter (Property & Casualty/Risk & Benefits Management Edition), September, 1999, at 4 ("The cost of rebuilding an automobile entirely from original equipment manufacturer parts costs more than four times a car's original price, a recent insurer-sponsored study has found.")

If, however, Chrysler denies independent service providers access to the tools, training and codes needed to determine that the consumer needs a new transmission, then the consumer will have no choice but to take his car to a Chrysler dealer who will install the $5,000 transmission sold by Chrysler.

As shown above, consumers generally do not properly account for aftermarket prices when making purchases in the primary market. The information asymmetries endemic in the automobile aftermarket,[58] compounded by addition of new technologies and design changes on a sometimes annual basis, make it extraordinarily difficult for the unusual consumer who attempts to gauge the lifecycle cost of her new car purchase to do so with any degree of confidence.[59] Therefore, contrary to Hovenkamp's assertion, Chrysler would likely suffer little, if any, loss of competitive advantage in the primary market by monopolizing the aftermarket for its brands of

[58] *See, e.g.,* Thomas N. Hubbard, *An Empirical Examination of Moral Hazard in the Vehicle Inspection Market,* 29 RAND J. of Econ. 406 (1998) ("Buyers in auto repair, health care, and other 'diagnosis-cure' markets generally are unable to determine their condition, and they can neither perfectly observe nor costlessly verify sellers' actions or recommendations."); *see also* Syed Saad Andaleeb & Amiya K. Basu, *Technical Complexity and Consumer Knowledge as Moderators of Service Quality Evaluation in the Automobile Service Industry,* 70 J. Retailing 367 (1994) ("[A]utomobile service and repair (henceforth ASR) . . . is considered to be among the most unpleasant experiences faced by American consumers. For this class of services, the cost can be high. Moreover, the technical nature of the services can be complex, which the customer may not be able to monitor or evaluate with regard to the precise input of the service provider. ASRs can therefore be differentiated from, say, hotel services where the customer can clearly evaluate the service provided and its cost. Because of the potentially complex nature of ASR, customers are likely to feel vulnerable. As the complexity of the service increases, their sense of vulnerability is likely to increase because of the uncertainty associated with the outcome they receive relative to their inputs.")

[59] Rapidly changing technology, *e.g.,* hybrids and biofuels, makes it extremely difficult to predict the need for and cost of repairs even as these changes provide OEMs with more intellectual property to lock in consumers to OEM parts provided by dealers. On antitrust law and the expansion of intellectual property generally, *see* Harry First, *Controlling the Intellectual Property Grab: Protect Innovation, Not Innovators,* 38 Rutgers L.J. 365 (2007)

automobiles, and it should come as little surprise that refusals to deal with independent service providers have become common.[60]

Monopolization of the automotive aftermarkets would likely reduce innovation as well as increase prices for consumers. For example, an industry representative expressed concern to Congress that providing third party parts manufacturers access to "proprietary information of the automakers" would, among other things, "allow them to alter vehicle performance characteristics."[61] Denial of access to prevent third parties from free riding on research and development efforts of the OEMs may serve a legitimate competitive purpose,[62] but preventing

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[60] Hodaka Morita & Michael Waldman, *Durable Goods, Monopoly Maintenance, and Time Incosistency*, 13 J. of Econ. & Mgmt. Strategy 273, 276 (2004) ("the practice is common in a variety of durable goods markets, [and] such behavior has been observed in markets for . . . automobiles.") Cohen, et. al., suggest that high quality aftermarket supports repeat business in the automotive industry, but it is not at all clear that they are referring to aftermarket services from independents as opposed to dealers. Morris A. Cohen et al., *Winning in the Aftermarket*, 84 Harv. Bus. Rev. 129, 130 (2006) ("In the automobile industry, for example, there's a distinct correlation between the quality of after-sales service and customer intent to repurchase. Brands like Lexus and Saturn inspire repeat purchases by providing superior service, and, consequently, have overtaken well-established rivals like Ford and Chrysler.") Quality control in the automobile industry does provide one of the more compelling justifications for aftermarket restraints by OEMs. Joseph Joseph P. Bauer, *Antitrust Implications of Aftermarkets*, 52 Antitrust Bull. 31, 40 (2007). But as Bauer notes, poor quality parts from third party manufacturers many enhance the OEMs' reputation in the aftermarket. *Id.* at n.29, *quoting*, Edward Iacobucci, *Tying As Quality Control: A Legal and Economic Analysis*, 32 J. Legal Stud. 435, 437-38 (2003).

[61] *Customer Choice in Automotive Repair Shops: Hearing Before the Subcomm. On Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. On Commerce, Science*, 107th Cong. 20 (2002) (Prepared Statement of Aaron Lowe, Vice President, Government Affairs, Automotive Aftermarket Industry Association and the Automotive Warehouse Distributors Association). Note that for a competitive automotive service market is not unrelated to a competitive aftermarket for parts, and that like independent service providers, third party parts manufacturers "need to know how to get on-board computers to recognize and accept properly functioning replacement parts." Harry Stoffer, *Automakers, Dealers Join to Fight OBD Legislation*, Automotive News, August, 1999, at 3.

[62] It seems entirely appropriate for OEMs to oppose "right to repair" legislation on grounds that such legislation "would make it easier for third parties to make clone parts." Simson Garfinkel, *Deciphering Cars*, Tech. Rev., February, 2004, at 80.

third parties from developing parts and tools which can alter a the car's performance denies consumers the benefits of innovation.[63] As a leading antitrust commentator has noted, "[s]mall companies, independents, aftermarket businesses *do things differently.*"[64] Regardless of competitive conditions in the market for new car sales, OEMs will raise prices above competitive levels in the aftermarket to the extent they can. Furthermore, innovation will suffer.

V. Motor Vehicle Owners Right to Repair Act

The Motor Vehicle Owners Right to Repair Act currently under consideration by Congress[65] attempts to deal with the threat to competition in the automotive service aftermarket by giving consumers and independents access to the tools, information and repair parts on an equal basis with dealers:

> (a) Duty To Disclose Information- The manufacturer of a motor vehicle sold, leased, or otherwise introduced into commerce in the United States shall provide to the motor vehicle owner, and to all service providers on reasonable and non-discriminatory terms, all information necessary to diagnose, service, maintain, or repair the motor vehicle, and all information necessary to fully utilize the tools and motor vehicle equipment (including replacement equipment) needed to diagnose, service, maintain, and repair the motor vehicle. Such information shall include--

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[63] The use of third party parts and tools can give independent service quality as well as cost advantages over dealers. *See, e.g., Customer Choice in Automotive Repair Shops: Hearing Before the Subcomm. On Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. On Commerce, Science*, 107th Cong. 27 (2002) (Statement of John Vallely, President, North McLean Autocare Center) ("Many of the diagnostic procedures that are made available are written only for use with specific OE scan tools. These procedures are not applicable to to more commonly sold scanners that are used and updated annually from aftermarket source scan tools such as Snap-on diagnostics. … Recently, my shop had to send a customer to a Jeep dealership to program his replacement ignition keys and remote transmitters. … My domestic car scanner, with a fully updated Snap-on, was unable to perform that procedure.")

[64] Jonathan L. Rubin, *Remarks Before the National Credit Reporting Association, Inc.'s 2005 Annual Conference*, 6-7, available at http://www.antitrustinstitute.org/archives/files/463.pdf

[65] Motor Vehicle Protection Act of 2007, H.R. 2694, 110th Cong. (2007). For earlier versions of the bill, *see* Motor Vehicle Owners' Right to Repair Act of 2003, H.R. 2735, 108th Cong. (2003), and Motor Vehicle Owners' Right to Repair Act of 2005, H.R. 2048, 109th Cong. (2005).

(1) information about safety alerts, recalls, service bulletins and the need for adjustments to maintain energy efficiency;

(2) information necessary to access and integrate replacement equipment into the motor vehicle; and

(3) all other information of any kind needed or used to diagnose, service, maintain, repair, activate, certify, or install any motor vehicle equipment (including replacement equipment) in a motor vehicle.

(b) Duty To Make Tools Available- The manufacturer of a motor vehicle sold, leased, or otherwise introduced into commerce in the United States shall offer for sale to consumers, and to all service providers on reasonable and non-discriminatory terms, any tool necessary to diagnose, service, maintain, or repair a motor vehicle, and shall provide the information necessary to enable aftermarket tool companies to manufacture tools with the same functional characteristics as those tools made available by the manufacturers to authorized dealers.

(c) Replacement Equipment- The manufacturer of a motor vehicle sold, leased, or otherwise introduced into commerce in the United States shall offer for sale to consumers, and to all service providers on reasonable and non-discriminatory terms, all equipment necessary to diagnose, service, maintain, or repair a motor vehicle.[66]

One of the most important features of this proposal will no doubt prove to be one of the most difficult features to enforce should the bill become law, namely the duty of OEMs to provide consumers and independents with the information, tools and parts on "reasonable and *non-discriminatory* terms." The bill does not specify that the "reasonable and non-discriminatory" means that OEMs must offer independent providers the same terms that they offer their dealers.[67] Without that, OEMs could offer all independents the same price, but it would not allow them to compete with dealers because of a price squeeze strategy. Assuming that the courts would

[66] H.R. 2694, 110th Cong. § 3 (2007).

[67] While such an interpretation is possible, it would be contrary to the intent of the bill. Section 2(a)(14) of the bill recites the Congressional finding that discriminating "*between authorized dealers and independent service providers* and restricting the availability of information, tools and replacement equipment limits who can diagnose, service, maintain, and repair motor vehicles and what tools and replacement equipment may be used to repair those vehicles, limits consumer choice, limits competition, and impedes the safe and energy-efficient operation of motor vehicles." This finding strongly suggests, although it does not expressly state that "non-discriminatory" should refer to the terms offered to dealers versus independents rather than the terms offered one independent versus another.

interpret the language to prevent OEMs from offering their dealers better terms than independent service providers, the prices charged to dealers are not transparent and can be clouded by discounts given for new automobiles, financing terms and promotional activities.[68]

The bill does not require OEMs to disclose trade secrets, but it removes "information ... provided (directly or indirectly) to authorized dealers" from the scope of what may constitute a trade secret.[69] Less clear is what happens to the protection afforded OEMs' intellectual property under the patent and copyright laws.[70]

With respect to enforcement, the bill would authorize the Federal Trade Commission to enforce the law as, among other things, an unfair or deceptive trade practice and to issue appropriate rules.[71] The bill also provides for direct enforcement by consumers and independents, allowing them to recover attorney fees in addition to damages,[72] as well as enforcement by state attorneys general.[73]

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[68] It should also be noted that the legislation does not address the cost disadvantage faced by independents resulting from the independents to service the cars of multiple OEMs, *e.g.*, a Toyota dealer does not need to purchase to tools need to work on Ford, but an independent needs to purchase tools for both Toyotas and Fords. It is difficult to imagine how such legislation could be crafted without forcing OEMs to forgo product differentiation and innovation in the primary market.

[69] H.R. 2694, 110th Cong. § 3(d) (2007).

[70] *Cf.*, Motor Vehicle Owners' Right to Repair Act of 2003, H.R. 2735, 108th Cong. § 3(b)(2) (2003) ("No such information may be withheld by a manufacturer if that information is provided (directly or indirectly) to franchised dealers or other repair facilities."); Motor Vehicle Owners' Right to Repair Act of 2005, H.R. 2048, 109th Cong. § 3(b) (2005) ("No information necessary to repair a vehicle shall be withheld by a manufacturer if such information is provided (directly or indirectly) to franchised dealerships or other repair facilities.").

[71] H.R. 2694, 110th Cong. § 4 (2007); *cf.* H.R. 2048, 109th Cong. §§ 4 and 5 (2005); H.R. 2735, 108th Cong. §§ 4 and 6 (2003).

[72] H.R. 2694, 110th Cong. § 6 (2007). The 2003 version of the bill allowed for direct actions by consumers and independents, H.R. 2735, 108th Cong. § 5 (2003), but the 2005 version did not.

[73] H.R. 2694, 110th Cong. § 5 (2007). Neither of the earlier versions of the bill considered in the

VI. Conclusion

OEMs as well as their dealers have a motive to reduce competition in the aftermarket for automotive repair services and in fact this reduction has been taking place at a fast rate. Presently, dealers lack the capacity to meet all consumer demand in the aftermarket, but independents do not have to be completely eliminated from the aftermarket before OEMs and their dealers will be able to exercise enhanced market power to the detriment of consumers.

The denial of access to information, tools, and codes, either by refusing to deal with independents or charging them prohibitive prices, inhibits competition in the aftermarket to the detriment of consumers. Without access to diagnostic tools, codes and training on an affordable basis, independents will not be able to compete effectively with dealers in the aftermarket. Consumers will pay higher prices for aftermarket services and parts. Consumers will lose the benefit of innovation both in terms of "cross-pollenization" of diagnosis and repair techniques available from independents and in terms of enhanced vehicle performance that can come from the installation of third party parts. The harm to competition and consumers will likely increase as hybrids and other new technologies become integrated into automobiles unless legislation such as the Motor Vehicle Owners Right to Repair Act is adopted to enable independent service providers to obtain access to the tools and codes needed to diagnosis and repair problems that have a connection to the IT systems in modern automobiles on terms equivalent to that provided dealers.

The Motor Vehicle Owners Right to Repair Act of 2007 or similar legislation could result in OEMs raising the initial price of the automobile. Although this may sound anti-consumer, the

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House of Representatives provided for enforcement by state attorneys general.

preservation of an option for independent service in the aftermarket and the competitive pressure such independent imposes on dealers, should result in a lower life cycle cost and greater convenience for consumers.

The proposed legislation, however, does nothing to spark competition in the aftermarket for parts and tools protected by intellectual property law. To further increase competition in the aftermarket and transparency in the primary market, Congress would have to require OEMs to license on reasonable and non-discriminatory terms the intellectual property necessary to diagnose, repair and maintain their brands of automobiles to third parties. Compulsory licensing raises serious problems, not the least of which is determining price. The experience with the Clean Air Act requirements provide both a precedent for and an illustration of the problems inherent in compulsory access remedies.