

## CONSUMERS' RIGHT TO REPAIR DEFECTIVE ELECTRONIC PRODUCTS<sup>\*</sup>

*Atijit Kururatchaikul*

*Master of Laws in Business Laws (English Program)*

*Faculty of Law, Thammasat University*

*Email address: Atijit.k@outlook.com*

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### **Abstract**

Currently, the manufacturers attempt to restrict the owners and third-party repair shops from repairing electronic products, such as specifying the terms under warranty or limiting spare parts. Therefore, the consumers have been forced to receive authorised service only. The manufacturer will not provide the spare parts and essential information to owners and third-party repair shops. There are only two choices left: requiring the authorised service provider to repair the product or disposing it. The consumers' right to repair seems unobvious in Thailand because Thai Civil and Commercial Code and regulations relating to consumer protection do not specify the right to repair. Consumers have to spend more money on repair services by the manufacturer. The study mainly analyses relevant laws of the United States: the Magnuson-Moss Warranty Act and the Fair Repair Act. The study finds that Thailand should adopt the right to repair to protect consumers from unfair practices. Therefore, the article would like to propose the new regulation and provisions which protect the consumer from the unfair practice of manufacturers. Firstly, the regulation should mandate the manufacturers to distribute the spare parts, equipment and information at "the equitable price." The manufacturer has to consider the

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<sup>\*</sup> This article is summarised and rearranged from the thesis "Consumers' Right to Repair Defective Electronic Products", Faculty of Law, Thammasat University, 2021.

ability of users and repair shops to afford the parts, equipment, or guidance information. Secondly, the regulation shall provide a specific provision to prevent consumers from being bound by unfair terms. For example, the manufacturer shall not specify the warranty clauses that compel the consumer to receive only the manufacturer's service.

**Keywords:** Consumer Protection, Consumers' Right to Repair, Defective Electronic Product

## **1. Introduction**

Once an accident occurs and causes malfunctions on your smartphones, tablets, or laptops, such as a broken screen, blurred camera, and blown speaker, the users may require the manufacturer to repair the device, find a reliable third-party repair shop, or undertake it by themselves. More than thirty per cent of smartphone owners have damaged their device's display screen at least once, and twenty-one per cent of people are currently using a phone with a damaged screen.<sup>1</sup> Currently, the manufacturers attempt to restrict the owners and third-party repair shops from repairing electronic products, such as specifying the terms under warranty, terminating user licence agreement, and limiting spare parts. Therefore, the consumers have been forced to receive authorised service only. When the consumer's product got a defect made by themselves or others, the consumers will not be able to claim the defect under the warranty coverage, and the consumer has four choices: 1) requiring the original equipment manufacturer or authorised provider to repair the product; 2) using the service of a third-party repairer; 3) attempting to repair it by themselves or 4) discarding and replacing the device.

Therefore, the consumers' right to repair is regarded as a right that the consumers can intentionally choose their preferable repairer, parts, price, and place for repairing their electronic products. The era of electronic manufacturers may not have a good impact on customers who have no power and insufficient knowledge to receive fair service and products from the manufacturer. The customer would receive the only minimum right specified by law like consumer protection law in their countries. It is about time that the lawmaker reconsiders any provisions to provide the customers' rights and amend some necessary points.

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<sup>1</sup> Adam Lella, 'U.S. Smartphone Penetration surpassed 80 percent in 2016' (COMSCORE, 3 Febuary 2017), <<http://www.comscore.com/Insites/blog/US-Smartphone-Penetration-Surpassed-80-Percent-in-2016>> accessed 24 August 2021.

The consumers' right to repair seems unobvious in Thailand because Thai Civil and Commercial Code and regulations relating to Consumer protection do not specify the right to repair. Consumers have to spend more money on repair services of the manufacturer. The study mainly analyses relevant laws of the United States: the Magnuson-Moss Warranty Act and the Fair Repair Act.

The main benefit of the right to repair is that electronic customers will be capable of repairing their own electronic devices by themselves. The customer could extend their product life at a reasonable cost. These policies not only raise the competitiveness of the third offering the repair services party but also benefit local repair shops in the big scheme that consumers will repair electronics rather than discard and replace them with new ones.

Nevertheless, when the customers decide to discard and replace the devices, every part of the electronic device causes carbon emissions and material waste. Instead of dumping the items, repairing or recycling them would not deteriorate the environment with thousands of tons of e-waste. Therefore, under the purpose of the Fair Repair Act, the aims are not only considered to grant the customers right but also to reduce the electronic waste that directly affects climate change at present.

## **2. Consumer protection measures**

Normally a contract was not made between parties having equal matters in economy, knowledge and expertise, and liberty to decide. The public sectors, including related government offices, found it necessary to issue the law so as to protect the party having an inferior power and restrict the liberty both prior to a contract or after contract execution for justice. Consequently, although the contract of sale originated from Thai Civil and Commercial Code, there are many regulations related to the contract of sale in according to protect purchasers, including a) Consumer Protection Act (Issue No. 2) B.E. 2541, b) Unfair Contract Terms Act B.E. 2540, c) Electronic Transaction Act B.E. 2544, d) Direct Selling and Direct Marketing

Act B.E. 2545, e) Consumer Case Procedure Act B.E. 2551, and f) Product liability Act B.E. 2551.

## **2.1 Fundamental consumers' rights**

Besides the incorporation, investment, and management, there are some regulations related to consumer protection that the manufacturer shall consider before they run the business. Some products or services require a license before distribution or sale with controlled price, which could be deemed as a limitation of liberty.<sup>2</sup> Therefore, the consumer protection law shall protect consumers from unfair practices and provide fundamental consumer rights.

### **2.1.1 Right to be informed**

Providing the information will lead to the consumers' knowledge to consider desirable products or services. If the consumer is barred from the importation information of the products or services, it causes they may be misled to enter into the contract. The right to be informed will decrease the manufacturer's unfair practice, which may insulate their customers against proper information. Therefore, the consumer protection law needs to regulate and control the use of advertisements, labels, and product information.<sup>3</sup>

### **2.1.2 Right to choose**

Consumers should be granted the right to choose their desired products and services because the right to choose is the fundamental right in any liberal economic system that promotes competition and improvement of the manufacturer. Diminution of the right to repair could result from the inferior economic power of the consumers, whereby the

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<sup>2</sup> Suksom Supanit, Kham Athibai Kotmai Khumkhong Phuboriphok [Commentary on Consumer Protection Law], (6th edn, Chulalongkorn, 2551) (สุขสม ศุภนิตย์, คำอธิบายกฎหมายคุ้มครองผู้บริโภค, (พิมพ์ครั้งที่ 6, จุฬาลงกรณ์มหาวิทยาลัย 2551)) 11.

<sup>3</sup> Chaiwat Wongwattanasarn, Kotmai Khumkhong Phuboriphok [Consumer Protection Law], (Winyuchon 2543) (ชัยวัฒน์ วงศ์วัฒน์สานต์ม กฎหมายคุ้มครองผู้บริโภค (วิญญูชน 2543)) 19.

consumers must accept all the manufacturer's offers because they have no bargaining power. Moreover, monopoly is another cause of the consumers having no alternatives.<sup>4</sup>

### **2.1.3 Right to safety**

The products or services offered by the manufacturers to the consumers should be regarded as a presumption that the manufacturer has already prepared and produced products that are suitable for use. The manufacturers have no duty to produce, but, once they decide to produce, they should ensure that their products are appropriate to be sold to the consumers. The suitability of the product shall be considered in terms of its effectiveness and safety. The consumer protection law sets out the manufacturer's standard to provide products or services that are non-defective. As a result, the consumer protection law should consider not only the right to safety but also the right to goods or services that meet certain standards.<sup>5</sup>

### **2.1.4 Right to a fair contract**

The right to a fair contract should be concerned with two matters.<sup>6</sup> Firstly, the contract should specify the details and quality of products and services for consumer's consideration. Secondly, the contract should not bind the consumers to accept all offered goods and services. Therefore, if the contract terms do not satisfy these two requirements, they could be considered unfair contract terms.

### **2.1.5 Right to be compensated**

From the economist's perspective, they said that the government do not need to take part in the case that the consumers receive the damage

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<sup>4</sup> Ibid.

<sup>5</sup> Ibid, 20.

<sup>6</sup> Ibid.

from unsafe products. However, from a legal perspective, the law should take part to force the manufacturers to remedy (Corrective justice) the affected consumers.<sup>7</sup>

## **2.2 Consumers' right to repair**

At present, manufacturers do not allow consumers to choose the preferred repairer, parts, price, and place for repairing electronic products. With respect to consumer protection law, the regulations of Thailand are not regarded as the preferable measures to protect the consumer in this country. The regulations are still neglecting protection and assistance to the customers, especially in the case of the technology products, because all the manufacturers that are marketing in Thailand are foreign companies, and the government has not ever engaged in the consumers' rights conscientiously. The consumers' right to repair is a modern right for the customer in a technological era in which all the developed countries are facing challenges on this issue, whereas the manufacturers attempt to distribute their products in the market and monopolise them in various ways.

When consumers buy electronic devices, the manufacturer has to provide product warranty. According to the warranty terms, the consumer is entitled to receive repair service if defects or non-functioning are occurring to the device. The warranty terms may be considered fair practice for the consumer, but the manufacturer constantly includes the limitation terms, in which the right to repair under warranty will be restricted or terminated in some cases. For example, all manufacturers specify that the warranty shall be terminated after the consumer uses the service or parts unauthorised from the manufacturer or dealer.

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<sup>7</sup> Sakda Thanitkul, Naeokhit Lak Kotmai Lae Khamphiphaksa Kotmai Thurakit [Concept, Legal Principal, and Court Decision Relating to Business Laws] (4th edn, Nititham, 2557) (ศักดิ์ตา ธนิตกุล, แนวคิด หลักกฎหมาย และคำพิพากษา กฎหมายธุรกิจ, (พิมพ์ครั้งที่ 4, นิติธรรม 2557)) 132.

According to the manufacturer's innovations and patents, the manufacturers who invent or develop the device do not provide the parts, annual repair, diagnostic software, and tools for the user or repair shop. For example, joystick spares of the Nintendo Switch control are unavailable and impossible to repair. Third-party repairers or owners are forced to depend on recycled, imitation, or lower-quality parts because of restricted or unavailable OEM parts.<sup>8</sup>

Users may be forced to receive the manufacturers' authorised parts and equipment only because of the embedded software that detects the unauthorised parts. Some features, such as the TrueTone display, won't be possible if you replace the screen on your iPhone, even if it's a completely new OEM screen from another iPhone.<sup>9</sup> When consumers upgraded to the latest software and system, Apple deactivated iPhones containing non-OEM spares by warning users, "Do not use non-genuine Apple's components to repair your device, or else."<sup>10</sup> There are a few options for Thai consumers to choose from after they accidentally break their electronic belonging.

Moreover, when the manufacturers do not provide some important parts of the product or repair manual to the user or third-party repair shop, the user or third-party repair shop will not be able to fix the consumer's devices.

### **3. Legal measures purposing to protect consumers in the United States**

Even though consumers' right to repair is a new concept and the Consumer Bill of Rights does not specify the right to repair as a basic consumer right, it should be regarded as a right that the consumer can

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<sup>8</sup> Daniel A. Hanley, Claire Kelloway & Sandeep Vaheesan, *Fixing America: breaking manufacturers' aftermarket monopoly and restoring consumers' right and repair* (openmarketsinstitute, April 2020) 11.

<sup>9</sup> *Nixing the Fix: An FTC Report to Congress on Repair Restrictions*, (Federal trade Commission of the United States of America, May 2021) 23.

<sup>10</sup> Apple Inc., 'Apple Warranty' (Apple 11 March 2021) <<https://www.apple.com/legal/warranty/products/warranty-edition-row-english.html>> accessed 24 August 2021.

intentionally choose their preferable repairer, parts, price, and place for repairing. The United States has two regulations relating to consumers' right to repair: 1) Magnuson Moss Warranty Act and 2) Fair Repair Act. The regulations will increase the possibility that consumers can access spare parts for their electronic products.

### **3.1 Magnuson Moss Warranty Act**

The Magnuson-Moss Warranty Act aims to control the warranties of goods and products in the United States. The Act, which was enacted in 1975, compels producers and marketers of consumer items to disclose complete information regarding manufacturer warranty to customers.

Under the U.S. Code, Section 2302(c) mentions about the products warranty that "The warrantors shall not determine the warranty coverage to limit the consumer's utilise of an article or service identified by brand, trade, or corporate name unless the company provides the report or free service or has received a waiver from the Federal Trade Commission."<sup>11</sup> However, Section 2302(c) is still obscure for the warrantor to provide warranty conditions, so the Magnuson-Moss Warranty has to clarify it under the interpretation of the Magnuson-Moss Warranty Act.

Many consumers must confront product warranties that the consumers are required to use service and maintenance arranged by providers or authorised providers only. The interpretation under Magnuson-Moss Warranty Act Section 700.10 (c) states: "No warrantor may condition the continued validity of a warranty on the use of only authorised repair service and/or authorised replacement parts for non-warranty service and maintenance... For example, provisions such as, "This warranty is void if service is performed by anyone other than an authorised 'ABC' dealer and all replacement parts must be genuine 'ABC' parts," and the like, are

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<sup>11</sup> McDermott Will & Emery, 'FTC Looks to Fix Repair Restrictions', (Antitrust Alert, 3 August 2021), <<https://www.antitrustalert.com/2021/08/ftc-looks-to-fix-repair-restrictions/>> accessed 19 March 2022.

prohibited where the service or parts are not covered by the warranty.”<sup>12</sup> Therefore, the manufacturer shall not write their warranty terms with conditions that their consumer must accept only authorised spare parts from the manufacturer.

### **3.2 Fair Repair Act**

Many technology companies now demand that repairs or parts of electronic devices needed for repair must be authorised by the original equipment manufacturer (OEM) or its approved suppliers. Therefore, under this Act, OEMs will be required to make diagnostic and repair information, parts, and tools available to third-party repair shops and owners promptly and on fair and reasonable terms under the Fair Repair Act, assisting consumers and repairers in reducing unnecessary costs and time while also eliminating electronic waste.

The requirements under the Fair Repair Act are separated into two parts. Firstly, the general requirement under Section 2(a) specifies that the owners or third-party repairer of electronic devices sold or used in the U.S. will receive the documentary, parts and tools for diagnosis, maintenance, or repair from the original equipment manufacturer promptly and on fair and reasonable terms. This Section aims to force the manufacturers to provide their information and electronic device components, which are marketed in the U.S., to all owners and third-party repairers. Moreover, the manufacturers have to conform to this requirement under the provision fairly and reasonably.

Secondly, the additional requirement under Section 2(b) demands the manufacturer to contribute parts, tools, and documentation regarding the repair of the device “at a fair price” for an owner if the manufacturers have warranted such a device and the price is more than or equal to 100 dollars. It means that the manufacturers have to consider these factors:

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<sup>12</sup> Magnuson-Moss warranty Act Section 700.10 (c).

(1) the actual cost to the OEM to prepare and distribute the part, tool, or documentation, exclusive of any research and development costs incurred;

(2) the ability of owners and independent repair providers to afford the part, tool, or documentation; and

(3) the means by which the part, tool, or documentation is distributed.<sup>13</sup>

So, the manufacturer cannot independently determine the price of parts and device tools, which should be accounted for with the substantial cost of preparing by OEM, the affordability of the owner and third-party repairer, and the distribution process.

Moreover, Under Section 4(1), the manufacturer has to make the devices available that their functions may be secured by owners or third-party repairers to repair electronic devices under fair and reasonable terms. The manufacturer must provide documentation, tools, and parts required to turn off its security.

However, under this Section, the purpose of this Act does not apply to motor vehicle industries and medical devices.

#### **4. The analysis and possibility of adopting the consumers' right to repair to Thailand**

##### **4.1 The consumer protection and consumer rights in Thailand**

As mentioned previously, certain fundamental consumers' rights are specified under Thai regulations relating to consumer protection: Thai Civil and Commercial Code (CCC), Consumer Protection Act (Issue No. 2) B.E. 2541 (CPA), and Unfair Contract Terms Act B.E. 2540 (UCT)

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<sup>13</sup> Fair Repair Act, H.R.4006, 17th Congress (2021-2022) Section 2(b).

#### **4.1.1 Right to be informed**

A consumer has the right to information, including a correct and adequate description of quality.<sup>14</sup> Moreover, the consumer shall receive correct and sufficient information which the providers or manufacturers shall conform to the CPA regarding Advertisements and Labelling.

#### **4.1.2 Right to choose**

A consumer has the right to enjoy freedom in the selection of goods or services.<sup>15</sup> However, the provisions under CPA only mention the purchase phase and does not cover the post-purchase service.<sup>16</sup>

#### **4.1.3 Right to safety**

A consumer has the right to be afforded safety in the use of goods or services.<sup>17</sup> The suitability of the product shall be considered with the effectiveness and safety of the products.

#### **4.1.4 Right to a fair contract**

A consumer has the right to fairness in concluding contracts.<sup>18</sup> CPA prescribes that certain types of businesses are subject to control over the contract from Consumer Protection Board on Contract, and UCT is prescribed to apply to a contract in which contract terms are unfair through the court procedure.

#### **4.1.5 Right to be compensated**

A consumer has the right to have injury considered and compensated.<sup>19</sup> In the case of the defective product, once the defect is

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<sup>14</sup> Consumer Protection Act (Issue No. 2) B.E. 2541, Section 4(1).

<sup>15</sup> Consumer Protection Act (Issue No. 2) B.E. 2541, Section 4(2).

<sup>16</sup> Chaiwat, (n 3) 30.

<sup>17</sup> Consumer Protection Act (Issue No. 2) B.E. 2541, Section 4(3).

<sup>18</sup> Consumer Protection Act (Issue No. 2) B.E. 2541, Section 4(3) bis.

<sup>19</sup> Consumer Protection Act (Issue No. 2) B.E. 2541, Section 4(4).

occurred to sold property and lead to decrease in property value or make the property unusable, the seller will be liable for the defect under Section 472 of CCC. The provision aims to specify the seller's responsibilities on the sold property that has any defect at the time of purchase or delivery of such property.

To summarise, as the author has mentioned, Thailand does not specify the regulations which could reduce or address any manufacturer's restriction to repair electronic products. Moreover, the consumers' problems are still unresolved.

Therefore, it could be considered that the legal status of consumers' right to repair is not valid in Thailand. Hence, to enhance consumers' right to repair, the lawmaker has to propose new regulations which could address the restriction to repair interfering with consumers' rights.

#### **4.2 The analysis of consumers' right to repair in the United States and its possible adoption in Thailand.**

Even though consumers' right to repair was not specified under the Consumer Bill of Rights 1962, the U.S.A. has provided legal measures that grant their people the right to repair. The consumers' right to repair is regarded as a right in which the consumers can intentionally choose their preferable repairer, parts, price, and place for fixing. Consumers' right to repair needs to provide consumers with the distribution of spare parts, and fair warranty terms. Therefore, the author would like to propose that the concepts found in the Fair Repair Act and Magnuson Moss Warranty Act be adopted in Thailand on the following matters.

Firstly, concerning the provision of electronic spare parts, CPA does not mention the right to repair. Moreover, there is no regulation in which the manufacturer shall provide the spare parts, equipment and information about the electronic device. Enacting the new regulations which mandate the manufacturer to provide spare parts to users and third-party repair shops would be a good solution for enhancing consumers' right to repair in Thailand instead of amending the existing regulations.

Secondly, the warranty and end-user license agreement is separated from the sale of the contract because of their content. The warranty and end-user license agreement has been considered as an agreement between the manufacturer and consumer in the post-purchase phase and cannot satisfy the principles under Section 35 Bis of CPA. So, when the application of Section 35 Bis is obscure, enacting a new regulation would be more suitable than an amendment or issuing the Notification of the Contract Committee under CPA. Therefore, the unfair warranty terms shall not be resolved by applying Section 35 Bis of CPA to announce the Notification of the Committee Regarding Controlled Contract.

And lastly, because of the extent of UCTA, which lacks certainty, the court has to exercise its discretion on a case-by-case basis. The court can use their discretion whether the restriction according to warranty terms or end-user licence agreement provided by the manufacturer is an unfair contract term or not, and there are no prior court decisions ruling under this issue. Therefore, the UCTA is unsuitable for applying to the warranty term or end-user license agreement to address this issue. It may cause unstable decisions on this issue.

## **5. Propositions**

The author would like to propose the new regulation and provisions which protect the consumer from the unfair practice of manufacturers as follows.

The regulation should mandate the manufacturers to distribute the spare parts, equipment and information at “the equitable price.” The manufacturer has to consider the ability of users and repair shops to afford the parts, equipment, or documentary. Because this regulation aims to protect the consumer from manufacturer’s malpractice, in determining the price of parts, the manufacturer shall consider the owners’ and repair shops’ ability to afford it.

The lawmaker should consider offering the spare parts, equipment, and repair guidance to be applicable and conform to the reality of the

product's lifetime. Moreover, it would be unfair for the manufacturer to produce spare parts without limited time. So, the distribution period should be considered by the nature of each kind of device. This regulation shall mandate manufacturers to sell spare parts, equipment, or diagnosis manuals to give repair information and parts in the specific years specified by the Notification of Committee issued under this regulation.

The provision does not cover vehicles and medical devices. In this case, from the author's perspective, some devices and equipment need to be repaired only by experienced repairers because their performance and functionality concern people's lives. In the case of medical devices, manufacturers' products often affect performance and patient safety. Therefore, medical devices should not be governed by these provisions. In other words, in some circumstances, consumers' right to repair cannot be applied to every device and equipment, such as medical devices, machinery, argosy, and aircraft.

According to the author's analysis, the consumers do not receive the fair warranty when the manufacturers adopt terms leading to the prohibition and limitation of consumers' right to repair. Therefore, In the author's opinion, the lawmaker shall provide a specific provision to prevent consumers from being bound by unfair terms. For example, the manufacturer shall not specify the warranty clauses that compel the consumer to receive only the manufacturer's service and authorised spare parts.

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