

2017-2018 Regular Sessions

I N S E N A T E

January 4, 2017

Introduced by Sens. BOYLE, ADDABBO, AKSHAR, AVELLA, CARLUCCI, CROCI, DILAN, HAMILTON, KAMINSKY, MURPHY, PERALTA, ROBACH -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

AN ACT to amend the general business law, in relation to the sale of digital electronic equipment diagnostic and repair information

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Short title. This act shall be known and may be cited as
2 the "fair repair act".

3 S 2. The general business law is amended by adding a new section 399-
4 nn to read as follows:

5 S 399-NN. SALE OF DIGITAL ELECTRONIC EQUIPMENT DIAGNOSTIC AND REPAIR
6 INFORMATION. 1. DEFINITIONS. FOR THE PURPOSES OF THIS SECTION, THE
7 FOLLOWING TERMS SHALL HAVE THE FOLLOWING MEANINGS:

8 (A) "ORIGINAL EQUIPMENT MANUFACTURER" OR "OEM" MEANS ANY PERSON OR
9 BUSINESS WHO, IN THE ORDINARY COURSE OF ITS BUSINESS, IS ENGAGED IN THE
10 BUSINESS OF SELLING OR LEASING NEW DIGITAL ELECTRONIC EQUIPMENT OR PARTS
11 OF EQUIPMENT TO ANY PERSON OR BUSINESS AND IS ENGAGED IN THE DIAGNOSIS,
12 SERVICE, MAINTENANCE OR REPAIR OF DIGITAL ELECTRONIC EQUIPMENT OR PARTS
13 OF SUCH EQUIPMENT.

14 (B) "AUTHORIZED REPAIR PROVIDER" MEANS A PERSON OR BUSINESS THAT HAS
15 AN ARRANGEMENT FOR A DEFINITE OR INDEFINITE PERIOD IN WHICH AN OEM
16 GRANTS TO A SEPARATE BUSINESS ORGANIZATION OR INDIVIDUAL LICENSE TO USE
17 A TRADE NAME, SERVICE MARK OR RELATED CHARACTERISTIC FOR THE PURPOSES OF
18 OFFERING REPAIR SERVICES UNDER THE NAME OF THE OEM.

19 (C) "INDEPENDENT REPAIR PROVIDER" MEANS A PERSON OR BUSINESS OPERATING
20 IN THE STATE OF NEW YORK THAT IS NOT AFFILIATED WITH AN OEM OR AN OEM'S
21 AUTHORIZED REPAIR PROVIDER, WHICH IS ENGAGED IN THE DIAGNOSIS, SERVICE,
22 MAINTENANCE OR REPAIR OF EQUIPMENT; PROVIDED, HOWEVER, THAT, FOR THE
23 PURPOSES OF THIS SECTION, AN OEM SHALL BE CONSIDERED AN INDEPENDENT

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets
[] is old law to be omitted.

LBD05441-01-7

1 REPAIR PROVIDER FOR THE PURPOSES OF THOSE INSTANCES WHEN SUCH OEM
2 ENGAGES IN THE DIAGNOSIS, SERVICE, MAINTENANCE OR REPAIR OF DIGITAL
3 EQUIPMENT THAT IS NOT AFFILIATED WITH THE OEM.

4 (D) "OWNER" MEANS A PERSON OR BUSINESS WHO OWNS OR LEASES A DIGITAL
5 ELECTRONIC PRODUCT PURCHASED OR USED IN THE STATE OF NEW YORK.

6 (E) "DOCUMENTATION" MEANS ANY MANUALS, DIAGRAMS, REPORTING OUTPUT, OR
7 SERVICE CODE DESCRIPTIONS PROVIDED TO THE AUTHORIZED REPAIR PROVIDER FOR
8 THE PURPOSES OF EFFECTING REPAIR.

9 (F) "DIGITAL ELECTRONIC EQUIPMENT" OR "EQUIPMENT" MEANS A PART OR
10 EQUIPMENT ORIGINALLY MANUFACTURED FOR DISTRIBUTION AND SALE IN THE
11 UNITED STATES.

12 (G) "EMBEDDED SOFTWARE" MEANS ANY PROGRAMMABLE INSTRUCTIONS PROVIDED
13 ON FIRMWARE DELIVERED WITH THE EQUIPMENT OR PART FOR THE PURPOSES OF
14 EQUIPMENT OPERATION, INCLUDING ALL RELEVANT PATCHES AND FIXES MADE BY
15 THE MANUFACTURER FOR THIS PURPOSE, INCLUDING, BUT NOT LIMITED TO SYNO-
16 NYMS "BASIC INTERNAL OPERATING SYSTEM", "INTERNAL OPERATING SYSTEM",
17 "MACHINE CODE", "ASSEMBLY CODE", "ROOT CODE", AND "MICROCODE".

18 (H) "REMOTE DIAGNOSTICS" MEANS ANY REMOTE DATA TRANSFER FUNCTION
19 BETWEEN EQUIPMENT AND THE PROVIDER OF REPAIR SERVICES INCLUDING FOR
20 PURPOSES OF REMOTE DIAGNOSTICS, SETTING CONTROLS, OR LOCATION IDENTIFI-
21 CATION.

22 (I) "SERVICE PARTS" OR "PARTS" MEANS ANY REPLACEMENT PARTS, EITHER NEW
23 OR USED, MADE AVAILABLE BY THE OEM TO THE AUTHORIZED REPAIR PROVIDER FOR
24 THE PURPOSES OF EFFECTING REPAIR.

25 (J) "FAIR AND REASONABLE TERMS" MEANS AN EQUITABLE PRICE IN LIGHT OF
26 RELEVANT FACTORS, INCLUDING, BUT NOT LIMITED TO, THE FOLLOWING:

27 (I) THE NET COST TO THE AUTHORIZED REPAIR PROVIDER FOR SIMILAR INFOR-
28 MATION OBTAINED FROM AN OEM, LESS ANY DISCOUNTS, REBATES, OR OTHER
29 INCENTIVE PROGRAMS;

30 (II) THE COST TO THE OEM FOR PREPARING AND DISTRIBUTING THE INFORMA-
31 TION, EXCLUDING ANY RESEARCH AND DEVELOPMENT COSTS INCURRED IN DESIGNING
32 AND IMPLEMENTING, UPGRADING OR ALTERING THE PRODUCT, BUT INCLUDING AMOR-
33 TIZED CAPITAL COSTS FOR THE PREPARATION AND DISTRIBUTION OF THE INFORMA-
34 TION;

35 (III) THE PRICE CHARGED BY OTHER OEMS FOR SIMILAR INFORMATION;

36 (IV) THE PRICE CHARGED BY OEMS FOR SIMILAR INFORMATION PRIOR TO THE
37 LAUNCH OF OEM WEB SITES;

38 (V) THE ABILITY OF AFTERMARKET TECHNICIANS OR SHOPS TO AFFORD THE
39 INFORMATION;

40 (VI) THE MEANS BY WHICH THE INFORMATION IS DISTRIBUTED;

41 (VII) THE EXTENT TO WHICH THE INFORMATION IS USED, WHICH INCLUDES THE
42 NUMBER OF USERS, AND FREQUENCY, DURATION, AND VOLUME OF USE; AND

43 (VIII) INFLATION.

44 (K) "TRADE SECRET" MEANS ANYTHING TANGIBLE OR INTANGIBLE OR ELECTRON-
45 ICALLY STORED OR KEPT WHICH CONSTITUTES, REPRESENTS, EVIDENCES OR
46 RECORDS INTELLECTUAL PROPERTY INCLUDING SECRET OR CONFIDENTIALLY HELD
47 DESIGNS, PROCESSES, PROCEDURES, FORMULAS, INVENTIONS OR IMPROVEMENTS, OR
48 SECRET OR CONFIDENTIALLY HELD SCIENTIFIC, TECHNICAL, MERCHANDISING,
49 PRODUCTION, FINANCIAL, BUSINESS OR MANAGEMENT INFORMATION, OR ANYTHING
50 WITHIN THE DEFINITION OF PARAGRAPH THREE OF SECTION 1839 OF TITLE EIGH-
51 TEEN OF THE UNITED STATES CODE.

52 (L) "MOTOR VEHICLE" MEANS ANY VEHICLE THAT IS DESIGNED FOR TRANSPORT-
53 ING PERSONS OR PROPERTY ON A STREET OR HIGHWAY AND THAT IS CERTIFIED BY
54 THE MANUFACTURER UNDER ALL APPLICABLE FEDERAL SAFETY AND EMISSIONS STAN-
55 DARDS AND REQUIREMENTS FOR DISTRIBUTION AND SALE IN THE UNITED STATES,

1 BUT EXCLUDING (I) A MOTORCYCLE; OR (II) A RECREATIONAL VEHICLE OR AN
2 AUTO HOME EQUIPPED FOR HABITATION.

3 (M) "MOTOR VEHICLE MANUFACTURER" MEANS ANY PERSON OR BUSINESS ENGAGED
4 IN THE BUSINESS OF MANUFACTURING OR ASSEMBLING NEW MOTOR VEHICLES.

5 (N) "MOTOR VEHICLE DEALER" MEANS ANY PERSON OR BUSINESS WHO, IN THE
6 ORDINARY COURSE OF ITS BUSINESS, IS ENGAGED IN THE BUSINESS OF SELLING
7 OR LEASING NEW MOTOR VEHICLES TO A PERSON OR BUSINESS PURSUANT TO A
8 FRANCHISE AGREEMENT AND WHO HAS OBTAINED A LICENSE, AS REQUIRED UNDER
9 APPLICABLE LAW, AND IS ENGAGED IN THE DIAGNOSIS, SERVICE, MAINTENANCE OR
10 REPAIR OF MOTOR VEHICLES OR MOTOR VEHICLE ENGINES PURSUANT TO SAID FRAN-
11 CHISE AGREEMENT.

12 2. (A) FOR EQUIPMENT AND PARTS SOLD OR USED IN THIS STATE, THE OEMS OF
13 SUCH EQUIPMENT AND PARTS SHALL (I) MAKE AVAILABLE TO INDEPENDENT REPAIR
14 PROVIDERS OR OWNERS OF PRODUCTS MANUFACTURED BY SUCH OEM DIAGNOSTIC AND
15 REPAIR INFORMATION, INCLUDING REPAIR TECHNICAL UPDATES, UPDATES AND
16 CORRECTIONS TO EMBEDDED SOFTWARE FOR NO CHARGE OR IN THE SAME MANNER
17 SUCH OEM MAKES AVAILABLE TO ITS AUTHORIZED REPAIR PROVIDER; AND

18 (II) MAKE AVAILABLE FOR PURCHASE BY THE EQUIPMENT OWNER, HIS OR HER
19 AUTHORIZED AGENT OR INDEPENDENT REPAIR PROVIDER, PARTS, INCLUSIVE OF ANY
20 UPDATES TO THE EMBEDDED SOFTWARE OF THE PARTS, UPON FAIR AND REASONABLE
21 TERMS. NOTHING IN THIS SUBDIVISION SHALL REQUIRE THE OEM TO SELL PARTS
22 IF THE PARTS ARE NO LONGER AVAILABLE TO THE OEM OR THE AUTHORIZED REPAIR
23 PROVIDER OF THE OEM.

24 (B) ANY OEM THAT SELLS ANY DIAGNOSTIC, SERVICE, OR REPAIR INFORMATION
25 TO ANY INDEPENDENT REPAIR PROVIDER OR TO ANY OWNER IN A FORMAT THAT IS
26 STANDARDIZED WITH OTHER OEMS, AND ON TERMS AND CONDITIONS MORE FAVORABLE
27 THAN THE MANNER AND THE TERMS AND CONDITIONS PURSUANT TO WHICH THE
28 AUTHORIZED REPAIR PROVIDER OBTAINS THE SAME DIAGNOSTIC, SERVICE OR
29 REPAIR INFORMATION, SHALL BE PROHIBITED FROM REQUIRING ANY AUTHORIZED
30 REPAIR PROVIDER TO CONTINUE PURCHASING DIAGNOSTIC, SERVICE, OR REPAIR
31 INFORMATION IN A PROPRIETARY FORMAT, UNLESS SUCH PROPRIETARY FORMAT
32 INCLUDES DIAGNOSTIC, SERVICE, OR REPAIR OPERATIONS INFORMATION OR FUNC-
33 TIONALITY THAT IS NOT AVAILABLE IN SUCH STANDARDIZED FORMAT.

34 (C) EACH OEM OF EQUIPMENT SOLD OR USED IN THE STATE OF NEW YORK SHALL
35 MAKE AVAILABLE FOR PURCHASE BY OWNERS AND INDEPENDENT REPAIR FACILITIES
36 ALL DIAGNOSTIC REPAIR TOOLS INCORPORATING THE SAME DIAGNOSTIC, REPAIR
37 AND REMOTE COMMUNICATIONS CAPABILITIES THAT SUCH OEM MAKES AVAILABLE TO
38 ITS OWN REPAIR OR ENGINEERING STAFF OR ANY AUTHORIZED REPAIR PROVIDER.
39 EACH OEM SHALL OFFER SUCH TOOLS FOR SALE TO OWNERS AND TO INDEPENDENT
40 REPAIR FACILITIES UPON FAIR AND REASONABLE TERMS.

41 EACH OEM THAT PROVIDES DIAGNOSTIC REPAIR INFORMATION TO AFTERMARKET
42 TOOL, DIAGNOSTICS, OR THIRD PARTY SERVICE INFORMATION PUBLICATIONS AND
43 SYSTEMS SHALL HAVE FULLY SATISFIED ITS OBLIGATIONS UNDER THIS SECTION
44 AND THEREAFTER NOT BE RESPONSIBLE FOR THE CONTENT AND FUNCTIONALITY OF
45 AFTERMARKET DIAGNOSTIC TOOLS OR SERVICE INFORMATION SYSTEMS.

46 (D) OEM EQUIPMENT OR PARTS SOLD OR USED IN THE STATE OF NEW YORK FOR
47 THE PURPOSE OF PROVIDING SECURITY-RELATED FUNCTIONS MAY NOT EXCLUDE
48 DIAGNOSTIC, SERVICE AND REPAIR INFORMATION NECESSARY TO RESET A SECURI-
49 TY-RELATED ELECTRONIC FUNCTION FROM INFORMATION PROVIDED TO OWNERS AND
50 INDEPENDENT REPAIR FACILITIES. IF EXCLUDED UNDER THIS PARAGRAPH, THE
51 INFORMATION NECESSARY TO RESET AN IMMOBILIZER SYSTEM OR SECURITY-RELATED
52 ELECTRONIC MODULE SHALL BE OBTAINED BY OWNERS AND INDEPENDENT REPAIR
53 FACILITIES THROUGH THE APPROPRIATE SECURE DATA RELEASE SYSTEMS.

54 3. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO REQUIRE AN OEM TO
55 DIVULGE A TRADE SECRET.

1 4. NOTWITHSTANDING ANY LAW, RULE OR REGULATION TO THE CONTRARY, NO
2 PROVISION IN THIS SECTION SHALL BE READ, INTERPRETED OR CONSTRUED TO
3 ABROGATE, INTERFERE WITH, CONTRADICT OR ALTER THE TERMS OF ANY AGREEMENT
4 EXECUTED AND IN FORCE BETWEEN AN AUTHORIZED REPAIR PROVIDER AND AN OEM
5 INCLUDING, BUT NOT LIMITED TO, THE PERFORMANCE OR PROVISION OF WARRANTY
6 OR RECALL REPAIR WORK BY AN AUTHORIZED REPAIR PROVIDER ON BEHALF OF AN
7 OEM PURSUANT TO SUCH AUTHORIZED REPAIR AGREEMENT; PROVIDED, HOWEVER,
8 THAT ANY PROVISION IN SUCH AN AUTHORIZED REPAIR AGREEMENT THAT PURPORTS
9 TO WAIVE, AVOID, RESTRICT OR LIMIT AN OEM'S COMPLIANCE WITH THIS SECTION
10 SHALL BE VOID AND UNENFORCEABLE.

11 5. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO REQUIRE OEMS OR
12 AUTHORIZED REPAIR PROVIDERS TO PROVIDE AN OWNER OR INDEPENDENT REPAIR
13 PROVIDER ACCESS TO NON-DIAGNOSTIC AND REPAIR INFORMATION PROVIDED BY AN
14 OEM TO AN AUTHORIZED REPAIR PROVIDER PURSUANT TO THE TERMS OF AN AUTHOR-
15 IZING AGREEMENT.

16 6. NOTHING IN THIS SECTION SHALL APPLY TO MOTOR VEHICLE MANUFACTURERS,
17 ANY PRODUCT OR SERVICE OF A MOTOR VEHICLE MANUFACTURER OR MOTOR VEHICLE
18 DEALERS AS DEFINED IN THIS SECTION.

19 7. ANY INDEPENDENT REPAIR PROVIDER THAT PURCHASES OR ACQUIRES EMBEDDED
20 SOFTWARE OR SERVICE PARTS SHALL, PRIOR TO PERFORMING ANY SERVICES ON
21 DIGITAL ELECTRONIC EQUIPMENT, NOTIFY THE OWNER OF SUCH EQUIPMENT IN
22 WRITING THAT:

23 (A) CONSUMERS SHOULD REVIEW THE TERMS AND CONDITIONS OF THE WARRANTY
24 FOR SUCH DIGITAL ELECTRONIC EQUIPMENT AS REPAIRS NOT PERFORMED BY AN
25 AUTHORIZED REPAIR PROVIDER COULD AFFECT THE TERMS AND CONDITIONS OF THE
26 WARRANTY;

27 (B) WARRANTORS CANNOT REQUIRE THAT ONLY BRANDED PARTS BE USED WITH THE
28 PRODUCT IN ORDER TO RETAIN THE WARRANTY;

29 (C) WARRANTORS SHALL DEMONSTRATE THAT A DEFECT OR DAMAGE WAS CAUSED BY
30 INDEPENDENT REPAIR TO AFFECT THE WARRANTY;

31 (D) WARRANTIES ARE GOVERNED BY THE FEDERAL MAGNUSON-MOSS WARRANTY ACT;
32 AND

33 (E) SUCH INDEPENDENT REPAIR PROVIDER IS NOT AN AUTHORIZED REPAIR
34 PROVIDER FOR SUCH DIGITAL ELECTRONIC EQUIPMENT.

35 8. THE CONSUMER PROTECTION DIVISION SHALL DEVELOP, ESTABLISH AND
36 IMPLEMENT A PUBLIC OUTREACH PROGRAM DIRECTED AT INDEPENDENT REPAIR
37 PROVIDERS, CONSUMERS AND DIGITAL ELECTRONIC ORIGINAL EQUIPMENT MANUFAC-
38 TURERS TO INFORM THEM OF THEIR RIGHTS AND RESPONSIBILITIES PURSUANT TO
39 THIS SECTION. SUCH PUBLIC OUTREACH SHALL INCLUDE BROCHURES, CONSUMER
40 GUIDES, POSTERS OR ANY COMBINATION THEREOF AND MADE AVAILABLE TO CONSUM-
41 ERS AND OTHER STAKEHOLDERS BY ANY MEANS DEEMED APPROPRIATE BY SUCH DIVI-
42 SION AND MAY INCLUDE INTERNET, RADIO, AND PRINT ADVERTISING. THE PUBLIC
43 OUTREACH MAY ALSO IDENTIFY AND RECRUIT INDIVIDUALS OR TRADE ORGANIZA-
44 TIONS TO ASSIST IN DISTRIBUTING THIS INFORMATION AND MATERIALS. THE
45 PUBLIC OUTREACH SHALL BEGIN NO LATER THAN THE THIRTIETH DAY AFTER THE
46 EFFECTIVE DATE OF THIS SECTION.

47 9. (A) WHENEVER THE ATTORNEY GENERAL SHALL BELIEVE FROM EVIDENCE
48 SATISFACTORY TO HIM THAT ANY PERSON, FIRM, CORPORATION OR ASSOCIATION OR
49 AGENT OR EMPLOYEE THEREOF HAS ENGAGED IN OR IS ABOUT TO ENGAGE IN ANY OF
50 THE ACTS OR PRACTICES IN VIOLATION OF THIS SECTION HE MAY BRING AN
51 ACTION IN THE NAME AND ON BEHALF OF THE PEOPLE OF THE STATE OF NEW YORK
52 TO ENJOIN SUCH UNLAWFUL ACTS OR PRACTICES AND TO OBTAIN RESTITUTION OF
53 ANY MONEYS OR PROPERTY OBTAINED DIRECTLY OR INDIRECTLY BY ANY SUCH ACTS
54 OR PRACTICES IN VIOLATION OF THIS SECTION. IN SUCH ACTION PRELIMINARY
55 RELIEF MAY BE GRANTED UNDER ARTICLE SIXTY-THREE OF THE CIVIL PRACTICE
56 LAW AND RULES.

1 (B) BEFORE ANY VIOLATION OF THIS SECTION IS SOUGHT TO BE ENJOINED, THE
2 ATTORNEY GENERAL SHALL BE REQUIRED TO GIVE THE PERSON AGAINST WHOM SUCH
3 PROCEEDING IS CONTEMPLATED NOTICE BY CERTIFIED MAIL AND AN OPPORTUNITY
4 TO SHOW IN WRITING WITHIN FIVE BUSINESS DAYS AFTER RECEIPT OF NOTICE WHY
5 PROCEEDINGS SHOULD NOT BE INSTITUTED AGAINST HIM, UNLESS THE ATTORNEY
6 GENERAL SHALL FIND, IN ANY CASE IN WHICH HE SEEKS PRELIMINARY RELIEF,
7 THAT TO GIVE SUCH NOTICE AND OPPORTUNITY IS NOT IN THE PUBLIC INTEREST.

8 (C) IN CONNECTION WITH ANY PROPOSED PROCEEDING UNDER THIS SECTION, THE
9 ATTORNEY GENERAL IS AUTHORIZED TO TAKE PROOF AND MAKE A DETERMINATION OF
10 THE RELEVANT FACTS, AND TO ISSUE SUBPOENAS IN ACCORDANCE WITH THE CIVIL
11 PRACTICE LAW AND RULES.

12 (D) THIS SUBDIVISION SHALL APPLY TO ALL ACTS OR PRACTICES DECLARED TO
13 BE IN VIOLATION OF THIS SECTION, WHETHER OR NOT SUBJECT TO ANY OTHER LAW
14 OF THIS STATE, AND SHALL NOT SUPERSEDE, AMEND OR REPEAL ANY OTHER LAW OF
15 THIS STATE UNDER WHICH THE ATTORNEY GENERAL IS AUTHORIZED TO TAKE ANY
16 ACTION OR CONDUCT ANY INQUIRY.

17 (E) ANY PERSON, FIRM, CORPORATION OR ASSOCIATION OR AGENT OR EMPLOYEE
18 THEREOF WHO ENGAGES IN ANY OF THE ACTS OR PRACTICES TO BE IN VIOLATION
19 OF THIS SECTION SHALL BE LIABLE TO A CIVIL PENALTY OF NOT MORE THAN FIVE
20 HUNDRED DOLLARS FOR EACH VIOLATION, WHICH SHALL ACCRUE TO THE STATE OF
21 NEW YORK AND MAY BE RECOVERED IN A CIVIL ACTION BROUGHT BY THE ATTORNEY
22 GENERAL.

23 (F) EXCEPT IN THE INSTANCE OF A DISPUTE ARISING BETWEEN AN ORIGINAL
24 EQUIPMENT MANUFACTURER AND ITS AUTHORIZED REPAIR PROVIDER RELATED TO
25 EITHER PARTY'S COMPLIANCE WITH AN EXISTING AUTHORIZED REPAIR AGREEMENT,
26 AN AUTHORIZED REPAIR PROVIDER SHALL HAVE ALL THE RIGHTS AND REMEDIES
27 PROVIDED IN THIS SECTION.

28 S 3. This act shall take effect on the sixtieth day after it shall
29 have become a law; provided, however, that subdivision 7 of section
30 399-nn of the general business law, as added by section two of this act
31 shall take effect on the ninetieth day after it shall have become a law.