

3998

2015-2016 Regular Sessions

I N S E N A T E

February 25, 2015

Introduced by Sen. BOYLE -- 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 certain diagnostic and repair information systems

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

1 Section 1. The general business law is amended by adding a new section
2 399-nn to read as follows:

3 S 399-NN. SALE OF DIAGNOSTIC AND REPAIR INFORMATION SYSTEMS. 1. DEFINI-
4 TIONS. AS USED IN THIS SECTION, THE FOLLOWING TERMS SHALL HAVE THE
5 SIGNIFICANCE HEREIN DEFINED UNLESS ANOTHER MEANING IS CLEARLY APPARENT
6 IN LANGUAGE OR CONTEXT:

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

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

19 (C) "AUTHORIZED REPAIR PROVIDER" MEANS AN ORAL OR WRITTEN ARRANGEMENT
20 FOR A DEFINITE OR INDEFINITE PERIOD IN WHICH A MANUFACTURER OR DISTRIBUTOR
21 GRANTS TO A SEPARATE BUSINESS ORGANIZATION OR INDIVIDUAL LICENSE TO
22 USE A TRADE NAME, SERVICE MARK OR RELATED CHARACTERISTIC FOR THE
23 PURPOSES OF OFFERING REPAIR SERVICES UNDER THE NAME OF THE MANUFACTURER.

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

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

LBD07386-03-5

- 1 (I) THE NET COST TO THE AUTHORIZED REPAIR ORGANIZATIONS FOR SIMILAR
2 INFORMATION OBTAINED FROM MANUFACTURERS, LESS ANY DISCOUNTS, REBATES, OR
3 OTHER INCENTIVE PROGRAMS;
- 4 (II) THE COST TO THE MANUFACTURER FOR PREPARING AND DISTRIBUTING THE
5 INFORMATION, EXCLUDING ANY RESEARCH AND DEVELOPMENT COSTS INCURRED IN
6 DESIGNING AND IMPLEMENTING, UPGRADING OR ALTERING THE PRODUCT, BUT
7 INCLUDING AMORTIZED CAPITAL COSTS FOR THE PREPARATION AND DISTRIBUTION
8 OF THE INFORMATION;
- 9 (III) THE PRICE CHARGED BY OTHER MANUFACTURERS FOR SIMILAR INFORMA-
10 TION;
- 11 (IV) THE PRICE CHARGED BY MANUFACTURERS FOR SIMILAR INFORMATION PRIOR
12 TO THE LAUNCH OF MANUFACTURER WEB SITES;
- 13 (V) THE ABILITY OF AFTERMARKET TECHNICIANS OR SHOPS TO AFFORD THE
14 INFORMATION;
- 15 (VI) THE MEANS BY WHICH THE INFORMATION IS DISTRIBUTED;
- 16 (VII) THE EXTENT TO WHICH THE INFORMATION IS USED, WHICH INCLUDES THE
17 NUMBER OF USERS, AND FREQUENCY, DURATION, AND VOLUME OF USE; AND
- 18 (VIII) INFLATION.
- 19 (E) "DATA SECURITY FEATURE" MEANS ANY FEATURE OF AN ELECTRONIC DEVICE
20 DESIGNED FOR THE SOLE PURPOSE OF PREVENTING THE USE OF AN ELECTRONIC
21 DEVICE IN WHICH IT IS INSTALLED FROM STARTING WITHOUT THE CORRECT ACTI-
22 VATION OR AUTHORIZATION CODE.
- 23 (F) "DOCUMENTATION" MEANS ANY MANUALS, DIAGRAMS, REPORTING OUTPUT, OR
24 SERVICE CODE DESCRIPTIONS PROVIDED TO THE AUTHORIZED REPAIR PROVIDER FOR
25 THE PURPOSES OF EFFECTING REPAIR.
- 26 (G) "SERVICE PARTS" MEANS ANY REPLACEMENT PARTS, EITHER NEW OR USED,
27 MADE AVAILABLE BY THE MANUFACTURER TO THE AUTHORIZED REPAIR PROVIDER FOR
28 THE PURPOSES OF EFFECTING REPAIR.
- 29 (H) "INDEPENDENT REPAIR PROVIDER" MEANS A PERSON OR BUSINESS OPERATING
30 IN THE STATE OF NEW YORK THAT IS NOT AFFILIATED WITH A MANUFACTURER OR
31 MANUFACTURER'S AUTHORIZED REPAIR PROVIDER, WHICH IS ENGAGED IN THE DIAG-
32 NOSIS, SERVICE, MAINTENANCE OR REPAIR OF DIGITAL ELECTRONIC EQUIPMENT;
33 PROVIDED, HOWEVER, THAT, FOR THE PURPOSES OF THIS SECTION, A MANUFACTUR-
34 ER SHALL BE CONSIDERED AN INDEPENDENT REPAIR PROVIDER FOR THE PURPOSES
35 OF THOSE INSTANCES WHEN SUCH MANUFACTURER ENGAGES IN THE DIAGNOSIS,
36 SERVICE, MAINTENANCE OR REPAIR OF DIGITAL ELECTRONIC EQUIPMENT THAT ARE
37 NOT AFFILIATED WITH THE MANUFACTURER.
- 38 (I) "DIGITAL ELECTRONIC EQUIPMENT" MEANS A PART OR MACHINE ORIGINALLY
39 MANUFACTURED FOR DISTRIBUTION AND SALE IN THE UNITED STATES.
- 40 (J) "OWNER" MEANS A PERSON OR BUSINESS WHO OWNS OR LEASES A DIGITAL
41 ELECTRONIC PRODUCT PURCHASED OR USED IN THE STATE OF NEW YORK.
- 42 (K) "REMOTE DIAGNOSTICS" MEANS ANY REMOTE DATA TRANSFER FUNCTION
43 BETWEEN A DIGITAL ELECTRONIC MACHINE AND THE PROVIDER OF REPAIR SERVICES
44 INCLUDING FOR PURPOSES OF REMOTE DIAGNOSTICS, SETTING CONTROLS, OR
45 LOCATION IDENTIFICATION.
- 46 (L) "TRADE SECRET" MEANS ANYTHING TANGIBLE OR INTANGIBLE OR ELECTRON-
47 ICALLY STORED OR KEPT WHICH CONSTITUTES, REPRESENTS, EVIDENCES OR
48 RECORDS INTELLECTUAL PROPERTY INCLUDING SECRET OR CONFIDENTIALLY HELD
49 DESIGNS, PROCESSES, PROCEDURES, FORMULAS, INVENTIONS OR IMPROVEMENTS, OR
50 SECRET OR CONFIDENTIALLY HELD SCIENTIFIC, TECHNICAL, MERCHANDISING,
51 PRODUCTION, FINANCIAL, BUSINESS OR MANAGEMENT INFORMATION, OR ANYTHING
52 WITHIN THE DEFINITION OF PARAGRAPH THREE OF SECTION 1839 OF TITLE EIGH-
53 TEEN OF THE UNITED STATES CODE.
- 54 (M) "MOTOR VEHICLE" MEANS ANY VEHICLE THAT IS DESIGNED FOR TRANSPORT-
55 ING PERSONS OR PROPERTY ON A STREET OR HIGHWAY AND THAT IS CERTIFIED BY
56 THE MANUFACTURER UNDER ALL APPLICABLE FEDERAL SAFETY AND EMISSIONS STAN-

1 DARDS AND REQUIREMENTS FOR DISTRIBUTION AND SALE IN THE UNITED STATES,
2 BUT EXCLUDING (I) A MOTORCYCLE; (II) A VEHICLE WITH A GROSS VEHICLE
3 WEIGHT OVER 14,000 POUNDS; OR (III) A RECREATIONAL VEHICLE OR AN AUTO
4 HOME EQUIPPED FOR HABITATION.

5 (N) "MOTOR VEHICLE MANUFACTURER" MEANS ANY PERSON OR BUSINESS ENGAGED
6 IN THE BUSINESS OF MANUFACTURING OR ASSEMBLING NEW MOTOR VEHICLES.

7 (O) "MOTOR VEHICLE DEALER" MEANS ANY PERSON OR BUSINESS WHO, IN THE
8 ORDINARY COURSE OF ITS BUSINESS, IS ENGAGED IN THE BUSINESS OF SELLING
9 OR LEASING NEW MOTOR VEHICLES TO CONSUMERS OR OTHER END USERS PURSUANT
10 TO A FRANCHISE AGREEMENT AND WHO HAS OBTAINED A LICENSE, AS REQUIRED
11 UNDER APPLICABLE LAW, AND IS ENGAGED IN THE DIAGNOSIS, SERVICE, MAINTENANCE
12 OR REPAIR OF MOTOR VEHICLES OR MOTOR VEHICLE ENGINES PURSUANT TO
13 SAID FRANCHISE AGREEMENT.

14 2. (A) MANUFACTURERS OF DIGITAL ELECTRONIC PARTS AND MACHINES SOLD OR
15 USED IN THE STATE OF NEW YORK SHALL: I. MAKE AVAILABLE FOR PURCHASE BY
16 INDEPENDENT REPAIR FACILITIES OR OTHER OWNERS OF PRODUCTS MANUFACTURED
17 BY SUCH MANUFACTURER DIAGNOSTIC AND REPAIR INFORMATION, INCLUDING REPAIR
18 TECHNICAL UPDATES, UPDATES AND CORRECTIONS TO FIRMWARE, AND RELATED
19 DOCUMENTATION, IN THE SAME MANNER SUCH MANUFACTURER MAKES AVAILABLE TO
20 ITS AUTHORIZED REPAIR CHANNEL. EACH MANUFACTURER SHALL PROVIDE ACCESS TO
21 SUCH MANUFACTURER'S DIAGNOSTIC AND REPAIR INFORMATION SYSTEM FOR
22 PURCHASE BY OWNERS AND INDEPENDENT REPAIR FACILITIES UPON FAIR AND
23 REASONABLE TERMS; AND

24 II. MAKE AVAILABLE FOR PURCHASE BY THE PRODUCT OWNER, OR THE AUTHOR-
25 IZED AGENT OF THE OWNER, SUCH SERVICE PARTS, INCLUSIVE OF ANY UPDATES TO
26 THE FIRMWARE OF THE PARTS, FOR PURCHASE UPON FAIR AND REASONABLE TERMS.
27 NOTHING IN THIS SUBDIVISION SHALL REQUIRE THE ORIGINAL EQUIPMENT
28 MANUFACTURER TO SELL SERVICE PARTS IF THE SERVICE PARTS ARE NO LONGER
29 AVAILABLE TO THE ORIGINAL EQUIPMENT MANUFACTURER OR THE AUTHORIZED
30 REPAIR PROVIDER OF THE ORIGINAL EQUIPMENT MANUFACTURER.

31 (B) ANY MANUFACTURER THAT SELLS ANY DIAGNOSTIC, SERVICE, OR REPAIR
32 INFORMATION TO ANY INDEPENDENT REPAIR PROVIDER OR OTHER THIRD PARTY
33 PROVIDER IN A FORMAT THAT IS STANDARDIZED WITH OTHER MANUFACTURERS, AND
34 ON TERMS AND CONDITIONS MORE FAVORABLE THAN THE MANNER AND THE TERMS AND
35 CONDITIONS PURSUANT TO WHICH THE AUTHORIZED REPAIR PROVIDER OBTAINS THE
36 SAME DIAGNOSTIC, SERVICE OR REPAIR INFORMATION, SHALL BE PROHIBITED FROM
37 REQUIRING ANY AUTHORIZED REPAIR PROVIDER TO CONTINUE PURCHASING DIAGNOS-
38 TIC, SERVICE, OR REPAIR INFORMATION IN A PROPRIETARY FORMAT, UNLESS SUCH
39 PROPRIETARY FORMAT INCLUDES DIAGNOSTIC, SERVICE, OR REPAIR OPERATIONS
40 INFORMATION OR FUNCTIONALITY THAT IS NOT AVAILABLE IN SUCH STANDARDIZED
41 FORMAT.

42 (C) EACH MANUFACTURER OF DIGITAL ELECTRONIC PRODUCTS SOLD OR USED IN
43 THE STATE OF NEW YORK SHALL MAKE AVAILABLE FOR PURCHASE BY OWNERS AND
44 INDEPENDENT REPAIR FACILITIES ALL DIAGNOSTIC REPAIR TOOLS INCORPORATING
45 THE SAME DIAGNOSTIC, REPAIR AND REMOTE COMMUNICATIONS CAPABILITIES THAT
46 SUCH MANUFACTURER MAKES AVAILABLE TO ITS OWN REPAIR OR ENGINEERING STAFF
47 OR ANY AUTHORIZED REPAIR CHANNELS. EACH MANUFACTURER SHALL OFFER SUCH
48 TOOLS FOR SALE TO OWNERS AND TO INDEPENDENT REPAIR FACILITIES UPON FAIR
49 AND REASONABLE TERMS.

50 EACH MANUFACTURER THAT PROVIDES DIAGNOSTIC REPAIR INFORMATION TO
51 AFTERMARKET TOOL, DIAGNOSTICS, OR THIRD PARTY SERVICE INFORMATION PUBLI-
52 CATIONS AND SYSTEMS SHALL HAVE FULLY SATISFIED ITS OBLIGATIONS UNDER
53 THIS SECTION AND THEREAFTER NOT BE RESPONSIBLE FOR THE CONTENT AND FUNC-
54 TIONALITY OF AFTERMARKET DIAGNOSTIC TOOLS OR SERVICE INFORMATION
55 SYSTEMS.

1 (D) MANUFACTURERS OF DIGITAL ELECTRONIC EQUIPMENT OR PARTS SOLD OR
2 USED IN THE STATE OF NEW YORK FOR THE PURPOSE OF PROVIDING SECURITY-RE-
3 LATED FUNCTIONS MAY NOT EXCLUDE DIAGNOSTIC, SERVICE AND REPAIR INFORMA-
4 TION NECESSARY TO RESET A SECURITY-RELATED ELECTRONIC FUNCTION FROM
5 INFORMATION PROVIDED TO OWNERS AND INDEPENDENT REPAIR FACILITIES. IF
6 EXCLUDED UNDER THIS PARAGRAPH, THE INFORMATION NECESSARY TO RESET AN
7 IMMOBILIZER SYSTEM OR SECURITY-RELATED ELECTRONIC MODULE SHALL BE
8 OBTAINED BY OWNERS AND INDEPENDENT REPAIR FACILITIES THROUGH THE APPRO-
9 PRIATE SECURE DATA RELEASE SYSTEMS.

10 3. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO REQUIRE A MANUFACTUR-
11 ER TO DIVULGE A TRADE SECRET.

12 4. NOTWITHSTANDING ANY LAW, RULE OR REGULATION TO THE CONTRARY, NO
13 PROVISION IN THIS SECTION SHALL BE READ, INTERPRETED OR CONSTRUED TO
14 ABROGATE, INTERFERE WITH, CONTRADICT OR ALTER THE TERMS OF ANY AGREEMENT
15 EXECUTED AND IN FORCE BETWEEN AN AUTHORIZED REPAIR PROVIDER AND A
16 MANUFACTURER INCLUDING, BUT NOT LIMITED TO, THE PERFORMANCE OR PROVISION
17 OF WARRANTY OR RECALL REPAIR WORK BY AN AUTHORIZED REPAIR PROVIDER ON
18 BEHALF OF A MANUFACTURER PURSUANT TO SUCH AUTHORIZED REPAIR AGREEMENT;
19 PROVIDED, HOWEVER, THAT ANY PROVISION IN SUCH AN AUTHORIZED REPAIR
20 PROVIDER THAT PURPORTS TO WAIVE, AVOID, RESTRICT OR LIMIT A MANUFACTUR-
21 ER'S COMPLIANCE WITH THIS SECTION SHALL BE VOID AND UNENFORCEABLE.

22 5. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO REQUIRE MANUFACTURERS
23 OR AUTHORIZED REPAIR PROVIDERS TO PROVIDE AN OWNER OR INDEPENDENT REPAIR
24 PROVIDER ACCESS TO NON-DIAGNOSTIC AND REPAIR INFORMATION PROVIDED BY A
25 MANUFACTURER TO AN AUTHORIZED REPAIR PROVIDER PURSUANT TO THE TERMS OF
26 AN AUTHORIZING AGREEMENT.

27 6. NOTHING IN THIS SECTION SHALL APPLY TO MOTOR VEHICLE MANUFACTURERS
28 OR MOTOR VEHICLE DEALERS AS DEFINED IN THIS SECTION.

29 7. (A) IN ADDITION TO ANY OTHER REMEDIES THAT MAY BE AVAILABLE AT LAW,
30 A VIOLATION OF THIS SECTION SHALL BE DEEMED TO BE AN UNFAIR METHOD OF
31 COMPETITION AND AN UNFAIR OR DECEPTIVE ACT OR PRACTICE IN THE CONDUCT OF
32 TRADE OR COMMERCE IN VIOLATION OF SECTION THREE HUNDRED FORTY-NINE OF
33 THIS CHAPTER.

34 (B) AN INDEPENDENT REPAIR PROVIDER OR OWNER WHO BELIEVES THAT A
35 MANUFACTURER HAS FAILED TO PROVIDE INFORMATION, INCLUDING DOCUMENTATION,
36 UPDATES TO FIRMWARE, SAFETY AND SECURITY CORRECTIONS, DIAGNOSTICS,
37 DOCUMENTATION, OR A TOOL REQUIRED BY THIS SECTION MUST NOTIFY THE
38 MANUFACTURER IN WRITING AND GIVE THE MANUFACTURER THIRTY DAYS FROM THE
39 TIME THE MANUFACTURER RECEIVES THE COMPLAINT TO CURE THE FAILURE. IF THE
40 MANUFACTURER CURES SUCH COMPLAINT WITHIN THE CURE PERIOD, DAMAGES SHALL
41 BE LIMITED TO ACTUAL DAMAGES IN ANY SUBSEQUENT LITIGATION.

42 (C) EXCEPT IN THE INSTANCE OF A DISPUTE ARISING BETWEEN AN ORIGINAL
43 EQUIPMENT MANUFACTURER AND ITS AUTHORIZED REPAIR PROVIDER RELATED TO
44 EITHER PARTY'S COMPLIANCE WITH AN EXISTING AUTHORIZED REPAIR AGREEMENT,
45 AN AUTHORIZED REPAIR PROVIDER SHALL HAVE ALL THE RIGHTS AND REMEDIES
46 PROVIDED IN THIS SECTION.

47 S 2. This act shall take effect on the sixtieth day after it shall
48 have become a law.