

3998--A

2015-2016 Regular Sessions

I N S E N A T E

February 25, 2015

Introduced by Sens. BOYLE, ADDABBO, AVELLA, CROCI, PERALTA, ROBACH, SAMPSON -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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

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

LBD07386-05-5

1 PURPOSES OF THIS SECTION, AN OEM SHALL BE CONSIDERED AN INDEPENDENT
2 REPAIR PROVIDER FOR THE PURPOSES OF THOSE INSTANCES WHEN SUCH OEM
3 ENGAGES IN THE DIAGNOSIS, SERVICE, MAINTENANCE OR REPAIR OF DIGITAL
4 EQUIPMENT THAT IS NOT AFFILIATED WITH THE OEM.

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

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

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

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

19 (H) "DATA SECURITY FEATURE" MEANS ANY FEATURE OF EQUIPMENT DESIGNED
20 FOR THE SOLE PURPOSE OF PREVENTING THE USE OF EQUIPMENT IN WHICH IT IS
21 INSTALLED FROM STARTING WITHOUT THE CORRECT ACTIVATION OR AUTHORIZATION
22 CODE.

23 (I) "REMOTE DIAGNOSTICS" MEANS ANY REMOTE DATA TRANSFER FUNCTION
24 BETWEEN EQUIPMENT AND THE PROVIDER OF REPAIR SERVICES INCLUDING FOR
25 PURPOSES OF REMOTE DIAGNOSTICS, SETTING CONTROLS, OR LOCATION IDENTIFI-
26 CATION.

27 (J) "SERVICE PARTS" OR "PARTS" MEANS ANY REPLACEMENT PARTS, EITHER NEW
28 OR USED, MADE AVAILABLE BY THE OEM TO THE AUTHORIZED REPAIR PROVIDER FOR
29 THE PURPOSES OF EFFECTING REPAIR.

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

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

35 (II) THE COST TO THE OEM FOR PREPARING AND DISTRIBUTING THE INFORMA-
36 TION, EXCLUDING ANY RESEARCH AND DEVELOPMENT COSTS INCURRED IN DESIGNING
37 AND IMPLEMENTING, UPGRADING OR ALTERING THE PRODUCT, BUT INCLUDING AMOR-
38 TIZED CAPITAL COSTS FOR THE PREPARATION AND DISTRIBUTION OF THE INFORMA-
39 TION;

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

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

43 (V) THE ABILITY OF AFTERMARKET TECHNICIANS OR SHOPS TO AFFORD THE
44 INFORMATION;

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

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

48 (VIII) INFLATION.

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

1 (M) "MOTOR VEHICLE" MEANS ANY VEHICLE THAT IS DESIGNED FOR TRANSPORT-
2 ING PERSONS OR PROPERTY ON A STREET OR HIGHWAY AND THAT IS CERTIFIED BY
3 THE MANUFACTURER UNDER ALL APPLICABLE FEDERAL SAFETY AND EMISSIONS STAN-
4 DARDS AND REQUIREMENTS FOR DISTRIBUTION AND SALE IN THE UNITED STATES,
5 BUT EXCLUDING (I) A MOTORCYCLE; (II) A VEHICLE WITH A GROSS VEHICLE
6 WEIGHT OVER 14,000 POUNDS; OR (III) A RECREATIONAL VEHICLE OR AN AUTO
7 HOME EQUIPPED FOR HABITATION.

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

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

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

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

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

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

46 EACH OEM THAT PROVIDES DIAGNOSTIC REPAIR INFORMATION TO AFTERMARKET
47 TOOL, DIAGNOSTICS, OR THIRD PARTY SERVICE INFORMATION PUBLICATIONS AND
48 SYSTEMS SHALL HAVE FULLY SATISFIED ITS OBLIGATIONS UNDER THIS SECTION
49 AND THEREAFTER NOT BE RESPONSIBLE FOR THE CONTENT AND FUNCTIONALITY OF
50 AFTERMARKET DIAGNOSTIC TOOLS OR SERVICE INFORMATION SYSTEMS.

51 (D) OEM EQUIPMENT OR PARTS SOLD OR USED IN THE STATE OF NEW YORK FOR
52 THE PURPOSE OF PROVIDING SECURITY-RELATED FUNCTIONS MAY NOT EXCLUDE
53 DIAGNOSTIC, SERVICE AND REPAIR INFORMATION NECESSARY TO RESET A SECURI-
54 TY-RELATED ELECTRONIC FUNCTION FROM INFORMATION PROVIDED TO OWNERS AND
55 INDEPENDENT REPAIR FACILITIES. IF EXCLUDED UNDER THIS PARAGRAPH, THE
56 INFORMATION NECESSARY TO RESET AN IMMOBILIZER SYSTEM OR SECURITY-RELATED

1 ELECTRONIC MODULE SHALL BE OBTAINED BY OWNERS AND INDEPENDENT REPAIR
2 FACILITIES THROUGH THE APPROPRIATE SECURE DATA RELEASE SYSTEMS.

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

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

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

20 6. NOTHING IN THIS SECTION SHALL APPLY TO MOTOR VEHICLE MANUFACTURERS,
21 ANY PRODUCT OR SERVICE OF A MOTOR VEHICLE MANUFACTURER OR MOTOR VEHICLE
22 DEALERS AS DEFINED IN THIS SECTION.

23 7. (A) WHENEVER THE ATTORNEY GENERAL SHALL BELIEVE FROM EVIDENCE
24 SATISFACTORY TO HIM THAT ANY PERSON, FIRM, CORPORATION OR ASSOCIATION OR
25 AGENT OR EMPLOYEE THEREOF HAS ENGAGED IN OR IS ABOUT TO ENGAGE IN ANY OF
26 THE ACTS OR PRACTICES IN VIOLATION OF THIS SECTION HE MAY BRING AN
27 ACTION IN THE NAME AND ON BEHALF OF THE PEOPLE OF THE STATE OF NEW YORK
28 TO ENJOIN SUCH UNLAWFUL ACTS OR PRACTICES AND TO OBTAIN RESTITUTION OF
29 ANY MONEYS OR PROPERTY OBTAINED DIRECTLY OR INDIRECTLY BY ANY SUCH ACTS
30 OR PRACTICES IN VIOLATION OF THIS SECTION. IN SUCH ACTION PRELIMINARY
31 RELIEF MAY BE GRANTED UNDER ARTICLE SIXTY-THREE OF THE CIVIL PRACTICE
32 LAW AND RULES.

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

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

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

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

55 (F) EXCEPT IN THE INSTANCE OF A DISPUTE ARISING BETWEEN AN ORIGINAL
56 EQUIPMENT MANUFACTURER AND ITS AUTHORIZED REPAIR PROVIDER RELATED TO

1 EITHER PARTY'S COMPLIANCE WITH AN EXISTING AUTHORIZED REPAIR AGREEMENT,
2 AN AUTHORIZED REPAIR PROVIDER SHALL HAVE ALL THE RIGHTS AND REMEDIES
3 PROVIDED IN THIS SECTION.
4 S 2. This act shall take effect on the sixtieth day after it shall
5 have become a law.