

STATE OF NEW YORK

8192--A

2017-2018 Regular Sessions

IN ASSEMBLY

June 2, 2017

Introduced by M. of A. MORELLE, LUPARDO, BRAUNSTEIN, SKOUFIS, GALEF, THIELE, GOTTFRIED, GLICK, WEPRIN, GUNTHER -- Multi-Sponsored by -- M. of A. ENGLEBRIGHT, JEAN-PIERRE, LENTOL, McDONOUGH, MONTESANO, SIMON, SKARTADOS -- read once and referred to the Committee on Consumer Affairs and Protection -- recommitted to the Committee on Consumer Affairs and Protection in accordance with Assembly Rule 3, sec. 2 -- 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 § 2. The general business law is amended by adding a new section 399-
4 nn to read as follows:

5 § 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 (i) a person or business that
15 has an arrangement with an OEM for a definite or indefinite period in
16 which the OEM grants to a person or business license to use a trade
17 name, service mark or related characteristic for the purposes of offer-
18 ing repair services under the name of the OEM, or (ii) a person or busi-

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

LBD05441-11-8

1 ness retained by the OEM to provide refurbishing services for the OEM's
2 product or products.

3 (c) "Independent repair provider" means a person or business operating
4 in the state of New York that is not affiliated with an OEM or an OEM's
5 authorized repair provider, which is engaged in the diagnosis, service,
6 maintenance or repair of equipment; provided, however, that, for the
7 purposes of this section, an OEM shall be considered an independent
8 repair provider for the purposes of those instances when such OEM
9 engages in the diagnosis, service, maintenance or repair of digital
10 equipment that is not affiliated with the OEM.

11 (d) "Owner" means a person or business who owns or leases a digital
12 electronic product purchased or used in the state of New York.

13 (e) "Documentation" means any manuals, diagrams, reporting output, or
14 service code descriptions provided to the authorized repair provider for
15 the purposes of effecting repair.

16 (f) "Digital electronic equipment" or "equipment" means a part or
17 equipment originally manufactured for distribution and sale in the
18 United States.

19 (g) "Embedded software" means any programmable instructions provided
20 on firmware delivered with the equipment or part for the purposes of
21 equipment operation, including all relevant patches and fixes made by
22 the manufacturer for this purpose, including, but not limited to syno-
23 nyms "basic internal operating system", "internal operating system",
24 "machine code", "assembly code", "root code", and "microcode".

25 (h) "Remote diagnostics" means any remote data transfer function
26 between equipment and the provider of repair services including for
27 purposes of remote diagnostics, setting controls, or location identifi-
28 cation.

29 (i) "Service parts" or "parts" means any replacement parts, either new
30 or used, made available by the OEM to the authorized repair provider for
31 the purposes of effecting repair.

32 (j) "Fair and reasonable terms" means an equitable price in light of
33 relevant factors, including, but not limited to, the following:

34 (i) the net cost to the authorized repair provider for similar infor-
35 mation obtained from an OEM, less any discounts, rebates, or other
36 incentive programs;

37 (ii) the cost to the OEM for preparing and distributing the informa-
38 tion, excluding any research and development costs incurred in designing
39 and implementing, upgrading or altering the product, but including amor-
40 tized capital costs for the preparation and distribution of the informa-
41 tion;

42 (iii) the price charged by other OEMs for similar information;

43 (iv) the price charged by OEMs for similar information prior to the
44 launch of OEM web sites;

45 (v) the ability of aftermarket technicians or shops to afford the
46 information;

47 (vi) the means by which the information is distributed;

48 (vii) the extent to which the information is used, which includes the
49 number of users, and frequency, duration, and volume of use; and

50 (viii) inflation.

51 (k) "Motor vehicle" means any vehicle that is designed for transport-
52 ing persons or property on a street or highway and that is certified by
53 the manufacturer under all applicable federal safety and emissions stan-
54 dards and requirements for distribution and sale in the United States,
55 but excluding (i) a motorcycle; or (ii) a recreational vehicle or an
56 auto home equipped for habitation.

1 (l) "Motor vehicle manufacturer" means any person or business engaged
2 in the business of manufacturing or assembling new motor vehicles.

3 (m) "Motor vehicle dealer" means any person or business who, in the
4 ordinary course of its business, is engaged in the business of selling
5 or leasing new motor vehicles to a person or business pursuant to a
6 franchise agreement and who has obtained a license, as required under
7 applicable law, and is engaged in the diagnosis, service, maintenance or
8 repair of motor vehicles or motor vehicle engines pursuant to said fran-
9 chise agreement.

10 (n) "Manufacturer of motor vehicle equipment" means a person or busi-
11 ness engaged in the business of manufacturing or supplying components
12 that are used in the manufacture, servicing or repair of a motor vehi-
13 cle.

14 (o) "Medical device" means an instrument, apparatus, implement,
15 machine, contrivance, implant, or other similar or related article,
16 including a component part, or accessory, as defined in the federal
17 Food, Drug and Cosmetic Act, 21 USC, Section 321 (h) as amended from
18 time to time, which is intended for use in the diagnosis of disease or
19 other conditions, or in the cure, mitigation, treatment, or prevention
20 of disease, in man or other animals.

21 (p) "Aftermarket" means any entity that provides service parts, acces-
22 sories, second-hand equipment, tools, or diagnostic support for the care
23 or enhancement of original equipment.

24 2. For equipment and parts sold or used in this state in or after
25 calendar year two thousand twelve, the OEMs of such equipment and parts
26 shall make available to independent repair providers or owners of
27 products manufactured by such OEM in a timely manner:

28 (a) (1) documentation, diagnostic and repair information, including
29 repair technical updates, schematic diagrams, updates, corrections to
30 embedded software and safety and security patches at no cost or for the
31 same cost and in the same format such OEM makes such information and
32 material available to its authorized repair provider; and

33 (2) make available for purchase by the equipment owner, his or her
34 authorized agent or independent repair provider, parts, inclusive of any
35 updates to the embedded software of the parts, upon fair and reasonable
36 terms. Nothing in this subdivision shall require the OEM to sell parts
37 if the parts are no longer available to the OEM or the authorized repair
38 provider of the OEM.

39 (b) Any OEM that sells any diagnostic, service, or repair information
40 shall not require an authorized repair provider to purchase documenta-
41 tion, diagnostic, service, or repair information in proprietary format
42 if such information is sold or provided to any independent repair
43 provider or to any owner in a format that is standardized with other
44 OEMs, on terms and conditions more favorable than the terms and condi-
45 tions pursuant to which the authorized repair provider obtains the same
46 diagnostic, service or repair information, unless such proprietary
47 format includes documentation, diagnostic, service, or repair operations
48 information or functionality that is not available in such standardized
49 format.

50 (c) Each OEM of equipment sold or used in the state of New York shall
51 make available for purchase by owners and independent repair facilities
52 all diagnostic repair tools incorporating the same diagnostic, repair
53 and remote communications capabilities that such OEM makes available to
54 its own repair or engineering staff or any authorized repair provider.
55 Each OEM shall offer such tools for sale to owners and to independent
56 repair facilities upon fair and reasonable terms.

1 Each OEM that provides diagnostic repair information to aftermarket
2 tool, diagnostics, or third party service information publications and
3 systems shall have fully satisfied its obligations under this section
4 and thereafter not be responsible for the content and functionality of
5 aftermarket diagnostic tools or service information systems.

6 (d) OEM equipment or parts sold or used in the state of New York for
7 the purpose of providing security-related functions may not exclude
8 diagnostic, service and repair information necessary to reset a securi-
9 ty-related electronic function from information provided to owners and
10 independent repair facilities unless the information necessary to reset
11 an immobilizer system or security-related electronic module shall be
12 made available to owners and independent repair facilities through the
13 appropriate secure data release systems.

14 3. Nothing in this section shall be construed to require an OEM to
15 divulge a trade secret.

16 4. Notwithstanding any law, rule or regulation to the contrary, no
17 provision in this section shall be read, interpreted or construed to
18 abrogate, interfere with, contradict or alter the terms of any agreement
19 executed and in force between an authorized repair provider and an OEM
20 including, but not limited to, the performance or provision of warranty
21 or recall repair work by an authorized repair provider on behalf of an
22 OEM pursuant to such authorized repair agreement; provided, however,
23 that any provision in such an authorized repair agreement that purports
24 to waive, avoid, restrict or limit an OEM's compliance with this section
25 shall be void and unenforceable if such authorized repair agreement is
26 executed or extended on or after the effective date of this section.

27 5. Nothing in this section shall be construed to require OEMs or
28 authorized repair providers to provide an owner or independent repair
29 provider access to non-diagnostic and repair information provided by an
30 OEM to an authorized repair provider pursuant to the terms of an author-
31 izing agreement.

32 6. Nothing in this section shall apply to motor vehicle manufacturers,
33 any product or service of a motor vehicle manufacturer, manufacturer of
34 motor vehicle equipment, or motor vehicle dealers as defined in this
35 section.

36 7. Nothing in this section shall require a manufacturer of a medical
37 device as defined in this section to implement any provision of this
38 section that is not permitted under the federal Food, Drug and Cosmetic
39 Act or any other federal law, rule or regulation that supersedes this
40 section.

41 8. Any independent repair provider that purchases or acquires embedded
42 software or service parts shall, prior to performing any services on
43 digital electronic equipment, notify the owner of such equipment in
44 writing that:

45 (a) consumers should review the terms and conditions of the warranty
46 for such digital electronic equipment as repairs not performed by an
47 authorized repair provider could affect the terms and conditions of the
48 warranty;

49 (b) warrantors cannot require that only branded parts be used with the
50 product in order to retain the warranty;

51 (c) warrantors shall demonstrate that a defect or damage was caused by
52 independent repair to affect the warranty;

53 (d) warranties are governed by the federal Magnuson-Moss Warranty Act;
54 and

55 (e) such independent repair provider is not an authorized repair
56 provider for such digital electronic equipment.

1 9. (a) Whenever the attorney general shall believe from evidence
2 satisfactory to him or her that any person, firm, corporation or associ-
3 ation or agent or employee thereof has engaged in or is about to engage
4 in any of the acts or practices in violation of this section he or she
5 may bring a proceeding in the name and on behalf of the people of the
6 state of New York to enjoin such unlawful acts or practices and to
7 obtain restitution of any moneys or property obtained directly or indi-
8 rectly by any such acts or practices in violation of this section. In
9 such proceeding preliminary relief may be granted under article sixty-
10 three of the civil practice law and rules.

11 (b) Except as provided herein, before any violation of this section is
12 sought to be enjoined, the attorney general shall give the person
13 against whom such proceeding is contemplated notice and an opportunity
14 to show in writing, within five business days after the delivery of such
15 notice, why a proceeding should not be instituted against such person.
16 Such notice by the attorney general shall be delivered by certified mail
17 and by first-class mail with proof of mailing. In a proceeding in which
18 the attorney general seeks preliminary relief, such notice shall not be
19 required upon a finding by the attorney general that such notice is not
20 in the public interest.

21 (c) In connection with any proposed proceeding under this section, the
22 attorney general is authorized to take proof and make a determination of
23 the relevant facts, and to issue subpoenas in accordance with the civil
24 practice law and rules.

25 (d) This subdivision shall apply to all acts or practices declared to
26 be in violation of this section, whether or not subject to any other law
27 of this state, and shall not supersede, amend or repeal any other law of
28 this state under which the attorney general is authorized to take any
29 action or conduct any inquiry.

30 (e) Any person, firm, corporation or association or agent or employee
31 thereof who engages in any of the acts or practices to be in violation
32 of this section shall be liable to a civil penalty of not more than five
33 hundred dollars for each violation, which shall accrue to the state of
34 New York and may be recovered in a civil action brought by the attorney
35 general.

36 (f) Except in the instance of a dispute arising between an original
37 equipment manufacturer and its authorized repair provider related to
38 either party's compliance with an existing authorized repair agreement,
39 an authorized repair provider shall have all the rights and remedies
40 provided in this section.

41 § 3. This act shall take effect on the sixtieth day after it shall
42 have become a law.