

STATE OF NEW YORK

8192

2017-2018 Regular Sessions

IN ASSEMBLY

June 2, 2017

Introduced by M. of A. MORELLE -- read once and referred to the Committee on Consumer Affairs and 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 § 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-
19 ness retained by the OEM to provide refurbishing services for the OEM's
20 product or products.

21 (c) "Independent repair provider" means a person or business operating
22 in the state of New York that is not affiliated with an OEM or an OEM's
23 authorized repair provider, which is engaged in the diagnosis, service,
24 maintenance or repair of equipment; provided, however, that, for the
25 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.

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

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

52 (m) "Motor vehicle dealer" means any person or business who, in the
53 ordinary course of its business, is engaged in the business of selling
54 or leasing new motor vehicles to a person or business pursuant to a
55 franchise agreement and who has obtained a license, as required under
56 applicable law, and is engaged in the diagnosis, service, maintenance or

1 repair of motor vehicles or motor vehicle engines pursuant to said fran-
2 chise agreement.

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

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

14 2. (a) For equipment and parts sold or used in this state, the OEMs of
15 such equipment and parts shall (i) make available to independent repair
16 providers or owners of products manufactured by such OEM diagnostic and
17 repair information, including repair technical updates, schematic
18 diagrams, updates, corrections to embedded software and safety and secu-
19 rity patches timely, and for no charge or for the same charge and in the
20 same format such OEM makes available to its authorized repair provider;
21 and

22 (ii) make available for purchase by the equipment owner, his or her
23 authorized agent or independent repair provider, parts, inclusive of any
24 updates to the embedded software of the parts, upon fair and reasonable
25 terms. Nothing in this subdivision shall require the OEM to sell parts
26 if the parts are no longer available to the OEM or the authorized repair
27 provider of the OEM.

28 (b) Any OEM that sells any diagnostic, service, or repair information
29 to any independent repair provider or to any owner in a format that is
30 standardized with other OEMs, and on terms and conditions more favorable
31 than the terms and conditions pursuant to which the authorized repair
32 provider obtains the same diagnostic, service or repair information,
33 shall be prohibited from requiring any authorized repair provider to
34 continue purchasing diagnostic, service, or repair information in a
35 proprietary format, unless such proprietary format includes diagnostic,
36 service, or repair operations information or functionality that is not
37 available in such standardized format.

38 (c) Each OEM of equipment sold or used in the state of New York shall
39 make available for purchase by owners and independent repair facilities
40 all diagnostic repair tools incorporating the same diagnostic, repair
41 and remote communications capabilities that such OEM makes available to
42 its own repair or engineering staff or any authorized repair provider.
43 Each OEM shall offer such tools for sale to owners and to independent
44 repair facilities upon fair and reasonable terms.

45 Each OEM that provides diagnostic repair information to aftermarket
46 tool, diagnostics, or third party service information publications and
47 systems shall have fully satisfied its obligations under this section
48 and thereafter not be responsible for the content and functionality of
49 aftermarket diagnostic tools or service information systems.

50 (d) OEM equipment or parts sold or used in the state of New York for
51 the purpose of providing security-related functions may not exclude
52 diagnostic, service and repair information necessary to reset a securi-
53 ty-related electronic function from information provided to owners and
54 independent repair facilities. If excluded under this paragraph, the
55 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, manufacturer of
22 motor vehicle equipment, or motor vehicle dealers as defined in this
23 section.

24 7. Nothing in this section shall require a manufacturer of a medical
25 device as defined in this section to implement any provision of this
26 section that is not permitted under the federal Food, Drug and Cosmetic
27 Act or any other federal law, rule or regulation that supersedes this
28 section.

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

33 (a) consumers should review the terms and conditions of the warranty
34 for such digital electronic equipment as repairs not performed by an
35 authorized repair provider could affect the terms and conditions of the
36 warranty;

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

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

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

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

45 9. Beginning in calendar year two thousand twelve, and unless other-
46 wise specified, the provisions of subdivision two of this section shall
47 apply to any equipment and parts sold or used in this state for not less
48 than five years following the last date such equipment and parts were
49 manufactured.

50 10. The consumer protection division shall develop, establish and
51 implement a public outreach program directed at independent repair
52 providers, consumers and digital electronic original equipment manufac-
53 turers to inform them of their rights and responsibilities pursuant to
54 this section. Such public outreach shall include brochures, consumer
55 guides, posters or any combination thereof and made available to consum-
56 ers and other stakeholders by any means deemed appropriate by such divi-

1 sion and may include internet, radio, and print advertising. The public
2 outreach may also identify and recruit individuals or trade organiza-
3 tions to assist in distributing this information and materials. The
4 public outreach shall begin no later than the thirtieth day after the
5 effective date of this section.

6 11. (a) Whenever the attorney general shall believe from evidence
7 satisfactory to him that any person, firm, corporation or association or
8 agent or employee thereof has engaged in or is about to engage in any of
9 the acts or practices in violation of this section he may bring an
10 action in the name and on behalf of the people of the state of New York
11 to enjoin such unlawful acts or practices and to obtain restitution of
12 any moneys or property obtained directly or indirectly by any such acts
13 or practices in violation of this section. In such action preliminary
14 relief may be granted under article sixty-three of the civil practice
15 law and rules.

16 (b) Before any violation of this section is sought to be enjoined, the
17 attorney general shall be required to give the person against whom such
18 proceeding is contemplated notice by certified mail and an opportunity
19 to show in writing within five business days after receipt of notice why
20 proceedings should not be instituted against him, unless the attorney
21 general shall find, in any case in which he seeks preliminary relief,
22 that to give such notice and opportunity is not in the public interest.

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

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

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

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

43 § 3. This act shall take effect on the sixtieth day after it shall
44 have become a law; provided, however, that subdivision 8 of section
45 399-nn of the general business law, as added by section two of this act
46 shall take effect on the ninetieth day after it shall have become a law.