

STATE OF NEW YORK

7535

2019-2020 Regular Sessions

IN ASSEMBLY

May 9, 2019

Introduced by M. of A. STIRPE -- 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.

LBD09640-01-9

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

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

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

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

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

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

50 Each OEM that provides diagnostic repair information to aftermarket
51 tool, diagnostics, or third party service information publications and
52 systems shall have fully satisfied its obligations under this section
53 and thereafter not be responsible for the content and functionality of
54 aftermarket diagnostic tools or service information systems.

55 (d) OEM equipment or parts sold or used in the state of New York for
56 the purpose of providing security-related functions may not exclude

diagnostic, service and repair information necessary to reset a security-related electronic function from information provided to owners and independent repair facilities unless the information necessary to reset an immobilizer system or security-related electronic module shall be made available to owners and independent repair facilities through the appropriate secure data release systems.

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

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

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

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

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

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

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

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

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

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

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

9. (a) Whenever the attorney general shall believe from evidence satisfactory to him or her that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any of the acts or practices in violation of this section he or she may bring a proceeding in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indi-

1 rectly by any such acts or practices in violation of this section. In
2 such proceeding preliminary relief may be granted under article sixty-
3 three of the civil practice law and rules.

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

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

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

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

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

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