

# STATE OF NEW YORK

4104--A

2021-2022 Regular Sessions

## IN SENATE

February 2, 2021

Introduced by Sens. BRESLIN, THOMAS, BIAGGI, BRISPORT, BROUK, COMRIE, COONEY, GIANARIS, HINCHEY, HOYLMAN, MYRIE, REICHLIN-MELNICK, SALAZAR, SKOUFIS -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection -- recommitted to the Committee on Consumer Protection in accordance with Senate Rule 6, sec. 8 -- 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 and providing 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 "digital 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) "Authorized repair provider" means an individual or business who  
9 has an arrangement with the original equipment manufacturer under which  
10 the original equipment manufacturer grants to the individual or business  
11 a license to use a trade name, service mark, or other proprietary iden-  
12 tifier for the purposes of offering the services of diagnosis, mainte-  
13 nance, or repair of digital electronic equipment under the name of the  
14 original equipment manufacturer, or other arrangement with the original  
15 equipment manufacturer to offer such services on behalf of the original  
16 equipment manufacturer. An original equipment manufacturer who offers  
17 the services of diagnosis, maintenance, or repair of its own digital  
18 electronic equipment, and who does not have an arrangement described in

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

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1 this subdivision with an unaffiliated individual or business, shall be  
2 considered an authorized repair provider with respect to such equipment.

3 (b) "Digital electronic equipment" or "equipment" means any product  
4 with a value over ten dollars, adjusted annually by the rate of change  
5 in the consumer price index as reported by the bureau of labor statis-  
6 tics of the United States department of labor, that depends for its  
7 functioning, in whole or in part, on digital electronics embedded in or  
8 attached to the product.

9 (c) "Documentation" means any manual, diagram, reporting output,  
10 service code description, schematic diagram, security codes, passwords,  
11 or similar kinds of information used in effecting the services of diag-  
12 nosis, maintenance, or repair of digital electronic equipment.

13 (d) "Fair and reasonable terms" means making available parts, tools,  
14 or documentation as follows:

15 (i) With respect to documentation, that such documentation is made  
16 available by the original equipment manufacturer at no charge, except  
17 that, when the documentation is requested in physical printed form, a  
18 charge may be included for the reasonable actual costs of preparing and  
19 sending the copy.

20 (ii) With respect to tools, that such tools are made available by the  
21 original equipment manufacturer at no charge and without requiring  
22 authorization or internet access for use or operation of such tool, or  
23 imposing impediments to access or use of the tool to diagnose, maintain,  
24 or repair and enable full functionality of digital electronic equipment,  
25 or in a manner that impairs the efficient and cost-effective performance  
26 of any such diagnosis, maintenance, or repair, except that, when such  
27 tool is requested in physical form, a charge may be included for the  
28 reasonable, actual costs of preparing and sending such tool.

29 (iii) With respect to parts, that such parts are made available by the  
30 original equipment manufacturer, either directly or through an author-  
31 ized repair provider, to independent repair providers and owners at  
32 costs and terms that are equivalent to the most favorable costs and  
33 terms under which an original equipment manufacturer offers the part to  
34 an authorized repair provider and which:

35 A. accounts for any discount, rebate, convenient and timely means of  
36 delivery, means of enabling fully restored and updated functionality,  
37 rights of use, or other incentive or preference the original equipment  
38 manufacturer offers to an authorized repair provider, or any additional  
39 cost, burden, or impediment the original equipment manufacturer imposes  
40 on an owner or independent repair provider;

41 B. is not conditioned on or imposing a substantial obligation or  
42 restriction that is not reasonably necessary for enabling the owner or  
43 independent repair provider to engage in the diagnosis, maintenance, or  
44 repair of digital electronic equipment made by or on behalf of the  
45 original equipment manufacturer; and

46 C. is not conditioned on an arrangement described in paragraph (a) of  
47 this subdivision.

48 (iv) Such parts, tools, and documentation shall be made available to  
49 an authorized repair provider, and shall further be made available by an  
50 authorized repair provider to any independent repair provider or owner,  
51 provided that such authorized repair provider is contractually and prac-  
52 tically permitted by the original equipment manufacturer to sell such  
53 parts, tools, and documentation to any independent repair provider or  
54 owner, and provided further that such original equipment manufacturer  
55 shall not:

1 A. retaliate against or hinder the ability of any authorized repair  
2 provider to sell such parts, tools, or documentation through any means,  
3 including advertising restrictions or product allocation limitations  
4 unrelated to legitimate product shortages; or

5 B. condition or impose a substantial obligation or restriction that is  
6 not reasonably necessary for enabling the owner or independent repair  
7 provider to engage in the diagnosis, maintenance, or repair of digital  
8 electronic equipment made by or on behalf of the original equipment  
9 manufacturer.

10 (e) "Independent repair provider" means an individual or business  
11 operating in this state, that does not have an arrangement described in  
12 paragraph (a) of this subdivision with an original equipment manufactur-  
13 er, and who is engaged in the services of diagnosis, maintenance, or  
14 repair of digital electronic equipment.

15 (f) "Manufacturer of motor vehicle equipment" means a business engaged  
16 in the business of manufacturing or supplying components that are used  
17 in the manufacture, maintenance, or repair of a motor vehicle.

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

25 (h) "Motor vehicle" means a vehicle that is designed for transporting  
26 persons or property on a street or highway and is certified by the  
27 manufacturer under all applicable federal safety and emissions standards  
28 and requirements for distribution and sale in the United States.

29 (i) "Motor vehicle dealer" means an individual or business who, in the  
30 ordinary course of business, is engaged in the business of selling or  
31 leasing motor vehicles to an individual or business pursuant to a fran-  
32 chise agreement, has obtained a license under the vehicle and traffic  
33 law, and is engaged in the services of diagnosis, maintenance, or repair  
34 of motor vehicles or motor vehicle engines pursuant to such franchise  
35 agreement.

36 (j) "Motor vehicle manufacturer" means a business engaged in the manu-  
37 facturing or assembling of motor vehicles.

38 (k) "Original equipment manufacturer" means any individual or business  
39 that, in the normal course of business, is engaged in the business of  
40 selling or leasing digital electronic equipment manufactured by or on  
41 behalf of itself, to any individual or business.

42 (l) "Owner" means an individual or business that owns or leases  
43 digital electronic equipment purchased or used in this state.

44 (m) "Part" means any replacement part, either new or used, made avail-  
45 able by an original equipment manufacturer for purposes of effecting the  
46 services of maintenance or repair of digital electronic equipment manu-  
47 factured or sold by the original equipment manufacturer.

48 (n) "Tool" means any software program, hardware implement, or other  
49 apparatus used for diagnosis, maintenance, or repair of digital elec-  
50 tronic equipment, including software or other mechanisms that provide,  
51 program, or pair a part, calibrate functionality, or perform any other  
52 function required to bring the equipment or part back to fully func-  
53 tional condition, including any updates.

54 (o) "Repair" means any act needed to restore digital electronic equip-  
55 ment or equipment to fully working order.

1 (p) "Maintenance" means any act necessary to keep currently working  
2 digital electronic equipment or equipment in fully working order.

3 (q) "Diagnosis" means the process of identifying the issue or issues  
4 that cause digital electronic equipment or equipment to not be in fully  
5 working order.

6 (r) "Modifications" or "modify" means any alteration to digital elec-  
7 tronic equipment that is not maintenance and not a repair.

8 2. Requirements. (a) For digital electronic equipment and parts for  
9 such equipment that are sold or used in this state, an original equip-  
10 ment manufacturer shall make available to any independent repair provid-  
11 er and owner of digital electronic equipment manufactured by or on  
12 behalf of or sold by such original equipment manufacturer, on fair and  
13 reasonable terms, any documentation, parts, and tools required for the  
14 diagnosis, maintenance, or repair of such digital electronic equipment  
15 and parts for such equipment. Such documentation, parts, and tools  
16 shall be made available either directly by such original equipment  
17 manufacturer or via an authorized repair provider.

18 (b) For equipment that contains an electronic security lock or other  
19 security-related function, the original equipment manufacturer shall  
20 make available to any owner and independent repair provider, on fair and  
21 reasonable terms, any special documentation, tools, and parts needed to  
22 access and reset the lock or function when disabled in the course of  
23 diagnosis, maintenance, or repair of such equipment. Such documenta-  
24 tion, tools, and parts may be made available through appropriate secure  
25 release systems.

26 3. Limitations. (a) Nothing in this section shall be construed to  
27 require an original equipment manufacturer to divulge any trade secret  
28 to any owner or independent service provider.

29 (b) Nothing in this section shall be construed to alter the terms of  
30 any arrangement described in paragraph (a) of subdivision one of this  
31 section in force between an authorized repair provider and an original  
32 equipment manufacturer, including, but not limited to, the performance  
33 or provision of warranty or recall repair work by an authorized repair  
34 provider on behalf of an original equipment manufacturer pursuant to  
35 such arrangement, except that any provision in such terms that purports  
36 to waive, avoid, restrict, or limit the original equipment manufactur-  
37 er's obligations to comply with this section shall be void and unen-  
38 forceable.

39 (c) Nothing in this section shall be construed to require an original  
40 equipment manufacturer or an authorized repair provider to provide to an  
41 owner or independent repair provider access to information, other than  
42 documentation, that is provided by the original equipment manufacturer  
43 to an authorized repair provider pursuant to the terms of an arrangement  
44 described in paragraph (a) of subdivision one of this section.

45 (d) Nothing in this section shall be construed to require an original  
46 equipment manufacturer or authorized repair provider to make available  
47 any parts, tools or documentation for the purposes of modifying or  
48 making modifications to any digital electronic equipment.

49 (e) Nothing in this section shall be construed to require an original  
50 equipment manufacturer or authorized repair provider to make available  
51 any parts, tools, or documentation required for the diagnosis, mainte-  
52 nance, or repair of public safety communications equipment, the intended  
53 use of which is for emergency response or prevention purposes by an  
54 emergency service organization such as a police, fire or emergency  
55 medical services agency.

(f) Nothing in this section shall be construed to require any original equipment manufacturer or authorized repair provider to make available any parts, tools, or documentation required for the diagnosis, maintenance, or repair of digital electronic equipment in a manner that is inconsistent with or in violation of any federal law, such as gaming and entertainment consoles, related software and components.

(g) Nothing in this section shall be construed to require any original equipment manufacturer or authorized repair provider to make available any parts, tools, or documentation required for the diagnosis, maintenance, or repair of any home appliance that has a digital electronic product embedded within it, including, but not limited to, refrigerators, ovens, microwaves, air conditioning and heating units, including any related software and components.

**4. Exclusions. Nothing in this section shall apply to:**

(a) a motor vehicle manufacturer, manufacturer of motor vehicle equipment, or motor vehicle dealer acting in such capacity, or to any product or service of a motor vehicle manufacturer, manufacturer of motor vehicle equipment, or motor vehicle dealer acting in such capacity;

(b) a medical device, as defined in this section, or a digital electronic product found in a medical setting including diagnostic, monitoring, or control equipment or any product or service that they offer; or

(c) a manufacturer, distributor, importer, or dealer of any off-road (non-road) equipment, including but not limited to, farm and utility tractors, farm implements, farm machinery, forestry equipment, industrial equipment, utility equipment, construction equipment, compact construction equipment, mining equipment, turf, yard and garden equipment, outdoor power equipment (including portable generators), marine, all-terrain sports and recreational vehicles (including racing vehicles), stand-alone or integrated stationary or mobile internal combustion engines, other power sources, (including without limitation, generator sets, electric/battery and fuel cell power), power tools, and any tools, technology, attachments, accessories, components and repair parts for any of the foregoing.

**5. No original equipment manufacturer or authorized repair provider shall be liable for any damage or injury caused to any digital electronic equipment by an independent repair provider or owner which occurs during the course of repair, diagnosis, maintenance, or modification, including but not limited to, any indirect, incidental, special or consequential damages; any loss of data, privacy or profits; or any inability to use, or reduced functionality of, the digital electronic equipment.**

**6. Enforcement by the attorney general. (a) Whenever the attorney general shall believe from evidence satisfactory to the attorney general that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any acts or practices in violation of this section, the attorney general may bring an action 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 indirectly by any such acts or practices in violation of this section. In such proceeding preliminary relief may be granted under article sixty-three of the civil practice law and rules.**

**(b) Except as provided herein, before any violation of this section is sought to be enjoined, the attorney general shall give such person, firm, corporation, or association against whom such proceeding is contemplated notice and an opportunity to show in writing, within five**

1 business days after the delivery of such notice, why proceedings should  
2 not be instituted against such person, firm, corporation, or associ-  
3 ation. Such notice by the attorney general shall be delivered by certi-  
4 fied mail and by first-class mail with proof of mailing. In any proceed-  
5 ing in which the attorney general seeks preliminary relief, such notice  
6 shall not be required upon a finding by the attorney general that such  
7 notice and opportunity is not in the public interest.

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

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

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

22 (f) Except in the instance of a dispute arising between an original  
23 equipment manufacturer and an authorized repair provider related to  
24 either party's compliance with an existing authorized repair agreement,  
25 an authorized repair provider shall have all the rights and remedies  
26 provided in this section.

27 § 3. This act shall take effect one year after it shall have become a  
28 law.