STATE OF NEW YORK

7006--B

2021-2022 Regular Sessions

IN ASSEMBLY

April 19, 2021

Introduced by M. of A. FAHY, LUPARDO, MAGNARELLI, GLICK, GOTTFRIED, BRONSON, L. ROSENTHAL, STECK, McDONALD, DICKENS, REYES, SIMON, GUNTHER, SEAWRIGHT, PHEFFER AMATO, NIOU, COLTON, GRIFFIN, FALL, GALEF, ZINERMAN, BURKE, HUNTER, WOERNER, J. RIVERA, MAMDANI, JACKSON, FORREST, THIELE, B. MILLER, CLARK, HEVESI, BLANKENBUSH, JEAN-PIERRE, KIM, WALLACE, CARROLL, LUNSFORD, BURDICK, GALLAGHER, JACOBSON, BURGOS, GIBBS, KELLES, GONZALEZ-ROJAS, ZEBROWSKI, ENGLEBRIGHT, STERN -- Multi-Sponsored by -- M. of A. BRAUNSTEIN, DAVILA -- 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 -- reported and referred to the Committee on Codes -- reported and referred to the Committee on Rules -- Rules Committee discharged, bill amended, ordered reprinted as amended and recommitted to the Committee on Rules

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:

Section 1. Short title. This act shall be known and may be cited as the "digital fair repair act".

§ 2. The general business law is amended by adding a new section 399-nn to read as follows:

§ 399-nn. Sale of digital electronic equipment; diagnostic and repair information. 1. Definitions. For the purposes of this section, the following terms shall have the following meanings:

(a) "Authorized repair provider" means an individual or business who has an arrangement with the original equipment manufacturer under which the original equipment manufacturer grants to the individual or business

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

LBD06580-13-2

a license to use a trade name, service mark, or other proprietary identifier for the purposes of offering the services of diagnosis, maintenance, or repair of digital electronic equipment under the name of the original equipment manufacturer, or other arrangement with the original equipment manufacturer to offer such services on behalf of the original equipment manufacturer. An original equipment manufacturer who offers the services of diagnosis, maintenance, or repair of its own digital electronic equipment, and who does not have an arrangement described in this subdivision with an unaffiliated individual or business, shall be considered an authorized repair provider with respect to such equipment.

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

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

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

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

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

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

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

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

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

(iv) Such parts, tools, and documentation shall be made available to an authorized repair provider, and shall further be made available by an authorized repair provider to any independent repair provider or owner, provided that such authorized repair provider is contractually and practically permitted by the original equipment manufacturer to sell such parts, tools, and documentation to any independent repair provider or owner, and provided further that such original equipment manufacturer shall not:

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

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

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

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

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

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

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

(j) "Motor vehicle manufacturer" means a business engaged in the manufacturing or assembling of motor vehicles.

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

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

(m) "Part" means any replacement part, either new or used, made available by an original equipment manufacturer for purposes of effecting the services of maintenance or repair of digital electronic equipment manufactured or sold by the original equipment manufacturer.

(n) "Tool" means any software program, hardware implement, or other apparatus used for diagnosis, maintenance, or repair of digital electronic equipment, including software or other mechanisms that provide, program, or pair a part, calibrate functionality, or perform any other function required to bring the equipment or part back to fully functional condition, including any updates.

(o) "Repair" means any act needed to restore digital electronic equipment or equipment to fully working order.

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

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

(r) "Modifications" or "modify" means any alteration to digital electronic equipment that is not maintenance and not a repair.

2. Requirements. (a) For digital electronic equipment and parts for such equipment that are sold or used in this state, an original equipment manufacturer shall make available to any independent repair provider and owner of digital electronic equipment manufactured by or on behalf of or sold by such original equipment manufacturer, on fair and reasonable terms, any documentation, parts, and tools required for the diagnosis, maintenance, or repair of such digital electronic equipment and parts for such equipment. Such documentation, parts, and tools shall be made available either directly by such original equipment manufacturer or via an authorized repair provider.

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

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

(b) Nothing in this section shall be construed to alter the terms of any arrangement described in paragraph (a) of subdivision one of this section in force between an authorized repair provider and an original equipment manufacturer, including, but not limited to, the performance or provision of warranty or recall repair work by an authorized repair provider on behalf of an original equipment manufacturer pursuant to such arrangement, except that any provision in such terms that purports to waive, avoid, restrict, or limit the original equipment manufacturer's obligations to comply with this section shall be void and unenforceable.

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

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

(e) Nothing in this section shall be construed to require an original equipment manufacturer or authorized repair provider to make available any parts, tools, or documentation required for the diagnosis, maintenance, or repair of public safety communications equipment, the intended use of which is for emergency response or prevention purposes by an emergency service organization such as a police, fire or emergency 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 prac-

tices 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 business days after the delivery of such notice, why proceedings should not be instituted against such person, firm, corporation, or association. Such notice by the attorney general shall be delivered by certified mail and by first-class mail with proof of mailing. In any proceeding in which the attorney general seeks preliminary relief, such notice shall not be required upon a finding by the attorney general that such notice and opportunity is not in the public interest.

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

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

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

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

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