Big Tech's "Digital Trade" Agenda Threatens California's Tech Policy Goals

Nationwide, state legislators have introduced bills to protect people from biased artificial intelligence (AI) models, online privacy violations, abuses of children and teens' data, and anti-competitive practices by tech companies—and to guarantee our right to repair our phones, cars and other equipment.

The surge in statehouse tech legislation shows that the American people—and their elected officials at every level—want action now. But few people realize that the very firms whose conduct led to this bipartisan response have a strategy to undermine tech regulation through a stealthy form of international preemption. They want to add rules to international trade deals that limit how state and federal governments can regulate tech.

The most extreme of what these Big Tech interests misleadingly call "digital trade" rules would:

- limit governments' powers to require impact assessments, bias audits, or pre-deployment testing of even high-risk AI and other programs if this involves government regulators or independent reviewers having access to detailed descriptions of algorithms or to source code;
- forbid right to repair polices that require manufacturers to share repair tools that depend on access to code or algorithms;
- ban regulation of international data transfers, guaranteeing rights for firms to choose where our personal data moves and is stored; and
- prohibit requirements to keep certain data locally stored, for instance to keep sensitive data within the state for privacy or any other reason.

California lawmakers' initiatives to regulate the tech industry must not be thwarted by "digital trade" rules being pushed by Big Tech firms. We must ensure that California tech bills—including some measures already signed into law—are not undermined by this international preemption plot.

The rest of this explainer details how "digital trade" provisions conflict with specific Californian policies relating to data privacy, AI regulation, kids' online safety, and right to repair.

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**For a detailed analysis of these "digital trade" rules, see https://rethinktrade.org/reports/international-preemption-by-trade-agreement/*

DATA PRIVACY

Consumers and regulators have many new concerns about data privacy as AI systems have proliferated in all sectors of the economy. State bills aimed at preserving privacy have gained ground in recent years, including measures meant to limit the sharing of personal information.

California's AB 352 (2023) amended the Confidentiality of Medical Information Act to require in-state storage of sensitive medical information relating to reproductive health and gender-affirming care, forbidding the transfer of such data outside the state:

> "*(c) (1) A business, (...) that electronically stores or maintains medical information on the provision of sensitive services (...) shall develop capabilities, policies, and procedures (...) to enable all of the following: (...) (B) Prevent the disclosure, access, transfer, transmission, or processing of medical information related to gender affirming care, abortion and abortion-related services, and contraception to persons and entities outside of this state in accordance to this part. (...) (D) Provide the ability to automatically disable access to segregated medical information related to gender affirming care, abortion and abortion-related services, and contraception by individuals and entities in another state.*"

If the "digital trade" rules Big Tech seeks were widely in effect, this bill's limit on the movement of data out of the state would be inconsistent with the "digital trade" ban on regulation of cross-border data flows.

AI REGULATION

To try to avoid civil rights and liberties violations and other harms from AI systems being rushed into use, legislators are introducing bills in statehouses nationwide that require impact assessments, bias audits, or pre-deployment testing to ensure that AI models are fair and accurate. The Big Tech-demanded "digital trade" rule that bans access to source code and algorithms would forbid such reviews from being conducted by or made available to government regulators or independent bodies, as many bills require.

For instance, in California, AB 2930 (2024) passed the Assembly and is now awaiting a Senate vote in the ongoing legislative session. This bill would require deployers and developers of automated decision tools to perform impact assessments on these tools before they are first deployed; deployers and developers to provide these impact assessment to the California Privacy Protection Agency; and developers to share information with deployers, so that the latter can conduct their impact assessments:

> "*22756.3. (a) A developer shall provide a deployer with a statement regarding the intended uses of the automated decision tool and documentation regarding all of the following:*
> *(1) The known limitations of the automated decision tool, including any reasonably foreseeable risks of algorithmic discrimination arising from its intended use. (2) A description of the type of data used to program or train the automated decision tool. (3) A description of how the automated decision tool was evaluated for validity and explainability before sale or licensing. (4) A description of the deployer's responsibilities under this chapter.*"

If the "digital trade" rules Big Tech seeks were widely enacted, the requirement for AI developers to make available algorithmic information to deployers could be attacked as a violation of the "digital trade" special secrecy guarantees forbidding disclosure of even detailed descriptions of algorithms. Other potentially affected bills include AB 2013 (2024), Artificial Intelligence Training Data Transparency, which also passed the Assembly floor and is currently being considered in the Senate.

KIDS' ONLINE SAFETY

Source code and algorithms are not AI-specific terms. They also are at the heart of social media, which is another software subject to state-level regulation. If the "digital trade" rules Big Tech seeks were widely enacted, the same "digital trade" secrecy guarantees that forbid regulators' access to algorithmic information would undermine bills aimed at protecting children from harmful social media models.

The California Age-Appropriate Design Code Act passed the Assembly and Senate floors unanimously and was signed into law by the governor in 2022. This bill establishes requirements for data protection impact assessments, which must include information about algorithmic design:

> "*1798.99.31. (a) A business that provides an online service, product, or feature likely to be accessed by children shall take all of the following actions:*
> *(1) (A) Before any new online services, products, or features are offered to the public, complete a Data Protection Impact Assessment for any online service, product, or feature likely to be accessed by children and maintain documentation of this assessment (...)*
> *(B) (...) The Data Protection Impact Assessment shall address (...) (v) Whether algorithms used by the online product, service, or feature could harm children. (...)*
> *(4) (A) For any Data Protection Impact Assessment completed pursuant to paragraph (1), make the Data Protection Impact Assessment available (...) to the Attorney General pursuant to a written request.*"

The Code requires businesses to complete data protection impact assessments, which shall include "whether algorithms used by the online product, service, or feature could harm children." Since the state's Attorney General can demand access to the data protection impact assessments, companies could argue that the law requires them to disclose their algorithms in violation of source code secrecy rules.

RIGHT TO REPAIR

The "digital trade" source code secrecy guarantees wouldn't just shield AI from government oversight: they also would undermine market competition and consumers' rights to access the repair tools and information needed to keep their phones, cars, and other equipment operating.

California bill SB 244 (2023), the Right to Repair Act, is intended to grant the owners and independent repairers of electronic products access to the tools necessary to perform repairs. For electronic products, these "tools" also include software, code, and other algorithmic tools:

> "*42488.2. (a) Notwithstanding any other law, every manufacturer of an electronic or appliance product (...) shall make available to owners of the product, service and repair facilities, and service dealers, sufficient documentation and functional parts and tools, inclusive of any updates, on fair and reasonable terms, to effect the diagnosis, maintenance, or repair of a product (...).*"

Right to repair laws that require manufacturers to make available to consumers and independent repair shops tools, parts, and information necessary to repair electronic products could be undermined by algorithm and source code secrecy rules since the broad definition of algorithms would encompass repair tools such as diagnosis software, firmware, and digital keys.

The good news is that very few of the hundreds of trade agreements in effect worldwide include Big Tech's "digital trade" rules. The bad news is that Big Tech lobbyists are using their power and money to try to rig numerous trade deals that are being negotiated right now to derail the wave of tech regulation underway nationwide. To learn more, please visit: www.rethinktrade.org