Big Tech's "Digital Trade" Agenda Threatens Illinois'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.

Illinois 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 Illinois tech bills are not undermined by this international preemption plot.

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

rethink TRADE

AMERICAN ECONOMIC LIBERTIES PROJECT

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

KIDS' ONLINE SAFETY

The onset of a youth mental health crisis has driven legislators to introduce bills across several states aimed at regulating social media, some of which require reviews of social media software design. The Big Tech-demanded "digital trade" rule that bans access to source code and algorithms would forbid reviews from being conducted by or made available to government regulators or independent bodies.

Illinois's Children's Privacy Protection and Parental Empowerment Act, which was considered in 2023, would have required social media companies to complete and submit data protection assessments that addressed design elements of their apps or online services:

> "*(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) 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 (...) The Data Protection Impact Assessment shall address, to the extent applicable, all of the following: (...) (E) whether algorithms used by the online product, service, or feature could harm children; (...) (4) For any Data Protection Impact Assessment completed as required by paragraph (1), make the Data Protection Impact Assessment available, within 5 business days, to the Attorney General pursuant to a written request.*"

The bill's required data protection impact assessments 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 impact assessments, companies could argue that the law requires them to disclose their algorithms in violation of algorithm and source code secrecy rules.

RIGHT TO REPAIR

The "digital trade" source code secrecy guarantees wouldn't just shield social media companies 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.

Illinois bill SB 2680 (2024), the Right to Repair Act, was 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:

> "*Section 10. Right to repair. (a) Notwithstanding any other law, every manufacturer of an electronic or appliance product (...) shall make available to 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 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. Other bills potentially affected by "digital trade" secrecy rules include the 2024 Agricultural Equipment Bill of Rights Act, the 2023 Powered Wheelchair Right to Repair Act, and the 2023 Educational Technology Right to Repair Act.

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 Illinois, the Automated Decision Tools Act was considered in the 2024 legislative session. This bill would require deployers of algorithmic tools to complete and submit to the government impact assessments that include descriptions of the tools' inputs and outputs:

> *"Section 10. Impact assessment. (a) On or before January 1, 2026, and annually thereafter, a deployer of an automated decision tool shall perform an impact assessment for any automated decision tool the deployer uses that includes all of the following: (...)*
> *(2) a description of the automated decision tool's outputs and how they are used to make, or be a controlling factor in making, a consequential decision;*
> *(3) a summary of the type of data collected from natural persons and processed by the automated decision tool when it is used to make, or be a controlling factor in making, a consequential decision; (...)*
> *(5) a description of the safeguards implemented, or that will be implemented, by the deployer to address any reasonably foreseeable risks of algorithmic discrimination arising from the use of the automated decision tool known to the deployer at the time of the impact assessment; (...)*
> *Section 35. Impact assessment. (a) Within 60 days after completing an impact assessment required by this Act, a deployer shall provide the impact assessment to the Department of Human Rights."*

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.

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