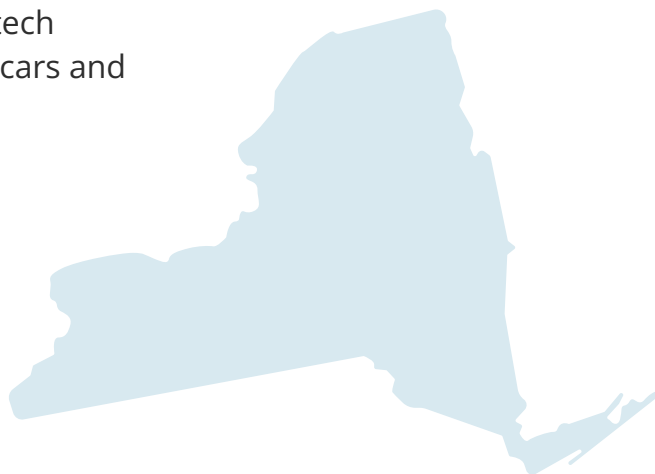


Big Tech’s “Digital Trade” Agenda Threatens New York’s Tech Policy Goals

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.

New York 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 New York 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 New York state policies relating to AI regulation and right to repair.



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

RIGHT TO REPAIR

The Big Tech-demanded “digital trade” rule guaranteeing source code secrecy undermines market competition and consumers’ rights to access the repair tools and information needed to keep their phones, cars, and other equipment operating.

New York’s Digital Fair Repair Act, which took effect in December 2023, 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:

“(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.”

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.

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 available to government regulators or independent bodies, as many bills require.

For instance, in New York, the Boundaries on Technology Act is currently being considered in the Assembly and Senate. This bill would require employers to audit AI tools for bias prior to their use:

§ 1011. 1. It shall be unlawful for an employer with one hundred or more employees to use an automated employment decision tool for an employment decision unless such tool has been the subject of an impact assessment. Impact assessments for automated employment decision tools must: (...) (B) Be conducted by an impartial party with no financial or legal conflicts of interest; (C) Identify and describe the attributes and modeling techniques that the tool uses to produce outputs; (...) (H) Be submitted in its entirety or an accessible summary form to the Department for inclusion in a public registry of such impact assessments (...).”

Since this bill would require impact assessments to be conducted by impartial parties, AI developers could argue that it forces them to disclose their algorithms to a third party contrary to “digital trade” secrecy guarantees. Other potentially affected bills include the New York Privacy Act; the AI Bill of Rights; the Advanced AI Licensing Act; the Digital Fairness Act; and Automated Employment Decision Tools.

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