Big Tech's "Digital Trade" Agenda Threatens Washington, Oregon, and Idaho 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.

Washington, Oregon, and Idaho 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 state-level tech bills in the Pacific Northwest—including some measures already signed into law—are not undermined by this plot for international preemption.

The rest of this explainer details how "digital trade" provisions conflict with specific Washington, Oregon, and Idaho policies relating to AI regulation 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/*

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, Idaho state code §19-1910 requires transparency in the development, application, and outcomes of pretrial risk assessment AI tools when used in criminal proceedings:

> "*19-1910. (1) All pretrial risk assessment tools shall be transparent, and: (a) All documents, data, records, and information used by the builder to build or validate the pretrial risk assessment tool (...) shall be open to public inspection, auditing, and testing; (b) A party to a criminal case wherein a court has considered, or an expert witness has relied upon, a pretrial risk assessment tool shall be entitled to review all calculations and data used to calculate the defendant's own risk score; and (c) No builder or user of a pretrial risk assessment tool may assert trade secret or other intellectual property protections in order to quash discovery of the materials described in paragraph (a) of this subsection in a criminal or civil case.*"

The risk assessment system's source code and other algorithmic design elements are likely to be part of the information required by a defendant to be able to exercise their right to due process, as well as part of the documentation that Idaho requires to be publicly available. Yet, the source code secrecy terms that tech industry interests seek in "digital trade" agreements would deny access to such information. Washington state bills HB 1951 and SB 5356, both considered in the 2024 session, require disclosure of AI training data and could be at risk due to the same "digital trade" secrecy mandate.

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.

Oregon's SB 1596 (2024), which will take effect in 2025, 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:

> "*(2)(a) An original equipment manufacturer shall make available to an owner or an independent repair provider on fair and reasonable terms any documentation, tool, part or other device or implement that the original equipment manufacturer makes available to an authorized service provider for the purpose of diagnosing, maintaining, repairing or updating consumer electronic equipment that the original equipment manufacturer makes or sells and that is sold or used in this state.*"

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. Washington's HB 1933/SB 6276 (2024) would also be negatively affected by the "digital trade" secrecy requirement.

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