

116TH CONGRESS
2D SESSION

S. 4473

To amend title 17, United States Code, to address circumvention of copyright protection systems with respect to the maintenance or repair of critical medical infrastructure, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 6, 2020

Mr. WYDEN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 17, United States Code, to address circumvention of copyright protection systems with respect to the maintenance or repair of critical medical infrastructure, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Critical Medical Infra-
5 structure Right-to-Repair Act of 2020”.

6 **SEC. 2. DEFINITIONS.**

7 In this Act—

1 (1) the term “commerce” has the meaning
2 given the term in section 4 of the Federal Trade
3 Commission Act (15 U.S.C. 44);

4 (2) the terms “covered emergency”, “covered
5 service provider”, “critical medical infrastructure”,
6 “repair”, and “service material” have the meanings
7 given those terms in section 123(a) of title 17,
8 United States Code, as added by section 3(a)(1) of
9 this Act;

10 (3) the term “covered healthcare provider” has
11 the meaning given the term in section 1201(l)(1) of
12 title 17, United States Code, as added by section
13 3(a)(2) of this Act;

14 (4) the term “critical medical infrastructure
15 contract” means a contract relating to the purchase,
16 leasing, licensing, repair, or maintenance (including
17 periodic maintenance) of critical medical infrastruc-
18 ture;

19 (5) the term “service provider” means any per-
20 son engaged in the diagnosis of problems with re-
21 spect to, or the service, maintenance, or repair of,
22 critical medical infrastructure; and

23 (6) the term “trade secret” has the meaning
24 given the term in section 1839 of title 18, United
25 States Code.

1 **SEC. 3. COPYRIGHTS.**

2 (a) IN GENERAL.—Title 17, United States Code, is
3 amended—

4 (1) in chapter 1, by adding at the end the fol-
5 lowing:

6 **“§ 123. Limitation on exclusive rights: incidental cop-
7 ies of service materials made during
8 maintenance or repair of critical medical
9 infrastructure**

10 “(a) DEFINITIONS.—In this section—

11 “(1) the term ‘covered emergency’ means the
12 public health emergency declared by the Secretary of
13 Health and Human Services under section 319 of
14 the Public Health Service Act (42 U.S.C. 247d) on
15 January 31, 2020, with respect to the Coronavirus
16 Disease 2019 (COVID–19), including any renewal of
17 that declaration;

18 “(2) the term ‘covered service provider’
19 means—

20 “(A) the owner or licensee of a copy of
21 service materials; or

22 “(B) the agent of a person described in
23 subparagraph (A);

24 “(3) the term ‘critical medical infrastructure’
25 means a device, computer program, or other product
26 or equipment used to provide medical services;

1 “(4) the term ‘repair’, when used with respect
2 to critical medical infrastructure, means to restore
3 that critical medical infrastructure to a state that is
4 in accordance with the original specifications of that
5 critical medical infrastructure, including any
6 changes to those original specifications that are
7 issued by the manufacturer of the critical medical
8 infrastructure; and

9 “(5) the term ‘service material’, when used with
10 respect to critical medical infrastructure—

11 “(A) means any information or material
12 that the manufacturer of that infrastructure
13 provides directly, indirectly, or wirelessly to—

14 “(i) technicians of the manufacturer;

15 or

16 “(ii) repair facilities that are author-
17 ized by the manufacturer; and

18 “(B) includes—

19 “(i) manuals, schematics, wiring dia-
20 grams, mechanical layouts, and other per-
21 tinent data with respect to that critical
22 medical infrastructure;

23 “(ii) computer programs used in diag-
24 nosing problems with respect to that crit-
25 ical medical infrastructure or in cali-

1 brating, repairing, or maintaining that
2 critical medical infrastructure;

3 “(iii) service keys that are required to
4 access diagnostic information, and other-
5 wise authorize repairs, with respect to that
6 critical medical infrastructure;

7 “(iv) error logs that are required to
8 diagnose required repairs with respect to
9 that critical medical infrastructure;

10 “(v) preventative and corrective main-
11 tenance, inspection, and repair procedures
12 with respect to that critical medical infra-
13 structure;

14 “(vi) information regarding safety
15 alerts, recalls, service bulletins, specifica-
16 tion updates, and the need for adjustments
17 to maintain efficiency, safety, and conven-
18 ience with respect to that critical medical
19 infrastructure; and

20 “(vii) any other information provided
21 to diagnose problems with respect to, or to
22 service, maintain, repair, activate, certify,
23 or install, that critical medical infrastruc-
24 ture, including—

1 “(I) with respect to any replace-
2 ment part or equipment relating to
3 that piece of critical medical infra-
4 structure; and

5 “(II) training materials with re-
6 spect to that critical medical infra-
7 structure.

8 “(b) LIMITATION.—Notwithstanding the provisions
9 of section 106, it is not an infringement of copyright for
10 a covered service provider to make, or to authorize the
11 making of, a separate copy of service materials with re-
12 spect to the covered service provider, if—

13 “(1) making that separate copy is incidental to
14 the repair or maintenance of critical medical infra-
15 structure; and

16 “(2) the repair or maintenance described in
17 paragraph (1) is part of a response to the covered
18 emergency.

19 “(c) RULE OF CONSTRUCTION.—Nothing in this sec-
20 tion may be construed to imply that the actions explicitly
21 authorized under this section may not also be permitted
22 under another provision of this title.”; and

23 (2) in section 1201, by adding at the end the
24 following:

1 “(1) REPAIR OF CRITICAL MEDICAL INFRASTRUC-
2 TURE RELATING TO COVID-19.—

3 “(1) DEFINITIONS.—For purposes of this sub-
4 section—

5 “(A) the terms ‘covered emergency’, ‘crit-
6 ical medical infrastructure’, and ‘repair’ have
7 the meanings given those terms in section
8 123(a); and

9 “(B) the term ‘covered healthcare provider’
10 means—

11 “(i) a healthcare provider who is the
12 owner, lessee, or licensee of critical medical
13 infrastructure; or

14 “(ii) the agent of a person described
15 in clause (i).

16 “(2) PERMISSIBLE CIRCUMVENTION.—Notwith-
17 standing the provisions of subsection (a)(1)(A), it is
18 not a violation of that subsection for a covered
19 healthcare provider to circumvent a technological
20 measure that effectively controls access to a work
21 protected under this title, if—

22 “(A) the purpose of the act of circumven-
23 tion is to repair or maintain critical medical in-
24 frastructure with respect to that covered health-
25 care provider; and

1 “(B) the repair or maintenance described
2 in subparagraph (A) is part of preparation for,
3 or a response to, the covered emergency.

4 “(3) ENABLING CIRCUMVENTION.—Notwith-
5 standing the provisions of subsections (a)(2) and
6 (b), it is not a violation of either such provision for
7 a covered healthcare provider to manufacture, im-
8 port, offer to the public, provide, or otherwise traffic
9 in technological means to circumvent a technological
10 measure that effectively controls access to a work
11 protected under this title, or to circumvent protec-
12 tion afforded by a technological measure that effec-
13 tively controls access to a work protected under this
14 title, if that action by that covered healthcare pro-
15 vider enables a repair or maintenance permitted
16 under paragraph (2).

17 “(4) RULES OF CONSTRUCTION.—Nothing in
18 this subsection may be construed to—

19 “(A) exempt a covered healthcare provider
20 from compliance with any other applicable law
21 or regulation relating to the repair or mainte-
22 nance of critical medical infrastructure, except
23 as explicitly provided in this subsection; or

24 “(B) prevent the Librarian of Congress
25 from determining, under the applicable sub-

1 paragraphs of subsection (a)(1), that subpara-
 2 graph (A) of such subsection (a)(1) shall not
 3 apply to a covered healthcare provider relating
 4 to the circumvention of a technological measure
 5 that effectively controls access to a work pro-
 6 tected under this title.”.

7 (b) **TECHNICAL AND CONFORMING AMENDMENT.**—
 8 The table of sections for chapter 1 of title 17, United
 9 States Code, is amended by adding at the end the fol-
 10 lowing:

“123. Limitation on exclusive rights: incidental copies of service materials made
 during maintenance or repair of critical medical infrastruc-
 ture.”.

11 **SEC. 4. PATENTS.**

12 Section 271 of title 35, United States Code, is
 13 amended—

14 (1) by redesignating subsections (h) and (i) as
 15 subsections (i) and (j), respectively; and

16 (2) by inserting after subsection (g) the fol-
 17 lowing:

18 “(h) **DESIGN PATENTS.**—

19 “(1) **DEFINITIONS.**—In this subsection—

20 “(A) the terms ‘covered emergency’, ‘crit-
 21 ical medical infrastructure’, and ‘repair’ have
 22 the meanings given the terms in section 123(a)
 23 of title 17; and

1 “(B) the term ‘covered healthcare provider’
2 has the meaning given the term in section
3 1201(l) of title 17.

4 “(2) NON-INFRINGEMENT.—It shall not be an
5 act of infringement with respect to a patent for de-
6 sign obtained under section 171 for a covered
7 healthcare provider to fabricate a part on a non-
8 commercial basis, and as needed, for the repair or
9 maintenance of critical medical infrastructure with
10 respect to that covered healthcare provider, if the re-
11 pair or maintenance is part of a response to the cov-
12 ered emergency.

13 “(3) RULE OF CONSTRUCTION.—Nothing in
14 this subsection may be construed to exempt a cov-
15 ered healthcare provider from compliance with any
16 other applicable law or regulation relating to a part
17 or critical medical infrastructure described in para-
18 graph (2).”.

19 **SEC. 5. CONTRACTS.**

20 Notwithstanding any other provision of law or regula-
21 tion, a provision of a critical medical infrastructure con-
22 tract is null and void if that provision of the critical med-
23 ical infrastructure contract prohibits or restricts the abil-
24 ity of a covered healthcare provider that is a party to the
25 contract to, in response to the covered emergency, repair

1 or maintain critical medical infrastructure with respect to
2 the covered healthcare provider.

3 **SEC. 6. MANUFACTURER REQUIREMENTS.**

4 (a) DEFINITION.—

5 (1) IN GENERAL.—Subject to paragraph (2), in
6 this section, the term “fair and reasonable terms”
7 means, with respect to a manufacturer of critical
8 medical infrastructure, that the manufacturer pro-
9 vides access to service materials, or offers for sale a
10 tool, with respect to the critical medical infrastruc-
11 ture at costs and terms that are equivalent to the
12 most favorable costs and terms offered by that man-
13 ufacturer to repair facilities that are authorized by
14 that manufacturer—

15 (A) using the net costs that would be in-
16 curred by that repair facility in obtaining an
17 equivalent part, tool, or documentation; and

18 (B) taking into consideration any discount,
19 rebate, or other incentive offered by the manu-
20 facturer.

21 (2) DOCUMENTATION.—For the purposes of
22 paragraph (1), if a manufacturer described in that
23 paragraph provides access to service materials that
24 are in the form of documentation, the term “fair
25 and reasonable terms” with respect to that provision

1 of access means at no charge, except that if the ap-
2 plicable service provider requests documentation in
3 physical printed form, the term “fair and reasonable
4 terms” includes a charge imposed by the manufac-
5 turer for the reasonable actual costs of preparing
6 and sending the documentation.

7 (b) DUTY TO DISCLOSE INFORMATION.—The manu-
8 facturer of a piece of critical medical infrastructure sold,
9 leased, or otherwise introduced into commerce in the
10 United States shall provide owners, lessees, or service pro-
11 viders with respect to that piece of infrastructure with ac-
12 cess to, on fair and reasonable terms, service materials
13 that are required to—

14 (1) diagnose problems with respect to that crit-
15 ical medical infrastructure; and

16 (2) service, maintain, or repair that critical
17 medical infrastructure.

18 (c) DUTY TO MAKE TOOLS AVAILABLE.—The manu-
19 facturer of critical medical infrastructure sold, leased, or
20 otherwise introduced into commerce in the United States
21 shall—

22 (1) offer for sale to the owner or lessee of the
23 critical medical infrastructure, and to all service pro-
24 viders with respect to the critical medical infrastruc-
25 ture, on fair and reasonable terms, any tool (includ-

1 ing software) for the diagnosis, service, maintenance,
2 or repair of the critical medical infrastructure; and

3 (2) provide all information that enables after-
4 market tool companies to manufacture tools with the
5 same functional characteristics as those tools made
6 available by the manufacturers to authorized dealers.

7 (d) EQUIPMENT.—The manufacturer of critical med-
8 ical infrastructure sold, leased, or otherwise introduced
9 into commerce in the United States shall offer for sale
10 to the owner or lessee of the critical medical infrastruc-
11 ture, and to all service providers with respect to the crit-
12 ical medical infrastructure, on fair and reasonable terms,
13 all equipment for diagnosis of problems with respect to,
14 service, maintenance, or repair of the critical medical in-
15 frastructure.

16 (e) PROTECTION OF TRADE SECRETS.—

17 (1) IN GENERAL.—Subject to paragraph (2), a
18 manufacturer of critical medical infrastructure may
19 not be required to publicly disclose information that,
20 if made public, would divulge methods or processes
21 entitled to protection as trade secrets under chapter
22 90 of title 18, United States Code.

23 (2) PROVISION OF INFORMATION TO DEALERS
24 OR SERVICE PROVIDERS.—A manufacturer of critical
25 medical infrastructure may not withhold information

1 under paragraph (1) on the ground that disclosing
2 the information would divulge methods or processes
3 entitled to protection as trade secrets under chapter
4 90 of title 18, United States Code, if that informa-
5 tion is provided directly or indirectly to authorized
6 dealers or service providers.

7 (f) ENFORCEMENT BY THE FEDERAL TRADE COM-
8 MISSION.—

9 (1) UNFAIR OR DECEPTIVE ACTS OR PRAC-
10 TICES.—A violation of this section, or a regulation
11 promulgated under this section, shall be treated as
12 a violation of a rule defining an unfair or deceptive
13 act or practice prescribed under section 18(a)(1)(B)
14 of the Federal Trade Commission Act (15 U.S.C.
15 57a(a)(1)(B)).

16 (2) POWERS OF COMMISSION.—The Federal
17 Trade Commission (referred to in this subsection as
18 the “Commission”) shall enforce this section and
19 any regulation promulgated under this section in the
20 same manner, by the same means, and with the
21 same jurisdiction, powers, and duties as though all
22 applicable terms and provisions of the Federal Trade
23 Commission Act (15 U.S.C. 41 et seq.) were incor-
24 porated into and made a part of this section. Any
25 person who violates this section or a regulation pro-

1 mulgated under this section shall be subject to the
2 penalties and entitled to the privileges and immuni-
3 ties provided in the Federal Trade Commission Act.
4 Enforcement by the Commission shall be the exclu-
5 sive means of enforcing compliance with this section
6 and any regulation promulgated under this section.

7 (3) RULEMAKING AUTHORITY.—The Commis-
8 sion shall have authority under section 553 of title
9 5, United States Code, to promulgate any regula-
10 tions necessary to implement this section.

11 **SEC. 7. STUDY AND REPORT.**

12 (a) STUDY.—The Chairman of the Federal Trade
13 Commission, in consultation with the Register of Copy-
14 rights and the Under Secretary of Commerce for Intellec-
15 tual Property and Director of the United States Patent
16 and Trademark Office, shall conduct a study regarding
17 the impact and effectiveness of this Act, and the amend-
18 ments made by this Act, with respect to innovation and
19 anticompetitive practices in the market for critical medical
20 infrastructure, including enforcement with respect to those
21 practices.

22 (b) REPORT TO CONGRESS.—Not later than 1 year
23 after the date of enactment of this Act, the Chairman of
24 the Federal Trade Commission shall—

1 (1) submit to Congress a report that contains
2 the results of the study conducted under subsection
3 (a); and

4 (2) make publicly available on the website of
5 the Federal Trade Commission the report submitted
6 under paragraph (1).

○