116TH CONGRESS
2D SESSION

S. _____

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

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

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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Critical Medical Infrastructure Right-to-Repair Act of 2020''.

SEC. 2. DEFINITIONS.

In this Act—

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

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

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

(4) the term ''critical medical infrastructure contract'' means a contract relating to the purchase, leasing, licensing, repair, or maintenance (including periodic maintenance) of critical medical infrastructure;

(5) the term ''service provider'' means any person engaged in the diagnosis of problems with respect to, or the service, maintenance, or repair of, critical medical infrastructure; and

(6) the term ''trade secret'' has the meaning given the term in section 1839 of title 18, United States Code.

SEC. 3. COPYRIGHTS.

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

(1) in chapter 1, by adding at the end the following:

"§ 123. Limitation on exclusive rights: incidental copies of service materials made during maintenance or repair of critical medical infrastructure

''(a) DEFINITIONS.—In this section—

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

''(2) the term 'covered service provider' means—

''(A) the owner or licensee of a copy of service materials; or

''(B) the agent of a person described in subparagraph (A);

''(3) the term 'critical medical infrastructure' means a device, computer program, or other product or equipment used to provide medical services;

"(4) the term 'repair', when used with respect to critical medical infrastructure, means to restore that critical medical infrastructure to a state that is in accordance with the original specifications of that critical medical infrastructure, including any changes to those original specifications that are issued by the manufacturer of the critical medical infrastructure; and

"(5) the term 'service material', when used with respect to critical medical infrastructure—

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

"(i) technicians of the manufacturer; or

"(ii) repair facilities that are authorized by the manufacturer; and

"(B) includes—

"(i) manuals, schematics, wiring diagrams, mechanical layouts, and other pertinent data with respect to that critical medical infrastructure;

"(ii) computer programs used in diagnosing problems with respect to that critical medical infrastructure or in cali-

brating, repairing, or maintaining that critical medical infrastructure;

"(iii) service keys that are required to access diagnostic information, and otherwise authorize repairs, with respect to that critical medical infrastructure;

"(iv) error logs that are required to diagnose required repairs with respect to that critical medical infrastructure;

"(v) preventative and corrective maintenance, inspection, and repair procedures with respect to that critical medical infrastructure;

"(vi) information regarding safety alerts, recalls, service bulletins, specification updates, and the need for adjustments to maintain efficiency, safety, and convenience with respect to that critical medical infrastructure; and

"(vii) any other information provided to diagnose problems with respect to, or to service, maintain, repair, activate, certify, or install, that critical medical infrastructure, including—

''(I) with respect to any replacement part or equipment relating to that piece of critical medical infrastructure; and

''(II) training materials with respect to that critical medical infrastructure.

''(b) LIMITATION.—Notwithstanding the provisions of section 106, it is not an infringement of copyright for a covered service provider to make, or to authorize the making of, a separate copy of service materials with respect to the covered service provider, if—

''(1) making that separate copy is incidental to the repair or maintenance of critical medical infrastructure; and

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

''(c) RULE OF CONSTRUCTION.—Nothing in this section may be construed to imply that the actions explicitly authorized under this section may not also be permitted under another provision of this title.''; and

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

''(l) REPAIR OF CRITICAL MEDICAL INFRASTRUCTURE RELATING TO COVID–19.—

''(1) DEFINITIONS.—For purposes of this subsection—

''(A) the terms 'covered emergency', 'critical medical infrastructure', and 'repair' have the meanings given those terms in section 123(a); and

''(B) the term 'covered healthcare provider' means—

''(i) a healthcare provider who is the owner, lessee, or licensee of critical medical infrastructure; or

''(ii) the agent of a person described in clause (i).

''(2) PERMISSIBLE CIRCUMVENTION.—Notwithstanding the provisions of subsection (a)(1)(A), it is not a violation of that subsection for a covered healthcare provider to circumvent a technological measure that effectively controls access to a work protected under this title, if—

''(A) the purpose of the act of circumvention is to repair or maintain critical medical infrastructure with respect to that covered healthcare provider; and

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

"(3) ENABLING CIRCUMVENTION.—Notwithstanding the provisions of subsections (a)(2) and (b), it is not a violation of either such provision for a covered healthcare provider to manufacture, import, offer to the public, provide, or otherwise traffic in technological means to circumvent a technological measure that effectively controls access to a work protected under this title, or to circumvent protection afforded by a technological measure that effectively controls access to a work protected under this title, if that action by that covered healthcare provider enables a repair or maintenance permitted under paragraph (2).

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

"(A) exempt a covered healthcare provider from compliance with any other applicable law or regulation relating to the repair or maintenance of critical medical infrastructure, except as explicitly provided in this subsection; or

"(B) prevent the Librarian of Congress from determining, under the applicable sub-

paragraphs of subsection (a)(1), that subparagraph (A) of such subsection (a)(1) shall not apply to a covered healthcare provider relating to the circumvention of a technological measure that effectively controls access to a work protected under this title.''.

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 1 of title 17, United States Code, is amended by adding at the end the following:

''123. Limitation on exclusive rights: incidental copies of service materials made during maintenance or repair of critical medical infrastructure.''.

SEC. 4. PATENTS.

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

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

(2) by inserting after subsection (g) the following:

''(h) DESIGN PATENTS.—

''(1) DEFINITIONS.—In this subsection—

''(A) the terms 'covered emergency', 'critical medical infrastructure', and 'repair' have the meanings given the terms in section 123(a) of title 17; and

"(B) the term 'covered healthcare provider' has the meaning given the term in section 1201(l) of title 17.

"(2) NON-INFRINGEMENT.—It shall not be an act of infringement with respect to a patent for design obtained under section 171 for a covered healthcare provider to fabricate a part on a non-commercial basis, and as needed, for the repair or maintenance of critical medical infrastructure with respect to that covered healthcare provider, if the repair or maintenance is part of a response to the covered emergency.

"(3) RULE OF CONSTRUCTION.—Nothing in this subsection may be construed to exempt a covered healthcare provider from compliance with any other applicable law or regulation relating to a part or critical medical infrastructure described in paragraph (2).".

SEC. 5. CONTRACTS.

Notwithstanding any other provision of law or regulation, a provision of a critical medical infrastructure contract is null and void if that provision of the critical medical infrastructure contract prohibits or restricts the ability of a covered healthcare provider that is a party to the contract to, in response to the covered emergency, repair

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

SEC. 6. MANUFACTURER REQUIREMENTS.

(a) DEFINITION.—

(1) IN GENERAL.—Subject to paragraph (2), in this section, the term ''fair and reasonable terms'' means, with respect to a manufacturer of critical medical infrastructure, that the manufacturer provides access to service materials, or offers for sale a tool, with respect to the critical medical infrastructure at costs and terms that are equivalent to the most favorable costs and terms offered by that manufacturer to repair facilities that are authorized by that manufacturer—

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

(B) taking into consideration any discount, rebate, or other incentive offered by the manufacturer.

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

of access means at no charge, except that if the applicable service provider requests documentation in physical printed form, the term ''fair and reasonable terms'' includes a charge imposed by the manufacturer for the reasonable actual costs of preparing and sending the documentation.

(b) DUTY TO DISCLOSE INFORMATION.—The manufacturer of a piece of critical medical infrastructure sold, leased, or otherwise introduced into commerce in the United States shall provide owners, lessees, or service providers with respect to that piece of infrastructure with access to, on fair and reasonable terms, service materials that are required to—

(1) diagnose problems with respect to that critical medical infrastructure; and

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

(c) DUTY TO MAKE TOOLS AVAILABLE.—The manufacturer of critical medical infrastructure sold, leased, or otherwise introduced into commerce in the United States shall—

(1) offer for sale to the owner or lessee of the critical medical infrastructure, and to all service providers with respect to the critical medical infrastructure, on fair and reasonable terms, any tool (includ-

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

(2) provide all information that enables aftermarket tool companies to manufacture tools with the same functional characteristics as those tools made available by the manufacturers to authorized dealers.

(d) EQUIPMENT.—The manufacturer of critical medical infrastructure sold, leased, or otherwise introduced into commerce in the United States shall offer for sale to the owner or lessee of the critical medical infrastructure, and to all service providers with respect to the critical medical infrastructure, on fair and reasonable terms, all equipment for diagnosis of problems with respect to, service, maintenance, or repair of the critical medical infrastructure.

(e) PROTECTION OF TRADE SECRETS.—

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

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

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

(f) ENFORCEMENT BY THE FEDERAL TRADE COMMISSION.—

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

(2) POWERS OF COMMISSION.—The Federal Trade Commission (referred to in this subsection as the ''Commission'') shall enforce this section and any regulation promulgated under this section in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this section. Any person who violates this section or a regulation pro-

mulgated under this section shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act. Enforcement by the Commission shall be the exclusive means of enforcing compliance with this section and any regulation promulgated under this section.

(3) RULEMAKING AUTHORITY.—The Commission shall have authority under section 553 of title 5, United States Code, to promulgate any regulations necessary to implement this section.

SEC. 7. STUDY AND REPORT.

(a) STUDY.—The Chairman of the Federal Trade Commission, in consultation with the Register of Copyrights and the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, shall conduct a study regarding the impact and effectiveness of this Act, and the amendments made by this Act, with respect to innovation and anticompetitive practices in the market for critical medical infrastructure, including enforcement with respect to those practices.

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

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

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