

117TH CONGRESS
2D SESSION

S. 3880

To amend title 17, United States Code, to define and provide for accommodation and designation of technical measures to identify, protect, or manage copyrighted works, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 17, 2022

Mr. TILLIS (for himself and Mr. LEAHY) 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 define and provide for accommodation and designation of technical measures to identify, protect, or manage copyrighted works, 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 “Strengthening Meas-
5 ures to Advance Rights Technologies Copyright Act of
6 2022” or the “SMART Copyright Act of 2022”.

1 **SEC. 2. DEFINITION OF STANDARD TECHNICAL MEASURES.**

2 Section 512(i) of title 17, United States Code, is
3 amended by striking paragraph (2) and inserting the fol-
4 lowing:

5 “(2) DEFINITION.—In this subsection, the term
6 ‘standard technical measures’ means technical meas-
7 ures that are used by copyright owners to identify
8 or protect copyrighted works, or by service providers
9 to identify or manage copyrighted works on the serv-
10 ice, and—

11 “(A) have been identified or developed pur-
12 suant to—

13 “(i) a broad consensus of copyright
14 owners and service providers in an open,
15 fair, voluntary, multi-industry process; or

16 “(ii) a broad consensus of relevant
17 copyright owners and relevant service pro-
18 viders, in an open, fair, voluntary process,
19 for technical measures that are applicable
20 to a particular industry, type of work, type
21 or size of service provider, or type of tech-
22 nical measure;

23 “(B) are available to any person on—

24 “(i) nondiscriminatory terms; and

25 “(ii)(I) a royalty-free basis; or

26 “(II) a reasonable royalty basis; and

1 “(C) do not impose substantial and dis-
 2 proportionate costs on service providers or sub-
 3 stantial and disproportionate burdens on their
 4 systems or networks.”.

5 **SEC. 3. DESIGNATION OF CERTAIN TECHNICAL MEASURES**
 6 **TO IDENTIFY, PROTECT, OR MANAGE COPY-**
 7 **RIGHTED WORKS.**

8 (a) IN GENERAL.—Chapter 5 of title 17, United
 9 States Code, is amended by adding at the end the fol-
 10 lowing:

11 **“§ 514. Designation of certain technical measures to**
 12 **identify, protect, or manage copyrighted**
 13 **works**

14 “(a) DEFINITIONS.—In this section:

15 “(1) ACCOMMODATE.—The term ‘accommodate’
 16 includes adapting, implementing, integrating, adjust-
 17 ing, and conforming.

18 “(2) COVERED SERVICE PROVIDER.—The term
 19 ‘covered service provider’ means a service provider to
 20 which a designated technical measure applies.

21 “(3) DESIGNATED TECHNICAL MEASURE.—The
 22 term ‘designated technical measure’ means a tech-
 23 nical measure that has been designated by the Li-
 24 brarian in accordance with subsection (c).

1 “(4) LIBRARIAN.—The term ‘Librarian’ means
2 the Librarian of Congress.

3 “(5) PROPOSED TECHNICAL MEASURE.—The
4 term ‘proposed technical measure’ means a technical
5 measure that is proposed by a person under sub-
6 section (d)(1).

7 “(6) REGISTER.—The term ‘Register’ means
8 the Register of Copyrights.

9 “(7) SERVICE PROVIDER.—The term ‘service
10 provider’—

11 “(A) means a provider of online services or
12 network access, or the operator of facilities
13 therefor, that provides storage at the direction
14 of a user of material that resides on a system
15 or network controlled or operated by or for the
16 service provider; and

17 “(B) includes a provider described in sub-
18 paragraph (A) that offers the transmission,
19 routing, or providing of connections for digital
20 online communications, between or among
21 points specified by a user, of material of the
22 user’s choosing, without modification to the
23 content of the material as sent or received.

24 “(8) TECHNICAL MEASURE.—The term ‘tech-
25 nical measure’ means a technical measure that—

1 “(A) is used by—

2 “(i) a copyright owner to identify or
3 protect a copyrighted work; or

4 “(ii) a service provider to identify or
5 manage a copyrighted work; and

6 “(B) may vary across types and sizes of
7 service providers.

8 “(b) ACCOMMODATION OF DESIGNATED TECHNICAL
9 MEASURES.—A covered service provider shall use com-
10 mercially reasonable efforts to accommodate and not inter-
11 fere with designated technical measures that apply to that
12 covered service provider.

13 “(c) AUTHORITY OF THE LIBRARIAN.—

14 “(1) DESIGNATION OF TECHNICAL MEAS-
15 URES.—The Librarian may, at the recommendation
16 of the Register, and as provided in subsections (d)
17 and (e)—

18 “(A) designate proposed technical meas-
19 ures that—

20 “(i) are available to any person on—

21 “(I) nondiscriminatory terms;

22 and

23 “(II)(aa) a royalty-free basis; or

24 “(bb) a reasonable royalty basis;

25 and

1 “(ii) do not impose substantial and
2 disproportionate costs on service providers
3 or substantial and disproportionate bur-
4 dens on their systems or networks;

5 “(B) rescind previously designated tech-
6 nical measures; or

7 “(C) revise previously designated technical
8 measures.

9 “(2) PRESCRIPTION OF RULES.—The Librar-
10 ian, upon consultation with the Register, shall pre-
11 scribe rules that—

12 “(A) implement subsections (d) and (e);
13 and

14 “(B) provide for the protection of confiden-
15 tial and sensitive information provided to the
16 Librarian—

17 “(i) as part of a petition under sub-
18 section (d); or

19 “(ii) during a rulemaking under sub-
20 section (e).

21 “(d) PETITIONS.—

22 “(1) IN GENERAL.—Not later than 1 year after
23 the date of enactment of the SMART Copyright Act
24 of 2022 and every 3 years thereafter, the Librarian
25 shall accept petitions, from owners of copyrighted

1 works, service providers, and other stakeholders,
2 proposing the designation of a technical measure or
3 the rescission or revision of a designated technical
4 measure.

5 “(2) PETITION REQUIREMENTS.—In the case of
6 a petition submitted to the Librarian under para-
7 graph (1) proposing the designation of a technical
8 measure or review of a designated technical meas-
9 ure, as appropriate, the petition shall detail with
10 specificity—

11 “(A) the type of copyrighted works, or any
12 subset thereof, intended to be covered by the
13 technical measure;

14 “(B) the type of service provider, or any
15 subset thereof, intended to be covered by the
16 technical measure; and

17 “(C) how the proposed technical measure
18 or the designated technical measure proposed to
19 be revised meets both the definition of ‘tech-
20 nical measure’ under subsection (a) and the cri-
21 teria set forth in subsection (c)(1)(A).

22 “(3) EVALUATION OF PETITION.—After each
23 deadline under paragraph (1), the Librarian shall
24 evaluate each petition received under that paragraph
25 and take appropriate action as follows:

1 “(A) The Librarian may begin a rule-
2 making process to—

3 “(i) designate a proposed technical
4 measure; or

5 “(ii) rescind or revise a designated
6 technical measure.

7 “(B) The Librarian shall reject without a
8 rulemaking proceeding a petition that proposes
9 the designation or revision of a privately owned
10 technical measure, unless the petition is filed or
11 joined by the owner of the technical measure
12 proposed to be designated or revised.

13 “(e) RULEMAKING PROCESS.—

14 “(1) PUBLIC COMMENT.—For any proposed
15 technical measure or designated technical measure
16 for which the Librarian has begun a rulemaking
17 process under subsection (d)(3)(A), the public com-
18 ment process shall include not less than 1 public
19 hearing convened by the Register, which shall in-
20 clude written input from relevant technical experts.

21 “(2) FACTORS FOR EXAMINATION BY REG-
22 ISTER.—For any rulemaking process the Librarian
23 has begun under subsection (d)(3)(A), with respect
24 to each technical measure, the Register shall exam-
25 ine—

1 “(A) the availability and use of the tech-
2 nical measure to identify, manage, or protect
3 particular types of copyrighted works on par-
4 ticular types of services;

5 “(B) the terms on which the technical
6 measure is and will be made available to any
7 person under subsection (e)(1)(A)(i), including
8 whether there are any intellectual property
9 rights that need to be licensed by service pro-
10 viders to accommodate the technical measure;

11 “(C) the total cost that accommodating or
12 not interfering with the technical measure may
13 impose on the type of service providers de-
14 scribed in the petition;

15 “(D) the burden the technical measure
16 may impose on the systems or networks of serv-
17 ice providers, as compared to—

18 “(i) the total amount of alleged or
19 demonstrated infringing activity occurring
20 over systems or networks controlled by the
21 type of service providers described in the
22 petition;

23 “(ii) the revenue and other financial
24 resources of the type of service providers
25 described in the petition; and

1 “(iii) any mitigation of costs or other
2 benefits or savings that the type of service
3 providers described in the petition may
4 achieve by accommodating or not inter-
5 fering with the technical measure;

6 “(E) in the case of a proposed technical
7 measure, whether the proposed technical meas-
8 ure is also a standard technical measure, as de-
9 fined in section 512(i), to avoid designating a
10 technical measure that is otherwise a standard
11 technical measure;

12 “(F) the positive or negative impact the
13 technical measure may have on criticism, com-
14 ment, news reporting, teaching, scholarship, re-
15 search, increasing information sharing, or other
16 relevant public interest considerations;

17 “(G) whether the technical measure poses
18 an undue cybersecurity threat (as defined in
19 section 102 of the Cybersecurity Information
20 Sharing Act of 2015 (6 U.S.C 1501)) to, or
21 would create a security vulnerability (as defined
22 in such section 102) for, the information sys-
23 tems of the affected service providers;

24 “(H) the impact the technical measure
25 may have on privacy and data protection;

1 “(I) the impact the technical measure may
2 have on competition among service providers,
3 and the impact it may have on competition
4 among copyright owners;

5 “(J) whether certain categories or types of
6 service providers should be exempt from the
7 subset of service providers covered by a des-
8 ignation, such as—

9 “(i) libraries;

10 “(ii) educational institutions; or

11 “(iii) corporate or not-for-profit
12 websites that permit user comments or
13 posts, but have never or rarely had infring-
14 ing activity on their services; and

15 “(K) in the case of a proposed technical
16 measure, whether—

17 “(i) the proposed technical measure
18 may conflict or interfere with other pro-
19 posed technical measures or designated
20 technical measures; or

21 “(ii) multiple proposed technical
22 measures and designated technical meas-
23 ures should be subsumed under a broader
24 category of designated technical measures.

25 “(3) RECOMMENDATION.—

1 “(A) IN GENERAL.—The Register shall
2 make a recommendation that includes written
3 input from the Chief Technology Advisor to the
4 Librarian on each proposed technical measure,
5 and each designated technical measure pro-
6 posed to be revised or rescinded, that is consid-
7 ered under the rulemaking process under this
8 subsection, after consulting with, and reporting
9 and commenting on the views of, the following,
10 as appropriate:

11 “(i) The Director of the National In-
12 stitute of Standards and Technology.

13 “(ii) The Assistant Secretary of Com-
14 merce for Communications and Informa-
15 tion.

16 “(iii) The Attorney General, for the
17 purpose of providing an analysis of the im-
18 pact a proposed technical measure may
19 have on competition among service pro-
20 viders or copyright owners, as appropriate.

21 “(iv) Any relevant cybersecurity agen-
22 cy.

23 “(B) RESOLUTION OF DISAGREEMENT.—If
24 there is substantial disagreement between the
25 recommendation of the Register and any of the

1 views expressed by the agencies consulted under
2 subparagraph (A), the Librarian shall explain
3 in writing the reasons for the resolution of the
4 disagreement as part of the decision under
5 paragraph (4).

6 “(4) DECISION.—If, at the conclusion of the
7 rulemaking process under this subsection, the Li-
8 brarian determines that the record supports the des-
9 ignation of a proposed technical measure, or a re-
10 scission or revision of a designated technical meas-
11 ure, the Librarian shall—

12 “(A)(i) for a proposed technical measure,
13 designate the proposed technical measure; or

14 “(ii) for a designated technical measure
15 proposed to be revised, designate the revised
16 technical measure;

17 “(B) for a proposed technical measure or
18 a designated technical measure proposed to be
19 revised—

20 “(i) describe, as part of the designa-
21 tion under subparagraph (A), the type of
22 copyrighted work, or any subset thereof,
23 and the covered service providers to which
24 the technical measure applies; and

1 “(ii) include in the description under
2 clause (i), as appropriate, any category or
3 subset of type of service provider that is
4 exempt from the designation, such that the
5 requirement under subsection (b) does not
6 apply to those service providers;

7 “(C) for a designated technical measure
8 proposed to be rescinded, rescind the technical
9 measure;

10 “(D) for a proposed technical measure or
11 a designated technical measure proposed to be
12 revised, provide examples or a definition with
13 specificity for what ‘accommodate’ means for
14 the technical measure, taking into account how
15 different covered service providers to which the
16 technical measure applies may have to accom-
17 modate differently based on their size or other
18 relevant characteristics;

19 “(E) publish a list of designated technical
20 measures, including the description required
21 under subparagraph (B)(i), in effect after the
22 Librarian has designated, revised, and re-
23 scinded technical measures under this para-
24 graph in the Federal Register and publish and

1 maintain the list on the website of the Library
2 of Congress; and

3 “(F) for a proposed technical measure or
4 a revised designated technical measure, publish
5 a deadline, which shall not be earlier than 1
6 year after the date of publication, by which
7 service providers shall implement the designated
8 technical measure.

9 “(f) PUBLIC INFORMATION.—To assist the public in
10 understanding the requirements under this section, the
11 Register shall—

12 “(1) publish on the website of the Copyright
13 Office an index of cases relating to the requirements;
14 and

15 “(2) update the list published under paragraph
16 (1) not less frequently than annually.

17 “(g) AUTHORIZATION OF APPROPRIATIONS.—

18 “(1) IN GENERAL.—There is authorized to be
19 appropriated to carry out this section—

20 “(A) \$900,000 for fiscal year 2023; and

21 “(B) subject to paragraph (2), \$700,000
22 for fiscal year 2024 and each fiscal year there-
23 after.

24 “(2) ADJUSTMENT FOR INFLATION.—The
25 amount authorized to be appropriated under para-

1 graph (1)(B) for fiscal year 2025 and each fiscal
2 year thereafter shall be adjusted annually to reflect
3 the change in the Consumer Price Index for All
4 Urban Consumers published by the Bureau of Labor
5 Statistics.

6 “(h) APPEAL TO DISTRICT OF COLUMBIA CIRCUIT.—
7 Not later than 90 days after the date on which the Librar-
8 ian publishes a decision regarding a technical measure
9 under subsection (e)(4), any covered service provider to
10 which the technical measure applies and any party that
11 submitted a petition under subsection (d) regarding the
12 technical measure may appeal the decision to the United
13 States Court of Appeals for the District of Columbia Cir-
14 cuit.

15 “(i) CIVIL REMEDIES.—

16 “(1) CIVIL ACTIONS.—A copyright owner ag-
17 grieved by a violation of subsection (b) by a covered
18 service provider may bring a civil action against the
19 covered service provider in an appropriate United
20 States district court.

21 “(2) AUTHORITY OF THE COURT.—In an action
22 brought under paragraph (1), the court may—

23 “(A) grant a temporary or permanent in-
24 junction on such terms as it determines reason-
25 able to prevent or restrain a violation;

1 “(B) award damages, in accordance with
2 paragraph (3);

3 “(C) allow, in its discretion, the recovery of
4 costs by or against any party other than the
5 United States or an officer of the United
6 States; and

7 “(D) award, in its discretion, reasonable
8 attorney fees or expert witness fees to the pre-
9 vailing party.

10 “(3) AWARD OF DAMAGES.—

11 “(A) IN GENERAL.—Except as provided in
12 subparagraph (B) or otherwise provided in this
13 title, in an action brought by a copyright owner
14 against a service provider under paragraph (1),
15 the court shall award to the copyright owner
16 the actual damages suffered by the copyright
17 owner as a result of the violation.

18 “(B) STATUTORY DAMAGES.—

19 “(i) IN GENERAL.—In an action
20 brought under paragraph (1), the copy-
21 right owner may elect to recover, in lieu of
22 actual damages, an award of statutory
23 damages in an amount that is—

1 “(I) not less than \$200 and not
2 more than \$25,000 per violation, as
3 the court considers just; and

4 “(II) not more than \$150,000 in
5 the aggregate.

6 “(ii) REPEATED VIOLATIONS.—

7 “(I) 2 OR MORE VIOLATIONS.—
8 If, in an action brought against a
9 service provider under paragraph (1),
10 the copyright owner proves that the
11 service provider violated subsection
12 (b) not less than 1 time during the 3-
13 year period beginning on the date of
14 a final judgment entered against the
15 service provider for a violation of that
16 subsection, the copyright owner may
17 elect to recover an award of statutory
18 damages in an amount that is—

19 “(aa) not less than \$5,000
20 and not more than \$400,000 per
21 violation, as the court considers
22 just; and

23 “(bb) not more than
24 \$800,000 in the aggregate.

1 “(II) 3 OR MORE VIOLATIONS.—
2 If, in an action brought against a
3 service provider under paragraph (1),
4 the copyright owner proves that the
5 service provider violated subsection
6 (b) not fewer than 2 times during the
7 5-year period beginning on the date of
8 a final judgment entered against the
9 service provider for a violation of that
10 subsection, the court may increase the
11 award of damages to not more than
12 triple the amount that would other-
13 wise be awarded under subparagraph
14 (A) or subclause (I) of this clause, as
15 the court considers just.

16 “(C) INNOCENT VIOLATIONS.—The court,
17 in its discretion, may reduce or remit the total
18 award of damages in any action brought
19 against a service provider under paragraph
20 (1)—

21 “(i) in which the service provider
22 proves by a preponderance of the evidence
23 that the service provider was not aware
24 and had no reason to believe that its acts
25 constituted a violation of subsection (b); or

1 “(ii) for reasons of equity.

2 “(j) NO IMPACT ON SAFE HARBOR.—

3 “(1) IN GENERAL.—Nothing in this section
4 shall be construed to alter the scope of the safe har-
5 bors set forth in subsections (a) through (e) of sec-
6 tion 512, or to impose a condition on eligibility for
7 those safe harbors.

8 “(2) NO DEFENSE TO LIABILITY.—The safe
9 harbors set forth in subsections (a) through (e) of
10 section 512 shall not constitute a defense to liability
11 under this section.

12 “(k) LIMITATION OF LIABILITY.—Notwithstanding
13 subsection (i), no covered service provider shall be held
14 liable in a civil action on account of—

15 “(1) any action voluntarily taken in good faith
16 under this section to restrict access to or availability
17 of material; or

18 “(2) any action taken under this section to en-
19 able or make available to covered service providers
20 the technical means to restrict access to material de-
21 scribed in paragraph (1).”.

22 (b) TECHNICAL AND CONFORMING AMENDMENT.—
23 The table of sections for chapter 5 of title 17, United
24 States Code, is amended by adding at the end the fol-
25 lowing:

“514. Designation of certain technical measures to identify, protect, or manage copyrighted works.”.

1 **SEC. 4. ADVISORS.**

2 (a) ADVISORS TO THE REGISTER.—Chapter 7 of title
3 17, United States Code, is amended by adding at the end
4 the following:

5 **“§ 711. Advisors to the Register**

6 “(a) CHIEF ECONOMIST.—Not later than 180 days
7 after the date of enactment of the SMART Copyright Act
8 of 2022, the Register shall appoint a Chief Economist
9 within the Office of the Register, who shall advise the Reg-
10 ister on issues related to economic policy and copyright.

11 “(b) CHIEF TECHNOLOGY ADVISOR.—

12 “(1) IN GENERAL.—Not later than 180 days
13 after the date of enactment of the SMART Copy-
14 right Act of 2022, the Register shall appoint a Chief
15 Technology Advisor, who shall advise the Register on
16 technology issues related to copyright law, including
17 by evaluating and providing advice on the factors in
18 section 514(e)(2).

19 “(2) QUALIFICATIONS.—The individual ap-
20 pointed as Chief Technology Advisor under para-
21 graph (1) shall have significant technical expertise,
22 including experience with computer software, stand-
23 ards, and technological measures relevant to copy-
24 right law.

1 “(3) TERM.—The individual appointed as Chief
2 Technology Advisor under paragraph (1) shall serve
3 for a limited term to be determined by the Register,
4 but not to exceed 5 years.”.

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

“711. Advisors to the Register.”.

○