H. R. 9541

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 HOUSE OF REPRESENTATIVES

December 14, 2022

Ms. Chu (for herself and Mr. Armstrong) introduced the following bill; which was 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.

Be it enacted by the Senate and House of Representa-

tives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Strengthening Meas-

ures to Advance Rights Technologies Copyright Act of

2023” or the “SMART Copyright Act of 2023”.

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SEC. 2. DESIGNATION OF USE IN THE MARKETPLACE OF CERTAIN TECHNICAL MEASURES TO IDENTIFY OR PROTECT COPYRIGHTED WORKS.

(a) In General.—Chapter 5 of title 17, United States Code, is amended by adding at the end the following:

“§514. Designation of use in the marketplace of certain technical measures to identify or protect copyrighted works

“(a) Definitions.—In this section:

“(1) Covered service provider.—The term ‘covered service provider’ means a service provider to which a designated technical measure applies.

“(2) Designated technical measure.—The term ‘designated technical measure’ means a technical measure that has been designated by the Librarian in accordance with subsections (c), (d), and (e).

“(3) Librarian.—The term ‘Librarian’ means the Librarian of Congress.

“(4) Proposed technical measure.—The term ‘proposed technical measure’ means a technical measure that is proposed by a person under subsection (d).

“(5) Register.—The term ‘Register’ means the Register of Copyrights.
“(6) SERVICE PROVIDER.—The term ‘service provider’ means—

“(A) a provider of online services or network access, or the operator of facilities therefor, that—

“(i) provides storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider;

“(ii) refers or links users to an online location by using information location tools, including a directory, index, reference, pointer, or hypertext link; and/or

“(iii) provides the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which—

“(I) the material is made available online by a person other than the service provider;

“(II) the material is transmitted from the person described in clause (i) through the system or network to a person other than the person de-
scribed in clause (i) at the direction of that other person; and

“(III) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in clause (ii), request access to the material from the person described in clause (i); and

“(B) the term does not include—

“(i) a library or archives—

“(I) whose collections are open to the public, or are available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field;

“(II) that has a public service mission;

“(III) whose trained staff or volunteers provide professional services normally associated with libraries or archives; and
“(IV) whose collections are composed of lawfully acquired and/or licensed materials;
“(ii) a nonprofit educational institution; or
“(iii) any other person solely with regard to providing the services described in section 512(k) to an institution described in subparagraph (i) or (ii) in the course of providing such services to such institution.
“(7) TECHNICAL MEASURE.—The term ‘technical measure’ means a technical measure that is used in commerce by a copyright owner or a service provider to identify or protect a copyrighted work.
“(b) EMPLOYMENT OF DESIGNATED TECHNICAL MEASURES.—A covered service provider shall use reasonable efforts to employ and effectively implement applicable designated technical measures.
“(c) AUTHORITY OF THE LIBRARIAN.—
“(1) DESIGNATION OF TECHNICAL MEASURES.—The Librarian may, at the recommendation of the Register, and pursuant to subsections (d) and (e)—
“(A) designate proposed technical measures that—
“(i) are widely used in the marketplace by service providers; or

“(ii) are widely available in the marketplace on nondiscriminatory terms and a royalty-free basis;

“(B) rescind previous designations of technical measures; and

“(C) revise previous designations of technical measures.

“(2) PRESCRIPTION OF RULES.—The Librarian, upon consultation with the Register, shall prescribe rules that—

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

“(B) provide for the protection of confidential and sensitive information provided to the Librarian—

“(i) as part of a petition under subsection (d); or

“(ii) during a rulemaking under subsection (e).

“(d) Petitions.—

“(1) IN GENERAL.—Not later than 1 year after the date of enactment of the SMART Copyright Act of 2023 and every 3 years thereafter, the Librarian
shall accept petitions, from owners of copyrighted works, service providers, and other stakeholders, proposing the designation of a technical measure or the rescission or revision of a previous designation of a technical measure.

“(2) Petition Requirements.—In the case of a petition submitted to the Librarian under paragraph (1) proposing the designation of a technical measure or review of a previous designation of a technical measure, as appropriate, the petition shall detail with specificity—

“(A) how the proposed technical measure, or the designated technical measure as proposed to be revised, meets the definition of ‘technical measure’ under subsection (a) and the criteria for designation of such technical measure under subsection (c)(1)(A);

“(B) the classes of copyrighted works, or any subsets thereof, intended to be covered; and

“(C) the types of service provider, or any subsets thereof, intended to be covered.

“(3) Evaluation of Petition.—After each deadline under paragraph (1), the Librarian shall evaluate each petition received under that paragraph and take appropriate action as follows:
“(A) The Librarian may begin a rule-making process to—

“(i) designate a proposed technical measure; or

“(ii) rescind or revise a previous designation of a technical measure.

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

“(e) RULEMAKING PROCESS.—

“(1) PUBLIC COMMENT.—For any proposed technical measure or designated technical measure for which the Librarian has begun a rulemaking process under subsection (d)(3)(A), the public comment process shall include not less than 1 public hearing convened by the Register.

“(2) EXAMINATION BY REGISTER.—For any rulemaking process the Librarian has begun under subsection (d)(3)(A), with respect to each proposed technical measure, the Register, in making a rec-
ommendation under paragraph (3), shall consider whether the criteria set forth in subsection (e)(1)(A) have been met, and, in addition, shall take into account—

“(A) whether the proposed technical measure imposes substantial and disproportionate costs on service providers or substantial and disproportionate burdens on their systems or networks;

“(B) whether there are any intellectual property rights that need to be licensed by service providers to employ and effectively implement the proposed technical measure;

“(C) the total amount of alleged or demonstrated infringing activity occurring over systems or networks controlled by the types of service providers described in the petition, including the volume of valid takedown notices received by the service provider pursuant to section 512, taking into consideration the scale of the platform and existing systems to identify or protect copyrighted material;

“(D) the positive or negative impact the proposed technical measure may have on criticism, comment, news reporting, teaching, schol-
arship, research, increasing information sharing, or other relevant public interest considerations;

“(E) whether the proposed technical measure poses a cybersecurity threat (as defined in section 102 of the Cybersecurity Information Sharing Act of 2015 (6 U.S.C. 1501)) to, or would create a security vulnerability (as defined in such section 102) for, the information systems of the affected service providers;

“(F) the impact the proposed technical measure may have on privacy and data protection;

“(G) the impact the lack of use of the proposed technical measure may have on unfair competition among service providers;

“(H) whether certain categories or types of service providers should be exempt from the subset of service providers covered by the proposed technical measure, such as corporate or not-for-profit websites that permit user comments or posts, but have never or rarely had infringing activity on their services;

“(I) whether the proposed technical measure may conflict or interfere with other pro-
posed technical measures or designated technical measures; and

“(J) whether multiple proposed technical measures and designated technical measures should be subsumed under a broader category of designated technical measures.

“(3) RECOMMENDATION.—The Register shall make a recommendation on each proposed technical measure, and each proposed revision or rescinding of a previous designation of a technical measure, that is considered under the rulemaking process under this subsection, and after consulting with the following, as appropriate:

“(A) The Director of the National Institute of Standards and Technology.

“(B) The Assistant Secretary of Commerce for Communications and Information.

“(C) Any relevant cybersecurity agency.

“(4) DECISION.—If, at the conclusion of the rulemaking process under this subsection, the Librarian determines based on the recommendation of the Register that a proposed technical measure should be designated under the authority granted in subsection (c), the Librarian shall—
“(A)(i) for a proposed technical measure, designate the proposed technical measure; or

“(ii) for a revision of a previous designation of a technical measure, set forth the revised designation of the technical measure;

“(B) for a proposed technical measure or a proposed revision of a previous designation of a technical measure—

“(i) describe, as part of the designation under subparagraph (A), the classes of copyrighted works, or any subsets thereof, and the types of covered service providers to which the technical measure applies; and

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

“(C) for a previous designation of a technical measure proposed to be rescinded, rescind the designation of the technical measure;

“(D) for a proposed technical measure or a previous designation of a technical measure
proposed to be revised, provide examples or a
definition with specificity for what ‘employ and
effectively implement’ means for the technical
measure, taking into account how different cov-
ered service providers to which the technical
measure applies may have to employ and effec-
tively implement differently based on their size
or other relevant characteristics, provided that
no such examples shall imply that a particular
proprietary product must be used;

“(E) publish a list of designated technical
measures, including the description required
under subparagraph (B)(i), to be in effect after
the Librarian has designated technical meas-
ures or revised or rescinded previous designa-
tions of technical measures under the para-
graph in the Federal Register and publish and
maintain the list on the website of the Library
of Congress; and

“(F) for a proposed technical measure or
a revised designation of a technical measure,
publish a deadline, which shall not be earlier
than 1 year after the date of publication, by
which covered service providers shall implement
the designated technical measure.
“(f) Public Information.—To assist the public in understanding the requirements under this section, the Register shall—

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

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

“(g) Authorization of Appropriations.—

“(1) In General.—There is authorized to be appropriated to carry out this section—

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

“(B) subject to paragraph (2), $700,000 for fiscal year 2024 and each fiscal year thereafter.

“(2) Adjustment for Inflation.—The amount authorized to be appropriated under paragraph (1)(B) for fiscal year 2025 and each fiscal year thereafter shall be adjusted annually to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics.

“(h) Appeal to District of Columbia Circuit.—Not later than 90 days after the date on which the Librarian publishes a decision regarding a technical measure
under subsection (e)(4), any covered service provider to which the technical measure applies and any party that submitted a petition under subsection (d) regarding the technical measure may appeal the decision to the United States Court of Appeals for the District of Columbia Circuit.

"(i) CIVIL REMEDIES.—

"(1) CIVIL ACTIONS.—A copyright owner may bring a civil action in an appropriate United States district court against a covered service provider for a violation of subsection (b) for the remedies provided in this subsection.

"(2) AUTHORITY OF THE COURT.—In an action brought under paragraph (1), if the court finds a violation of subsection (b), the court shall enter an order on such terms as it may deem reasonable to ensure compliance by the covered service provider with subsection (b) within an appropriate time period, and, in addition, the court may—

"(A) award damages, in accordance with paragraph (3);

"(B) allow, in its discretion, the recovery of costs by or against any party other than the United States or an officer of the United States; and
“(C) award, in its discretion, reasonable attorney fees and expert witness fees to the prevailing party.

“(3) AWARD OF DAMAGES.—

“(A) IN GENERAL.—Except as provided in subparagraph (B) or otherwise provided in this title, the court may award to the copyright owner bringing a claim under paragraph (1)—

“(i) statutory damages in the sum of not less than $5,000 and not more than $500,000 for each violation of subsection (b), as the court considers just; and

“(ii) a separate award of statutory damages in the sum of not less than $5,000 and not more than $500,000 for each month that a covered service provider fails to comply with subsection (b) after the time period ordered by the court in paragraph (2)(A).

“(B) INNOCENT VIOLATIONS.—The court, in its discretion, may reduce or remit the total award of damages in any action brought against a covered service provider under paragraph (1)—
“(i) in which the covered service provider proves by a preponderance of the evidence that the covered service provider was not aware and had no reason to believe that its acts constituted a violation of subsection (b); or

“(ii) for reasons of equity.

“(j) No Impact on Safe Harbor.—

“(1) In general.—Nothing in this section shall be construed to alter the scope of the safe harbors set forth in subsections (a) through (e) of section 512, or to impose a condition on eligibility for those safe harbors.

“(2) No defense to liability.—The safe harbors set forth in subsections (a) through (e) of section 512 shall not constitute a defense to liability under this section.

“(k) Limitation of Liability.—Notwithstanding subsection (i), no covered service provider shall be held liable in a civil action on account of—

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

“(2) any action taken under this section to enable or make available to covered service providers
the technical means to restrict access to material described in paragraph (1).”.

(b) TECHNICAL AND CONFORMING AMENDMENT.—

The table of sections for chapter 5 of title 17, United States Code, is amended by adding at the end the following:

“514. Designation of use in the marketplace of certain technical measures to identify or protect copyrighted works.”.