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.

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 Measures to Advance Rights Technologies Copyright Act of 2022” or the “SMART Copyright Act of 2022”.

SEC. 2. DEFINITION OF STANDARD TECHNICAL MEASURES.

Section 512(i) of title 17, United States Code, is amended by striking paragraph (2) and inserting the following:

“(2) DEFINITION.—In this subsection, the term ‘standard technical measures’ means technical measures that are used by copyright owners to identify or protect copyrighted works, or by service providers to identify or manage copyrighted works on the service, and—

“(A) have been identified or developed pursuant to—

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

“(ii) a broad consensus of relevant copyright owners and relevant service providers, in an open, fair, voluntary process, for technical measures that are applicable to a particular industry, type of work, type or size of service provider, or type of technical measure;

“(B) are available to any person on—

“(i) nondiscriminatory terms; and

“(ii)(I) a royalty-free basis; or

“(II) a reasonable royalty basis; and
“(C) do not impose substantial and dis-
proportionate costs on service providers or sub-
stantial and disproportionate burdens on their
systems or networks.”.

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

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

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

“(a) DEFINITIONS.—In this section:

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

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

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

“(5) Proposed technical measure.—The term ‘proposed technical measure’ means a technical measure that is proposed by a person under subsection (d)(1).

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

“(7) Service provider.—The term ‘service provider’—

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

“(B) includes a provider described in subparagraph (A) that offers the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.

“(8) Technical measure.—The term ‘technical measure’ means a technical measure that—
“(A) is used by—

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

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

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

“(b) Accommodation of Designated Technical Measures.—A covered service provider shall use commercially reasonable efforts to accommodate and not interfere with designated technical measures that apply to that covered service provider.

“(c) Authority of the Librarian.—

“(1) Designation of Technical Measures.—The Librarian may, at the recommendation of the Register, and as provided in subsections (d) and (e)—

“(A) designate proposed technical measures that—

“(i) are available to any person on—

“(I) nondiscriminatory terms;

and

“(II)(aa) a royalty-free basis; or

“(bb) a reasonable royalty basis;

and
“(ii) do not impose substantial and disproportionate costs on service providers or substantial and disproportionate burdens on their systems or networks;
“(B) rescind previously designated technical measures; or
“(C) revise previously designated 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 2022 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 designated 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 designated technical measure, as appropriate, the petition shall detail with specificity—

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

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

“(C) how the proposed technical measure or the designated technical measure proposed to be revised meets both the definition of ‘technical measure’ under subsection (a) and the criteria set forth in subsection (c)(1)(A).

“(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 designated technical measure.

“(B) The Librarian shall reject without a rulemaking proceeding a petition that proposes the designation or revision of a privately owned technical measure, unless the petition is filed or joined by the owner of the technical measure proposed to be designated or 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, which shall include written input from relevant technical experts.

“(2) FACTORS FOR EXAMINATION BY REGISTER.—For any rulemaking process the Librarian has begun under subsection (d)(3)(A), with respect to each technical measure, the Register shall examine—
“(A) the availability and use of the technical measure to identify, manage, or protect particular types of copyrighted works on particular types of services;

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

“(C) the total cost that accommodating or not interfering with the technical measure may impose on the type of service providers described in the petition;

“(D) the burden the technical measure may impose on the systems or networks of service providers, as compared to—

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

“(ii) the revenue and other financial resources of the type of service providers described in the petition; and
“(iii) any mitigation of costs or other benefits or savings that the type of service providers described in the petition may achieve by accommodating or not interfering with the technical measure;

“(E) in the case of a proposed technical measure, whether the proposed technical measure is also a standard technical measure, as defined in section 512(i), to avoid designating a technical measure that is otherwise a standard technical measure;

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

“(G) whether the technical measure poses an undue 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;

“(H) the impact the technical measure may have on privacy and data protection;
“(I) the impact the technical measure may have on competition among service providers, and the impact it may have on competition among copyright owners;

“(J) whether certain categories or types of service providers should be exempt from the subset of service providers covered by a designation, such as—

“(i) libraries;

“(ii) educational institutions; or

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

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

“(i) the proposed technical measure may conflict or interfere with other proposed technical measures or designated technical measures; or

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

“(3) RECOMMENDATION.—
“(A) IN GENERAL.—The Register shall make a recommendation that includes written input from the Chief Technology Advisor to the Librarian on each proposed technical measure, and each designated technical measure proposed to be revised or rescinded, that is considered under the rulemaking process under this subsection, after consulting with, and reporting and commenting on the views of, the following, as appropriate:

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

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

“(iii) The Attorney General, for the purpose of providing an analysis of the impact a proposed technical measure may have on competition among service providers or copyright owners, as appropriate.

“(iv) Any relevant cybersecurity agency.

“(B) RESOLUTION OF DISAGREEMENT.—If there is substantial disagreement between the recommendation of the Register and any of the
views expressed by the agencies consulted under
subparagraph (A), the Librarian shall explain
in writing the reasons for the resolution of the
disagreement as part of the decision under
paragraph (4).

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

“(A)(i) for a proposed technical measure,
designate the proposed technical measure; or
“(ii) for a designated technical measure
proposed to be revised, designate the revised
technical measure;
“(B) for a proposed technical measure or
a designated technical measure proposed to be
revised—
“(i) describe, as part of the designa-
tion under subparagraph (A), the type of
copyrighted work, or any subset thereof,
and the 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 designated technical measure proposed to be rescinded, rescind the technical measure;

“(D) for a proposed technical measure or a designated technical measure proposed to be revised, provide examples or a definition with specificity for what ‘accommodate’ means for the technical measure, taking into account how different covered service providers to which the technical measure applies may have to accommodate differently based on their size or other relevant characteristics;

“(E) publish a list of designated technical measures, including the description required under subparagraph (B)(i), in effect after the Librarian has designated, revised, and rescinded technical measures under this paragraph 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 designated technical measure, publish a deadline, which shall not be earlier than 1 year after the date of publication, by which 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 para-
graph (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 aggrieved by a violation of subsection (b) by a covered service provider may bring a civil action against the covered service provider in an appropriate United States district court.

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

“(A) grant a temporary or permanent injunction on such terms as it determines reasonable to prevent or restrain a violation;
“(B) award damages, in accordance with paragraph (3);

“(C) 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

“(D) award, in its discretion, reasonable attorney fees or 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, in an action brought by a copyright owner against a service provider under paragraph (1), the court shall award to the copyright owner the actual damages suffered by the copyright owner as a result of the violation.

“(B) STATUTORY DAMAGES.—

“(i) IN GENERAL.—In an action brought under paragraph (1), the copyright owner may elect to recover, in lieu of actual damages, an award of statutory damages in an amount that is—
“(I) not less than $200 and not more than $25,000 per violation, as the court considers just; and

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

“(ii) REPEATED VIOLATIONS.—

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

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

“(bb) not more than $800,000 in the aggregate.
“(II) 3 OR MORE VIOLATIONS.—

If, in an action brought against a service provider under paragraph (1), the copyright owner proves that the service provider violated subsection (b) not fewer than 2 times during the 5-year period beginning on the date of a final judgment entered against the service provider for a violation of that subsection, the court may increase the award of damages to not more than triple the amount that would otherwise be awarded under subparagraph (A) or subclause (I) of this clause, as the court considers just.

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

“(i) in which the service provider proves by a preponderance of the evidence that the 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:
Sec. 4. Advisors.

(a) Advisors to the Register.—Chapter 7 of title 17, United States Code, is amended by adding at the end the following:

§ 711. Advisors to the Register

“(a) Chief Economist.—Not later than 180 days after the date of enactment of the SMART Copyright Act of 2022, the Register shall appoint a Chief Economist within the Office of the Register, who shall advise the Register on issues related to economic policy and copyright.

“(b) Chief Technology Advisor.—

“(1) In general.—Not later than 180 days after the date of enactment of the SMART Copyright Act of 2022, the Register shall appoint a Chief Technology Advisor, who shall advise the Register on technology issues related to copyright law, including by evaluating and providing advice on the factors in section 514(e)(2).

“(2) Qualifications.—The individual appointed as Chief Technology Advisor under paragraph (1) shall have significant technical expertise, including experience with computer software, standards, and technological measures relevant to copyright law.
“(3) Term.—The individual appointed as Chief Technology Advisor under paragraph (1) shall serve for a limited term to be determined by the Register, but not to exceed 5 years.”.

(b) Technical and Conforming Amendment.—The table of sections for chapter 7 of title 17, United States Code, is amended by adding at the end the following:

“711. Advisors to the Register.”.