

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.

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## 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

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## 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.”.

○