

117TH CONGRESS  
2D SESSION

# 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.

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## 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

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

1 **SEC. 2. DESIGNATION OF USE IN THE MARKETPLACE OF**  
2 **CERTAIN TECHNICAL MEASURES TO IDENTIFY OR PROTECT COPYRIGHTED WORKS.**  
3

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

7 **“§ 514. Designation of use in the marketplace of cer-**  
8 **tain technical measures to identify or**  
9 **protect copyrighted works**

10 “(a) DEFINITIONS.—In this section:

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

14 “(2) DESIGNATED TECHNICAL MEASURE.—The  
15 term ‘designated technical measure’ means a tech-  
16 nical measure that has been designated by the Li-  
17 brarian in accordance with subsections (c), (d), and  
18 (e).

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

21 “(4) PROPOSED TECHNICAL MEASURE.—The  
22 term ‘proposed technical measure’ means a technical  
23 measure that is proposed by a person under sub-  
24 section (d).

25 “(5) REGISTER.—The term ‘Register’ means  
26 the Register of Copyrights.

1           “(6) SERVICE PROVIDER.—The term ‘service  
2 provider’ means—

3           “(A) a provider of online services or net-  
4 work access, or the operator of facilities there-  
5 for, that—

6           “(i) provides storage at the direction  
7 of a user of material that resides on a sys-  
8 tem or network controlled or operated by  
9 or for the service provider;

10          “(ii) refers or links users to an online  
11 location by using information location  
12 tools, including a directory, index, ref-  
13 erence, pointer, or hypertext link; and/or

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

18           “(I) the material is made avail-  
19 able online by a person other than the  
20 service provider;

21           “(II) the material is transmitted  
22 from the person described in clause (i)  
23 through the system or network to a  
24 person other than the person de-

1 scribed in clause (i) at the direction of  
2 that other person; and

3 “(III) the storage is carried out  
4 through an automatic technical proc-  
5 ess for the purpose of making the ma-  
6 terial available to users of the system  
7 or network who, after the material is  
8 transmitted as described in clause (ii),  
9 request access to the material from  
10 the person described in clause (i); and

11 “(B) the term does not include—

12 “(i) a library or archives—

13 “(I) whose collections are open to  
14 the public, or are available not only to  
15 researchers affiliated with the library  
16 or archives or with the institution of  
17 which it is a part, but also to other  
18 persons doing research in a special-  
19 ized field;

20 “(II) that has a public service  
21 mission;

22 “(III) whose trained staff or vol-  
23 unteers provide professional services  
24 normally associated with libraries or  
25 archives; and

1                   “(IV) whose collections are com-  
2                   posed of lawfully acquired and/or li-  
3                   censed materials;

4                   “(ii) a nonprofit educational institu-  
5                   tion; or

6                   “(iii) any other person solely with re-  
7                   gard to providing the services described in  
8                   section 512(k) to an institution described  
9                   in subparagraph (i) or (ii) in the course of  
10                  providing such services to such institution.

11                  “(7) TECHNICAL MEASURE.—The term ‘tech-  
12                  nical measure’ means a technical measure that is  
13                  used in commerce by a copyright owner or a service  
14                  provider to identify or protect a copyrighted work.

15                  “(b) EMPLOYMENT OF DESIGNATED TECHNICAL  
16                  MEASURES.—A covered service provider shall use reason-  
17                  able efforts to employ and effectively implement applicable  
18                  designated technical measures.

19                  “(c) AUTHORITY OF THE LIBRARIAN.—

20                         “(1) DESIGNATION OF TECHNICAL MEAS-  
21                         URES.—The Librarian may, at the recommendation  
22                         of the Register, and pursuant to subsections (d) and  
23                         (e)—

24                                 “(A) designate proposed technical meas-  
25                                 ures that—

1 “(i) are widely used in the market-  
2 place by service providers; or

3 “(ii) are widely available in the mar-  
4 ketplace on nondiscriminatory terms and a  
5 royalty-free basis;

6 “(B) rescind previous designations of tech-  
7 nical measures; and

8 “(C) revise previous designations of tech-  
9 nical measures.

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

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

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

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

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

22 “(d) PETITIONS.—

23 “(1) IN GENERAL.—Not later than 1 year after  
24 the date of enactment of the SMART Copyright Act  
25 of 2023 and every 3 years thereafter, the Librarian

1 shall accept petitions, from owners of copyrighted  
2 works, service providers, and other stakeholders,  
3 proposing the designation of a technical measure or  
4 the rescission or revision of a previous designation of  
5 a technical measure.

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

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

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

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

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 previous des-  
6                   ignation of a technical measure.

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

15          “(e) RULEMAKING PROCESS.—

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

22                  “(2) EXAMINATION BY REGISTER.—For any  
23          rulemaking process the Librarian has begun under  
24          subsection (d)(3)(A), with respect to each proposed  
25          technical measure, the Register, in making a rec-



1       ommendation under paragraph (3), shall consider  
2       whether the criteria set forth in subsection (c)(1)(A)  
3       have been met, and, in addition, shall take into ac-  
4       count—

5               “(A) whether the proposed technical meas-  
6       ure imposes substantial and disproportionate  
7       costs on service providers or substantial and  
8       disproportionate burdens on their systems or  
9       networks;

10              “(B) whether there are any intellectual  
11       property rights that need to be licensed by serv-  
12       ice providers to employ and effectively imple-  
13       ment the proposed technical measure;

14              “(C) the total amount of alleged or dem-  
15       onstrated infringing activity occurring over sys-  
16       tems or networks controlled by the types of  
17       service providers described in the petition, in-  
18       cluding the volume of valid takedown notices re-  
19       ceived by the service provider pursuant to sec-  
20       tion 512, taking into consideration the scale of  
21       the platform and existing systems to identify or  
22       protect copyrighted material;

23              “(D) the positive or negative impact the  
24       proposed technical measure may have on criti-  
25       cism, comment, news reporting, teaching, schol-

1 arship, research, increasing information shar-  
2 ing, or other relevant public interest consider-  
3 ations;

4 “(E) whether the proposed technical meas-  
5 ure poses a cybersecurity threat (as defined in  
6 section 102 of the Cybersecurity Information  
7 Sharing Act of 2015 (6 U.S.C. 1501)) to, or  
8 would create a security vulnerability (as defined  
9 in such section 102) for, the information sys-  
10 tems of the affected service providers;

11 “(F) the impact the proposed technical  
12 measure may have on privacy and data protec-  
13 tion;

14 “(G) the impact the lack of use of the pro-  
15 posed technical measure may have on unfair  
16 competition among service providers;

17 “(H) whether certain categories or types of  
18 service providers should be exempt from the  
19 subset of service providers covered by the pro-  
20 posed technical measure, such as corporate or  
21 not-for-profit websites that permit user com-  
22 ments or posts, but have never or rarely had in-  
23 fringing activity on their services;

24 “(I) whether the proposed technical meas-  
25 ure may conflict or interfere with other pro-

1           posed technical measures or designated tech-  
2           nical measures; and

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

7           “(3) RECOMMENDATION.—The Register shall  
8           make a recommendation on each proposed technical  
9           measure, and each proposed revision or rescinding of  
10          a previous designation of a technical measure, that  
11          is considered under the rulemaking process under  
12          this subsection, and after consulting with the fol-  
13          lowing, as appropriate:

14                  “(A) The Director of the National Insti-  
15                  tute of Standards and Technology.

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

18                  “(C) Any relevant cybersecurity agency.

19           “(4) DECISION.—If, at the conclusion of the  
20           rulemaking process under this subsection, the Li-  
21           brarian determines based on the recommendation of  
22           the Register that a proposed technical measure  
23           should be designated under the authority granted in  
24           subsection (c), the Librarian shall—

1           “(A)(i) for a proposed technical measure,  
2 designate the proposed technical measure; or

3           “(ii) for a revision of a previous designa-  
4 tion of a technical measure, set forth the re-  
5 vised designation of the technical measure;

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

9           “(i) describe, as part of the designa-  
10 tion under subparagraph (A), the classes  
11 of copyrighted works, or any subsets there-  
12 of, and the types of covered service pro-  
13 viders to which the technical measure ap-  
14 plies; and

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

21           “(C) for a previous designation of a tech-  
22 nical measure proposed to be rescinded, rescind  
23 the designation of the technical measure;

24           “(D) for a proposed technical measure or  
25 a previous designation of a technical measure

1 proposed to be revised, provide examples or a  
2 definition with specificity for what ‘employ and  
3 effectively implement’ means for the technical  
4 measure, taking into account how different cov-  
5 ered service providers to which the technical  
6 measure applies may have to employ and effec-  
7 tively implement differently based on their size  
8 or other relevant characteristics, provided that  
9 no such examples shall imply that a particular  
10 proprietary product must be used;

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

20 “(F) for a proposed technical measure or  
21 a revised designation of a technical measure,  
22 publish a deadline, which shall not be earlier  
23 than 1 year after the date of publication, by  
24 which covered service providers shall implement  
25 the designated technical measure.

1 “(f) PUBLIC INFORMATION.—To assist the public in  
2 understanding the requirements under this section, the  
3 Register shall—

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

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

9 “(g) AUTHORIZATION OF APPROPRIATIONS.—

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

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

13 “(B) subject to paragraph (2), \$700,000  
14 for fiscal year 2024 and each fiscal year there-  
15 after.

16 “(2) ADJUSTMENT FOR INFLATION.—The  
17 amount authorized to be appropriated under para-  
18 graph (1)(B) for fiscal year 2025 and each fiscal  
19 year thereafter shall be adjusted annually to reflect  
20 the change in the Consumer Price Index for All  
21 Urban Consumers published by the Bureau of Labor  
22 Statistics.

23 “(h) APPEAL TO DISTRICT OF COLUMBIA CIRCUIT.—  
24 Not later than 90 days after the date on which the Librar-  
25 ian publishes a decision regarding a technical measure

1 under subsection (e)(4), any covered service provider to  
2 which the technical measure applies and any party that  
3 submitted a petition under subsection (d) regarding the  
4 technical measure may appeal the decision to the United  
5 States Court of Appeals for the District of Columbia Cir-  
6 cuit.

7 “(i) CIVIL REMEDIES.—

8 “(1) CIVIL ACTIONS.—A copyright owner may  
9 bring a civil action in an appropriate United States  
10 district court against a covered service provider for  
11 a violation of subsection (b) for the remedies pro-  
12 vided in this subsection.

13 “(2) AUTHORITY OF THE COURT.—In an action  
14 brought under paragraph (1), if the court finds a  
15 violation of subsection (b), the court shall enter an  
16 order on such terms as it may deem reasonable to  
17 ensure compliance by the covered service provider  
18 with subsection (b) within an appropriate time pe-  
19 riod, and, in addition, the court may—

20 “(A) award damages, in accordance with  
21 paragraph (3);

22 “(B) allow, in its discretion, the recovery  
23 of costs by or against any party other than the  
24 United States or an officer of the United  
25 States; and

1           “(C) award, in its discretion, reasonable  
2 attorney fees and expert witness fees to the pre-  
3 vailing party.

4           “(3) AWARD OF DAMAGES.—

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

9           “(i) statutory damages in the sum of  
10 not less than \$5,000 and not more than  
11 \$500,000 for each violation of subsection  
12 (b), as the court considers just; and

13           “(ii) a separate award of statutory  
14 damages in the sum of not less than  
15 \$5,000 and not more than \$500,000 for  
16 each month that a covered service provider  
17 fails to comply with subsection (b) after  
18 the time period ordered by the court in  
19 paragraph (2)(A).

20           “(B) INNOCENT VIOLATIONS.—The court,  
21 in its discretion, may reduce or remit the total  
22 award of damages in any action brought  
23 against a covered service provider under para-  
24 graph (1)—



1           “(i) in which the covered service pro-  
2           vider proves by a preponderance of the evi-  
3           dence that the covered service provider was  
4           not aware and had no reason to believe  
5           that its acts constituted a violation of sub-  
6           section (b); or

7           “(ii) for reasons of equity.

8           “(j) NO IMPACT ON SAFE HARBOR.—

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

14          “(2) NO DEFENSE TO LIABILITY.—The safe  
15          harbors set forth in subsections (a) through (e) of  
16          section 512 shall not constitute a defense to liability  
17          under this section.

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

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

24          “(2) any action taken under this section to en-  
25          able or make available to covered service providers

1 the technical means to restrict access to material de-  
2 scribed in paragraph (1).”.

3 (b) TECHNICAL AND CONFORMING AMENDMENT.—

4 The table of sections for chapter 5 of title 17, United  
5 States Code, is amended by adding at the end the fol-  
6 lowing:

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

