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SMART Act Would Help Prevent Online Copyright Infringement

by

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Current copyright law works in a lopsided way when it comes to the Internet: Online platforms that host copyrighted content get immunity for infringements on their websites while owners of music, movies, and books are under-protected and suffer steep losses from such infringements. But a bill introduced in the Senate on March 17 called the Strengthening Measures to Advance Rights Technologies Copyright Act of 2022 – the [SMART Copyright Act](#) – would address this problem by promoting deployment of technical measures for securing creative content on the Internet. Congress should give this thoughtful bill a full and fair hearing.

Section 512 of the Digital Millennium Copyright Act of 1998 was intended by Congress to strike a balance between the promotion of innovation in online services and protection for copyright owners. The law provides that an online platform receives legal immunity from copyright infringements on its website, provided that it meets certain conditions. One of those conditions is that a platform "accommodates and does not interfere with standard technical measures" (STMs).¹ According to Section 512(i), STMs are technologies that are "used by copyright owners to identify or protect copyrighted works" and that have been developed

¹ 17 U.S.C. § 512(i)(1)(B).

pursuant to a broad consensus of copyright owners and service providers" in an "open, fair, voluntary, multi-industry standards process."² Section 512(i) also states that STMs "are available to any person on reasonable and nondiscriminatory terms," and that they "do not impose substantial costs on service providers or substantial burdens on their systems or networks."³

In its May 2020 report on Section 512, the U.S. Copyright Office concluded that "Congress' original intended balance has been tilted askew."⁴ One of the reasons why Section 512 has fallen out of balance is that Section 512(i) has been completely ineffective. As the report observed, "no measures currently qualify as STMs despite the availability of various technologies and the potential interest in consensus-building across industries."⁵

Lack of STMs is at least partly to blame for the high volume of infringing activities taking place on popular user-upload Internet platforms like Facebook, Twitter, and YouTube. The Copyright Office's Section 512 report stated that "significant changes to the technical landscape" since the DMCA was passed in 1998 "have increased the potential economic impact of online infringements."⁶ And as a result, many copyright owners "have seen their livelihoods impacted drastically by ongoing infringement of their works online and for which they can achieve no relief."⁷ According to a Global IP Center estimate published in June 2019, for instance, global video piracy results in annual revenue losses between \$29 billion and \$79 billion for American copyright owners and licensees.⁸

The Copyright Office's report noted the potential for digital fingerprinting and filtering technologies to qualify as STMs. These technologies compare potential uploads to their sites against stored reference files, enabling online platforms to identify and filter out likely infringing content. Many online platforms currently use some form of fingerprinting and filtering. But as the report recognizes, effective implementation of STMs would require close coordination between copyright owners and online platforms.

Yet online platforms have decidedly little incentive to closely cooperate on efforts to aggressively combat infringements on their websites. In addition to enjoying broad legal immunity under Section 512, online platforms receive substantial revenues from running ads to Internet visitors who are drawn to the infringing content that is uploaded to their sites.

In order "to encourage the adoption and development of technologies as STMs in the spirit originally intended by Congress," the Copyright Office's report on Section 512 suggested certain legislative reforms. First, "Congress may want to amend the provision to broaden the

² 17 U.S.C. § 512(i)(2)(A)

³ 17 U.S.C. § 512(i)(2)(B)-(C).

⁴ U.S. Copyright Office, "Section 512 of Title 17: A Report of the Register of Copyrights" ("Report") (May 21, 2020), at 1. *See also id.* at 197. For an analysis of the report and suggested reforms, *see* Randolph J. May and Seth L. Cooper, "[Copyright Office Report Should Spur Modernizing the DMCA](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 37 (June 30, 2015).

⁵ Report, at 176

⁶ Report, at 84.

⁷ Report, at 197.

⁸ *See* Global Innovation Policy Center (GPIC), "Impacts of Digital Piracy on the U.S. Economy" (June 2019), at: <https://www.theglobalipcenter.com/report/digital-video-piracy/>.

language so as to avoid any perceived requirement that measures must be achieved only by the consensus of every industry involved in the digital ecosystem."⁹ Second, "Congress may also wish to provide the Copyright Office with regulatory authority to oversee the development of STMs."¹⁰ The [SMART Copyright Act](#) (S.3880), which is co-sponsored by Senators Thom Tillis and Patrick Leahy, advances both of these reasonable reforms.¹¹

First, the SMART Copyright Act widens the scope of eligible STMs that online platforms hosting copyrighted content are required to accommodate as a condition for immunity. Currently, Section 512(i) provides that STMs must be favored by a "broad consensus" pursuant to a "multi-industry" process. Demanding broad agreements be reached by multiple creative content and Internet-based industries with different and often competing economic incentives is unrealistic. The fact that there are no STMs in existence is solid evidence that the provision is unworkable.

Quite reasonably, the bill accords STM-eligibility to measures developed through "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, [or] type or size of service provider."¹² Thus, if copyright owners of sound recordings, TV and movies, or literary works reach consensus with online providers that cater to their respective audiences, then their agreed-upon measures would be deemed STMs that require accommodation. This change to the law avoids one-size-fits-all technology measures. And more closely connected industries have a more realistic chance of developing effective STMs.

Importantly for Congress' consideration, the SMART Copyright Act's proposed expansion of STM eligibility is tied to Section 512's special grant of legal immunity to online platforms. Congress is under no obligation to confer such immunity in the first place. And it is entirely reasonable that the conditions placed on online platforms for receiving that immunity provide reciprocal benefit to copyright owners who are harmed by infringements.

Second – and as an alternative to STMs – the SMART Copyright Act confers on the Librarian of Congress authority to recognize technical measures for protecting copyrighted works against online infringements. The bill authorizes the Librarian to conduct rulemaking proceedings every three years for purposes of proposing and adopting "designated technical measures" (DTMs) that would perform similar copyright protection functions as STMs.

As part of the rulemakings, the Register of Copyrights would make a written recommendation to the Librarian regarding any proposed DTM after consulting with other agency heads, including the Director of the National Institute of Standards and Technology and the Attorney General. The bill sets forth several factors that the Register would have to consider in making a DTM recommendation. Such factors include the terms of availability for the technical measures, the total costs to online platforms of accommodating the measures, an assessment of the burdens that the measures impose compared to the copyright protections they provide,

⁹ Report, at 179.

¹⁰ Report, at 179.

¹¹ The Strengthening Measures to Advance Rights Technologies Copyright Act of 2022 (SMART Copyright Act), S. 3880, 117th Cong. (2022).

¹² SMART Copyright Act, § 2.

the impact on fair use and data privacy, and the impact on market competition. To assist the Copyright Office in analyzing proposed DTMs, the bill would authorize and make appropriations for the Office to hire a Chief Technology Advisor and a Chief Economist.

The SMART Copyright Act includes a strong enforcement provision for DTMs. The bill provides that an online platform's failure to accommodate DTMs, or its interference with DTMs, makes the platform subject to legal liability, including actual or statutory damages. There is an exception for innocent violators.

Given that online platforms currently enjoy broad legal immunity without having to accommodate any STMs, one can expect them to resist increased accountability under the SMART Copyright Act. On March 29, critics sent a [letter](#) to the legislation's sponsors, claiming that the online industry is too diverse for DTMs, that triennial rulemaking proceedings would create uncertainties, and that the Copyright Office lacks expertise to evaluate cybersecurity and competition issues. But none of those objections should scuttle the bill. As described earlier, the bill recognizes STMs and DTMs that are directed to specific types of content and services, not the global Internet. Also, uncertainty has never proven to be a serious problem for the Copyright Office's triennial proceedings for granting temporary – and renewable – exemptions from Section 1201 for non-infringing uses of particular classes of copyrighted works that are protected by anti-circumvention technologies.

Moreover, triennial rulemakings conducted pursuant to the SMART Copyright Act would provide occasion to modify or rescind existing DTMs that are alleged to be too burdensome. Periodic assessments can help ensure their currency with available technologies, market trends, and user habits. Additionally, the triennial rulemakings conducted by the Copyright Office under Section 1201 involve assessments of technological capabilities, demonstrating that the Office does have some expertise in addressing technical measures. The bill's provision for staffing the Office with a Chief Technical Advisor and a Chief Economist, along with agency and public input, can be expected to help ensure that the Register's DTM recommendations are informed and judicious.

The [SMART Copyright Act](#) would help make the law's STM provision finally work and restore the long-lost balance between promotion of online innovation and copyright protections. And the bill's DTMs sections offer an additional, thoughtful way to address the problem of mass scale online infringement of copyrighted music, TV, movies, and literary content. Congress ought to consider the SMART Copyright Act in a careful and timely manner.

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Further Readings

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