

The SMART Copyright Act of 2022: A Bill to Reduce Online Theft and Enhance Content Sharing for All

Online service providers struck a deal with Congress twenty years ago—they wouldn't have to pay for copyright theft facilitated by their systems if they worked with copyright owners to create effective standardized technical measures (STMs) to identify and protect against distribution of stolen content. In enacting this grand bargain, Congress clearly envisioned this safe harbor immunity would act as an incentive for platforms and rights holders to collaborate on developing effective measures available to all on reasonable terms to combat piracy, lower transaction costs, accelerate information sharing, and create a healthy internet for everyone.

Yet rather than incentivizing collaboration on technologies to protect copyrighted works, the law actually inhibits it because service providers cannot risk losing their valuable safe harbors if an STM is created. In addition, the current statute provides only one path to establish that a technological measure is an STM that must be available to all. As a result, no STMs have been identified since the law took effect. The issue isn't whether technical measures to combat rampant copyright infringement exist—plenty do—but rather how hold big tech accountable by encouraging them to adopt technical measures to combat stealing and facilitate sharing of critical copyright data.

The SMART Copyright Act of 2022 takes a measured approach to addressing these barriers to collaboration and adoption by including additional ways that technical measures can qualify to become standard technical measures. It also creates a new triennial public rulemaking process to designate technical measures that should be widely available to the public.

Specifically, this bill's key provisions include:

- 1. Keeps existing legal requirement** in 17 USC 512(i) that service providers must “accommodate and not interfere with” standard technical measures to qualify for safe harbor immunity for copyright infringement on their services.
- 2. Expands ways to qualify for “standard technical measures” (STMs).** Recognizing that standards may not be “one size fits all,” the bill allows technical measures developed for a particular industry (e.g. music, movies) or type of work (e.g. photographs) to be considered for STMs if identified or developed by a broad consensus of relevant copyright owners and service providers.
- 3. Provides Public Triennial Rulemaking to Designate Technical Measures (DTMs).** Similar to the existing STM provisions, service providers must accommodate and not interfere with these measures. Unlike STMs, this is limited just to providers that host content, and does not result in the loss of safe harbors. The Register of Copyrights must consult with other government experts, including the National Institute of Standards and Technology (NIST) and the National Telecommunications and Information Administration (NTIA).
- 4. Creates Chief Technology Advisor and Chief Economist Positions.** The bill provides appropriations and requires the Copyright Office to hire key advisors to help provide necessary expertise to address digital copyright issues.
- 5. Penalizes Big Tech for Not Stopping Copyright Theft.** The new designated technical measures proceedings creates new liability for service providers that “host” content. Instead of risking the loss of safe harbors, covered service providers that don't accommodate or that interfere with the new DTMs can be liable for actual or statutory damages, from which innocent violators can be exempt.