March 29, 2022

The Honorable Patrick Leahy
Chair
Senate Committee on the Judiciary
Subcommittee on Intellectual Property
Washington, DC 20510

The Honorable Thom Tillis
Ranking Member
Senate Committee on the Judiciary
Subcommittee on Intellectual Property
Washington, DC 20510

Re: Civil Society and Industry Concerns with S. 3880

Dear Chair Leahy and Ranking Member Tillis:

The 32 undersigned civil society organizations, trade associations, companies, and academics write to share our collective opposition to S. 3880, the Strengthening Measures to Advance Rights Technologies (SMART) Copyright Act of 2022, which would amend 17 U.S.C. § 512(i), part of the Digital Millennium Copyright Act (DMCA), and create a new § 514. The proposal is problematic for several reasons.

First, the proposed amendments to § 512(i) break the careful balance between innovation and copyright protection struck by the DMCA. For example, they significantly lessen service provider and user clarity and certainty in present and future technical measures that are employed to maintain a safe harbor for service and innovation. Rather than build confidence in the use of technical measures or incentivize further collaborative solutions, these changes would inject uncertainty into a law that has proven foundational and has supported creators, rightsholders, consumers, and online service providers of all kinds. The Copyright Office has recognized that in the decades since the passage of the DMCA, no "standard technical measures" (STMs) have emerged. Far from demonstrating an underlying flaw in the DMCA as the legislation appears to assume, this lack of standard technical measures is largely because the constructive uses of the Internet and the technologies and media involved have become so diverse. Identifying anything as "standard" under the new proposal, and avoiding technical conflicts between measures so identified, will become more, not less, difficult.

Second, the new § 514 would result in endless triennial litigation cycles through the creation of an entirely separate—and potentially unconstitutional—category of government-mandated "designated technical measures." Section 514 gives the Copyright Office[1] authority far beyond its competence and expertise to identify and mandate such measures, transforming it into an Internet regulator with responsibility for overseeing an elaborate, multi-agency bureaucratic process that would recur every three years. To avoid costly litigation and potentially extensive statutory damages, service providers would be effectively compelled to devote significant resources into implementing such measures, only to find themselves continuously exposed to renewed obligations each time new measures are designated. Such direct and heavy-handed

[1] We assume that as with the triennial Section 1201 rulemaking, the STM rulemaking would as a practical matter be conducted by the Copyright Office.

governmental involvement in the creation of technical mandates for private industry conflicts with traditional U.S. standards policy.[2]

This proposal would also put an agency with no engineering or other relevant expertise in charge of how digital products are designed, irrespective of whether copyright infringement is actually occurring. Additionally, the Copyright Office does not have the expertise to evaluate complex technical issues such as cybersecurity and competition.[3] The legislation would put the government in the position of picking winners and losers in the market for content recognition technologies, which risks corruption and capture from specific businesses and vendors pitching their own products.[4] The potentially overlapping and burdensome technical requirements designated through this process would ultimately harm users — risking their privacy and security, undermining the stability of services they rely on, and limiting choice and access to information.

Finally, digital services are already constantly fine-tuning their efforts to combat infringement online in response to the evolving tactics of commercial infringers, and they have done so with notable success.[5] The legislation thus is not only unnecessary, but would freeze these efforts and stifle the ability of online services to get ahead of emerging challenges — locking collaboration into a triennial regulatory cycle and discouraging the private sector from making critical investments outside of these cycles. Within months of the designation of a technical measure, sophisticated infringers would find workarounds, while service providers would be on an endless cycle of "designated technical measure" rulemakings. Measures designated in one cycle could be rescinded in the next, creating uncertainty and constant churn.

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[2] This structure implicates policy conditions under OMB Circular A-119 (as revised in 1998). Historically, U.S. Government policy has been that when the government is endorsing standards, they must have been developed by standards development organizations with certain characteristics, including openness and due process. Members of Congress should adhere to this long-standing policy regarding U.S. Government designation of particular technologies for compliance purposes.

[3] While a welcome development, the proposed "Chief Technology Advisor" would not be sufficient to cure this problem.

[4] Josh Landau, *Why SMART Isn't Smart – Importing FRAND's Flaws Into Copyright*, Disruptive Competition Project (Mar. 24, 2022), https://www.project-disco.org/intellectual-property/032422-why-smart-isnt-smart-importing-frands-flaws-into-copyright/.

[5] *See, e.g.*, João Quintais & Joost Poort, *The Decline of Online Piracy: How Markets – Not Enforcement – Drive Down Copyright Infringement*, 34 Am. U. Int'l L. Rev. 807-76 (2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3437239; European Union Intellectual Property Office, *2020 Status Report on IPR Infringement: Why IP Rights Are Important, IPR Infringement, and the Fight Against Counterfeiting and Piracy* (June 2020), https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2020_Status_Report_on_IPR_infringement/2020_Status_Report_on_IPR_infringement_en.pdf.

The Copyright Office is currently reviewing the topic of technical measures. Last month, as part of this process, nearly 6,000 comments were filed in response to the Copyright Office's recent notice of inquiry on this topic,[6] many of them criticizing technical mandates.[7] We urge members to listen to these stakeholders and to oppose this flawed proposal that would undermine decades of collaboration and innovation.

Sincerely,

Association of College and Research Libraries
American Library Association
Association of Research Libraries
Authors Alliance
Computer & Communications Industry Association
Consumer Technology Association
Copia Institute
Creative Commons
EDUCAUSE
Engine
Etsy
Internet Archive
Internet Infrastructure Coalition
NetChoice
New Media Rights
Organization for Transformative Works
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Prof. Yvette Liebesman, Saint Louis University School of Law
Prof. Zachary Catanzaro, St. Thomas University College of Law

Cc: Members of the Senate Committee on the Judiciary
Members of the Senate Committee on Rules and Administration

[6] Available at https://www.regulations.gov/docket/COLC-2021-0009/comments.

[7] Re:Create, *No Technical Mandates: Strong Opposition Voiced to Copyright Office* (Mar. 9, 2022), https://www.recreatecoalition.org/no-technical-mandates-strong-opposition-voiced-to-copyright-office/.